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TRIBUTES

A TRIBUTE TO ELEANOR D. KINNEY HALL RENDER PROFESSOR OF LAW

DAVID ORENTLICHER*

While Eleanor DeArman Kinney undoubtedly will continue to make important contributions in health care law, it is fitting upon her retirement to celebrate all of the important contributions that she made during her career as a health law scholar.

She was the founding director of the internationally recognized William S. and Christine S. Hall Center for Law and Health at the Indiana University Robert H. McKinney School of Law, and for decades has been one of the nation's leading experts on health care law. When I came to the law school to take my first full-time position in the academy, I was very fortunate to be able to join a program that she had so effectively nurtured.

A widely published author and respected lecturer, Eleanor distinguished herself in the breadth of issues on which she left her mark. In her long list of books and journal articles, she has provided important guidance on medical malpractice reform, health coverage for the poor, consumer protection in health care, and the international principles for a universal right to health care. She was an early proponent of the need to inform health care law scholarship with empirical research, and her own empirical work has served as an important model for other scholars in the field.

One of the virtues of empirical scholarship is its ability to confirm or dispel commonly held assumptions, and Eleanor's malpractice research provides an important example. When Indiana adopted its caps on damage awards for malpractice plaintiffs, critics feared that patients would suffer from inadequate compensation. However, Eleanor's research showed that Indiana's caps actually may have increased the average award for large malpractice claims. After the law was passed, awards were higher in Indiana than in comparable neighboring states without damage caps.[1] Because physicians were responsible for only the first $100,000 (now $250,000), with a state patient compensation fund picking up the remainder of the damages, Indiana malpractice insurers and health care providers faced a weaker incentive than insurers and providers in other states to contest

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1. Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275, 1294-96 (1991).

fault.[2]

Eleanor also distinguished herself with her ability to bring to bear complementary perspectives to her scholarship. An expert in administrative law, as well as health care law, Eleanor applied the principles of both disciplines to her analyses of key health policy concerns and developed valuable insights as a result. Her book, *Protecting American Health Care Consumers*, provides important ways to think about how the needs of patients should be served properly by the different features of the U.S. health care system.[3]

On many occasions, governmental bodies have turned to Eleanor for guidance. She has served as a consultant to President Clinton's Task Force for Health Care Reform, the Administrative Conference of the United States on reforms of the federal regulatory process, and the Indiana Commission on Health Care for the Working Poor. She also was appointed by the governor of Indiana to the Executive Board of the Indiana State Department of Health and to other state advisory boards and task forces.

Eleanor's outstanding contributions in scholarship and service have been matched by her mentorship of students. Over the years, Indianapolis has developed a top-notch community of health care lawyers. Whether in governmental agencies, legal departments of hospitals and life science corporations, or health care groups at private law firms, Eleanor's students provide first-rate counsel to their clients and the public. Her protégés comprise a veritable who's who in Indianapolis health care law.

My colleagues at the School of Law and I were privileged to serve as members of the faculty with Eleanor, and we have been grateful for her devoted and exceptional leadership.

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2. *Id.* at 1278-80, 1302-03. Publication of the study led the Department of Insurance to become more aggressive in defending the patient compensation fund. Communication with Eleanor D. Kinney (Feb. 12, 2012).

3. Sara Rosenbaum, *Protecting American Health Care Consumers*, 288 J. AM. MED. ASS'N 2049 (2002) (reviewing ELEANOR DEARMAN KINNEY, PROTECTING AMERICAN HEALTH CARE CONSUMERS (2002)).

SUSANAH M. MEAD TRIBUTE

CYNTHIA A. BAKER*
ANDREW R. KLEIN**

Philosopher Albert Schweitzer once said, "Example is leadership." This quote personifies Susie Mead, who has led by example in the Indianapolis community and at the Indiana University Robert H. McKinney School of Law for more than thirty-five years.

Susie has deep roots in our community. Born and raised in Indianapolis, a distinguished graduate of the Tudor Hall Class of 1965, she became involved in our community in profound and myriad ways. Susie's talents, work ethic, and intellect could have taken her anywhere—theatre, finance, business, publishing, social work, religious leadership, politics, landscape design, culinary arts, or architecture. We speak for many when we say we are so grateful that she took an interest in the legal profession!

In 1972, Susie matriculated at our law school, one of a handful of women in her class. In the words of her husband Jack Mead, "At that time, while she was a fabulous mother, she and other women of her generation began to seek out professional careers."[1] Jerry Bepko, a former dean of our law school and long-time chancellor at IUPUI, described her as "part of that wave of outstanding women students who lifted our law school in a significant way in the 1970s. . . . They helped contribute to the growing sense that the [s]chool had a destiny of greatness that was within realistic reach."[2]

After graduation, Susie applied for a clerkship with the Hon. Paul H. Buchanan, then the chief judge of the Indiana Court of Appeals. Legend has it that when she dropped off her resume at the courthouse, the judge immediately corralled her for an interview and offered her the job before she left the building. The clerkship was a wonderful way to kick-start her career. And after working two years with Judge Buchanan, Susie returned to the law school as a legal writing instructor. We're not sure what Susie had in mind at that time. Certainly,

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** Paul E. Beam Professor of Law, Indiana University Robert H. McKinney School of Law.

1. Jack Mead, Undated Note to Authors (on file with authors).

2. Gerald Bepko, Remarks at the Introduction of Susanah Mead for the Distinguished Alumnae Honor, Indiana University Robert H. McKinney School of Law 1 (May 2007) (on file with authors). In his remarks honoring Susie as the law school's Alumna of the Year in 2007, Chancellor Bepko also told a story that has become law school lore:

> Saying Susie was well rounded as a first year law student might have applied literally since she was expecting their second child as she sat in my contracts class. In fact her doctor had predicted birth during the exam period. So I administered a special early exam for Susie and, sure enough, her second daughter was born on the very day of the contracts exam. The family rejected my suggestion that the baby be named Hadley, Baxendale, Taylor, Caldwell, Hawkins or McGee. Instead they chose the non-contractual name Edie.

Id.

she could not have imagined that before it was over, she would serve the institution in every imaginable capacity—as director of the legal writing program, a tenured professor, associate dean for academic affairs, and ultimately as dean, the first woman and first alumnus of the law school to do so.

Susie's leadership early in her academic career foreshadowed her ability to make this school a place to become a better lawyer, a better scholar, and a better colleague. For example, as a legal writing instructor at a time when that aspect of formal legal education was in its nascent stages, Susie helped found the Dean's Tutorial Society. The Society—an honorary student organization that provides academic support to other law students—was the first organized, volunteer, law student-to-law student tutoring effort in the nation. The Dean's Tutorial Society provided a model for similar tutorial efforts in law schools throughout America. Later, Susie made a transition from teaching legal writing to teaching and writing about tort law. A generation of students learned about the "reasonably prudent person" from someone who was eminently reasonable herself.

Most of us at the law school today, however, remember Susie best for her work in the deans' office, and it is in that role that we both came to know her as a colleague and friend. The move to administration came when Dean Norm Lefstein appointed her as Associate Dean for Academic Affairs in 1997. Dean Lefstein made numerous outstanding decisions during his long tenure at the school, but appointing Susie as associate dean was one of his wisest. Susie obviously had the "technical skills" to do the job—she was (and is) smart, organized, and responsible. But no one could possibly have done the "people skills" part of the job better than Susie.

Soon, Susie's deanly work was augmented by her service on the Building Committee for the law school to be built at the corner of West and New York streets. In that role, Susie literally donned her hard hat and steel-toed boots to shepherd our school into the future. According to Dean Lefstein, "Susie played a significant and lasting leadership role as plans for Inlow Hall were developed. Her contributions were especially invaluable as we determined new furniture to purchase, the selection and location of class photos, and artwork throughout the building, all of which remains on display today."[3] Susie took special pleasure in the committee's efforts to relocate the Woodard Room[4] from the old law school to the new building. In true Susie fashion, today's Woodard Room links alumni with a peaceful, welcoming workspace, graced with three magnificent pieces: a fireplace mantel, a bookshelf, and a table, all from the Maennerchor Building, which housed the law school from 1944 until 1970.

Susie was perhaps at her best when serving as a recruiter for new faculty and an ambassador for newcomers to our community, an enormously important role

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3. E-mail from Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University Robert H. McKinney School of Law, to Cynthia A. Baker, Clinical Professor of Law, Indiana University Robert H. McKinney School of Law (Mar. 14, 2012, 10:47 EDT) (on file with authors).

4. This room is set aside for alumni and dedicated to the late Hal Woodard. Mr. Woodard, a Harvard law graduate, was a longtime adjunct teacher at the law school and an important benefactor to our law school community.

for the good of the institution. She was a fixture on the faculty recruitment committee and the "go to" person when new members of the law school community were house-hunting, looking for the right school for their children, or just trying to learn more about life in Indianapolis. Chancellor Bepko said it very well when presenting Susie with the law school's Alumna of the Year award in 2007:

> She knows legal education well and can do a good job of selling the potential of our school. But there was much more. She took people to show them the city of Indianapolis. She talked to them about how their teaching packages could be best structured. She talked about family issues for those faculty members who had families. She also was a very compelling ambassador for the city. She was able to give them good[,] direct and candid advice along with a nurturing counsel that made them feel right at home.[5]

Susie's enthusiasm for, and example of, balancing the demands of profession and family did not stop once a prospective faculty member joined our academic community. Both of us have experienced, many times over, the even-handed encouragement of Susie Mead as we raised our children. Susie never failed to laugh with us about our, sometimes comical, struggles as parents. And, with a lightness of experience and wisdom, was always able to provide excellent advice about the art of balancing families and careers. Beyond being a wise mentor herself, Susie encouraged new faculty to seek the best guidance and insight from other faculty members as well. Indeed, our school has a special culture—a sense of camaraderie and a family-like atmosphere, not always present on academic faculties. This exists today because we were fortunate to have Susie's leadership for so long.

In 2004, Susie finished a seven-year run as the school's Associate Dean of Academic Affairs. At the time, Susie thought that her days in administration were complete. We recall talking to her then, discussing how she was looking forward to spending more time with students in the classroom and returning to writing in the area of products liability, her academic specialty. But—as Susie herself might say—alas, it wasn't to be. About a year later, the law school's then-dean announced his resignation in a somewhat abrupt fashion, and the school needed someone to lead it through what was clearly going to be a tumultuous time. Not surprisingly, the law school community quickly rallied around the one very obvious choice—Susie Mead.

Susie did not relish a return to the deans' suite. But once she took the reins, she displayed the characteristics that epitomize great leadership. Those of us who worked with Susie during that time saw someone who confronted the most difficult of situations with equanimity. We observed a person making difficult decisions promptly, but patiently. We also saw someone who was tolerant and slow to anger, but firm when necessary. In short, in Susie Mead, we saw that "example is leadership." And visa versa.

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5. Bepko, *supra* note 2, at 2.

With all that she devoted to our law school, one might think that our tribute would conclude here. But, as we tell our law students, there is so much more beyond the walls of this law school. And Susie again provides the model for leading a full and balanced life. Most importantly, she and Jack raised three beautiful daughters. In Jack's words, "As a result of her example, her counsel and her support[,] I think all three girls were destined to become career women as well. Each has obtained advanced degrees[,] two with masters and one with a Ph[.]D."[6] After her daughters' athletic and extra-curricular obligations waned, Susie began to share her time and talents more broadly in our community. As just a few examples, Susie has served as trustee to the Pension Fund of the International Alliance of Theatrical Stage Employees, Local No. 30, as an elected member of the Indianapolis Garden Club, as a great supporter of the Indianapolis Symphony Orchestra, and as an active member and leader of Christ Church Cathedral.

At times, Susie's legal background was as important as her leadership skills. Appointed as chancellor of Christ Church Cathedral then under the leadership of the Very Reverend Robert Giannini, she was effectively the legal advisor to her congregation for many years. Susie also served as an elected member of the Cathedral's vestry. In both capacities, she assisted the congregation with redrafting and updating its bylaws, canons and other foundational and policy documents, her work consistently contributing to the long-term well being of the Cathedral. She brought energy and insight to addressing issues of poverty, environmental degradation, and women's health in her role as a member of the Cathedral's Millennium Development Goals Committee. And, as she did for our law school community, she did this important work while retaining the ability to serve as the most gracious hostess one could imagine.[7] In the words of the Very Reverend Carlsen of Christ Church Cathedral, her hospitality to Bishop Zache Duracin of Haiti was emblematic of her ability to so gracefully meld roles of hostess and leader. "Bishop Zache Duracin was one year removed from Haiti's devastating earthquake of 2010. He was struggling with unbelievable burdens of leadership and needs of his country, his congregation, and his people. In Indianapolis, Susie's gracious welcome to our community allowed the Bishop to rest, nourish his body and his soul, and realize that he had the support of many people around the world."[8]

In the Christian church season of Advent, a time of anticipation and penitence, one week is recognized with a pink candle on a wreath along with three purple candles. This pink candle, traditionally lit on Rose Sunday, represents a lightening of spirit, a sense of calm, and a way toward hope. As this short tribute sets forth, Susie has, time and time again, brought a lightness and

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6. Mead, *supra* note 1.

7. Jack and Susie offered their home to many community and faculty celebrations, including events honoring guests like Justice Ruth Bader Ginsburg of the United States Supreme Court, and on another occasion, the Episcopal Bishop Zache Duracin of Haiti.

8. Telephone Interview with the Very Reverend Stephen Carlsen, Christ Church Cathedral (Feb. 29, 2012).

hope to difficult times, a path to improvement, and a contribution to everyone she has touched. To us, it seems that Susie, in so many ways, is the equivalent of what the pink Advent candle means to many—an example of a way toward patience and wisdom and peace in our busy, complicated world. So, to Susie Mead, we offer our thanks and best wishes. We miss you and your leadership around the law school, but wish you the very best for a long, happy, and healthy retirement. Enjoy your time with friends and family. And always remember that you have a family at the law school as well.

DEDICATION: A TRIBUTE TO PROFESSOR MARY THERESE WOLF LAW CLINIC DIRECTOR

JOANNE ORR*
FRAN WATSON**

Over the course of her distinguished career in legal education, Professor Mary Therese Wolf became the heart and soul of the Law Clinic at Indiana University Robert H. McKinney School of Law. When Mary Wolf arrived at the law school in 1984, as a visiting assistant professor in the Civil Practice Clinic,[1] live-client clinical legal education was in its infancy. By 1987, while continuing to teach in the Civil Practice Clinic, Professor Wolf was appointed Director of Clinical Programs. Over her tenure as Director, Professor Wolf oversaw expansion of the Law Clinic to include creation of the Disability, Criminal Defense, and Wrongful Conviction Clinics.

Professor Wolf was the law school's first full-time, real-client, clinician. She came to the school well-equipped for the task. Awarded the Juris Doctorate in 1974 from the University of Iowa College of Law, with distinction, Mary Wolf served as a law clerk to the Honorable Robert Downing of the Illinois Appellate Court immediately after law school. Her professional career thereafter included work with the Federal Disaster Assistance Administration. When she applied for the newly-created visiting faculty position at the law school, Mary Wolf was working as a managing attorney of a local legal service office covering six counties in northern Illinois and representing low-income clients with a range of civil problems.

Mary Wolf led the efforts at the law school to expand clinical opportunities to better serve our students, our state, and the concept of equal access to justice for all. This focus resulted in the creation of a number of new course offerings, including Law and Poverty, multiple health law externship placements, and the Advanced Clinical Experience course. One of Professor Wolf's long-held goals—that of crafting a multi-disciplinary approach to client representation—resulted in the approval of a JD/MSW: Doctor of Jurisprudence/Master of Social Work dual degree in 2007.

In addition to teaching and advocating in the Civil Practice Clinic, Mary Wolf's course load regularly included Interviewing and Counseling, Law and Poverty, and Professional Responsibility. She also supervised numerous externships and is credited with elevating the externship opportunities as a whole. In 2010, she was appointed the Director of Externships. Professor Wolf created the Desk Book for the Civil Practice Clinic, numerous simulated materials teaching lawyering skills, and The Jay Jones Case video, which became the basis

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1. Ronald W. Polston, *History of the Indiana University School of Law—Indianapolis*, 28 IND. L. REV. 161, 177 (1995).

of a 1993 American Association of Law Schools presentation. In a teaching exchange program in Spring 2001, Professor Wolf took her talents to the TC Beirne School of Law in Queensland, Australia. She also traveled to Europe for several summers as the resident faculty for the Law School's European Program.

Professor Wolf's service interests were tied to the needs of the under-served. Professor Wolf's contributions to the legal community included membership on the Indiana Supreme Court Pro Bono Commission, and participation in the Juvenile Justice Project and the Domestic Violence Protective Order Pro Bono Project. She also impacted the national landscape of the clinical legal education movement by her years of service within the Clinical Legal Education section of the American Association of Law Schools. Her investment in the legacy of clinical legal education included participation on American Bar Association Site Inspection Teams for accredited law schools from 1995 to 2000. In addition, her service to the broader community needs included membership on several non-profit boards. She also found time to change lives as a long-term literacy tutor and was equally willing to devote her energies to law school committee service and faculty matters of governance. Administratively, as the Director of Clinical Programs, she oversaw compliance with grant application and reporting requirements, handled budgetary matters, liaisoned with local service providers, answered public inquiries, and numerous other mundane tasks necessary to the operation of a vital law firm operating in a law school setting.

Perhaps Mary Wolf's greatest satisfaction as a clinical educator was in the daily supervision of students certified to practice law on behalf of clients in the Civil Practice Clinic. Mary and her students served as co-counsel to low-income clients referred from Indiana Legal Services in matters of general civil litigation, including family law, landlord-tenant law, and consumer law litigation. The Civil Practice Clinic includes an intensive classroom component in which the substantive law serves as the vehicle for problem-solving and skills-based learning. Within this live-client clinical model, Mary and student co-counsels provided much needed access to the legal system to thousands of real-world clients, benefitting clients, students, and the pursuit of justice for all.

For many years, Professor Wolf's homemade cheesecake was a coveted item at the annual Women's Caucus Auction. Her Thai noodles were to die for and her gazpacho could not be beat. Mary Therese Wolf was not only an exemplary teacher and lawyer, she was a law school colleague in the truest sense of the word.

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LECTURE

2011 JAMES P. WHITE LECTURE ON LEGAL EDUCATION A CHIEF JUDGE'S AFTER-LIFE: REFLECTIONS ON EDUCATING LAWYERS TODAY*

JUDITH S. KAYE**

Just to give you a bit of background, when my friend Jim White called several months ago requesting the title of my remarks, I responded with: How about "Women and Diversity" or "Children and the Law," to which he answered, "Choose a topic about which you have strong views. And by the way," he continued:

> Justice O'Connor, who gave the first White lecture, spoke about the internationalization of the practice of law and legal education with reference to CEELI (Central European and Eurasian Law Initiative). New York University President John Sexton next talked about legal education in a research university. And Lord Woolf discussed the differences in legal practice and legal education in the United Kingdom and the United States.

Before he could go on with the dazzling array of speakers (including Chief Justice John Roberts and Justice Ruth Bader Ginsburg) who have had the privilege of delivering the James P. White Lecture on Legal Education, I got the point. And yes, most definitely legal education is a topic about which I have strong views.

Before reaching that subject, I must say that, strong though my views may be on the subject of legal education, they are even stronger on the subject of James P. White. Jim, I cannot say for sure when it was that our paths first intersected. Over the past several decades your dedication to assuring the highest standards in our noble profession has happily brought us together in many exotic places. But it is my special pleasure to be here in your home, among your colleagues,

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* This is the text of the tenth James P. White Lecture on Legal Education delivered by Judith S. Kaye at the Indiana University Robert H. McKinney School of Law on September 13, 2011.

** Of Counsel, Skadden, Arps, Slate, Meagher & Flom, LLP; Chief Judge, New York Court of Appeals 1993-2008. Special thanks to Shari Graham, a superb Skadden, Arps colleague; to Diane Bosse, valiant head of New York's Board of Law Examiners; and to yet a third dear friend, former New York Court of Appeals Judge and former Dean of St. John's School of Law, Joseph Bellacosa. All three helped enormously in the development of these remarks.

friends and admirers who, together with the American Bar Association, have established this lecture in honor of your remarkable career.

Talk of remarkable, Jim and I were together in Toronto recently, when the American Bar Association honored Bob MacCrate, another star in the firmament of legal education and professional values. What a stunning coincidence that Bob was my very first "boss" and mentor when, fresh out of NYU law school, I had the good fortune to join the Litigation Department of the firm of Sullivan & Cromwell. As a woman, I guess the word "miracle" would be more apt than "good fortune" to describe that job opportunity back then. The first time my phone rang at Sullivan & Cromwell, on Tuesday, September 4, 1962—an incredible forty-nine years ago—it was Bob saying: "Miss Smith, this is Mr. MacCrate. Would you please come to my office?" Definitely an unforgettable day in my life, the official start of a half-century professional relationship and personal friendship. But it's an even greater coincidence that, like Jim White, so much of Bob's professional life has centered on the subject of the day: adequately educating students to perform effectively as lawyers.

Indeed, I spoke to Bob MacCrate as I was putting the finishing touches on these remarks. He wanted all of you to know that Jim White was a particular inspiration for him in his own relationship with the subject of legal education, that Jim more than anyone drew him to seeing what he could do to further a cause to which Jim has chosen to dedicate his life, and that reaching out to Jim always gave him new insights and fresh perspectives.

Clever man that he is, back in the early 1990s Bob MacCrate began his inquiry at the beginning, by identifying the skills required of a good lawyer: problem-solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, counseling, negotiation, understanding the procedures of litigation and dispute resolution, organizing and managing legal work, and recognizing and resolving ethical dilemmas. And as he explained in his influential 1992 report, today a classic on the subject, these skill sets must be used as a "checklist against which to judge the inclusiveness of . . . skills instruction or . . . the extent of [a student's] exposure to training in the skills needed in practice."[1] The MacCrate Report explored the educational continuum through which lawyers acquire their skills and values: prior to law school, during law school, and then in practice. It is safe to say that the MacCrate Report played a pivotal role in moving law schools from their previously static view of lawyers as repositories of legal knowledge to a more modern view of lawyers who do useful things with the law to anticipate and solve problems.

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1. Robert MacCrate, *The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 517, 523 (1994) (citing ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 127-30 (1992) [hereinafter MacCrate Report]).

CONTINUING CONCLAVES

Perhaps most significantly, Bob MacCrate's work, like Jim's and many others, inspired conclaves to continue the vital discussion of how best to educate law students for practice in a contemporary client-centered public profession. During the 1999-2000 academic year, a group of scholars at the Carnegie Foundation for the Advancement of Teaching examined and reported on the status of legal education across sixteen law schools.[2] They identified two major limitations of legal education. First, unlike other professional education such as medical school, legal education typically pays little attention to direct training in professional practice.[3] Second, they noted that law schools fail to recognize the different social and cultural contexts of legal institutions, and the varied forms of legal practice.[4] The 2007 report therefore concluded that the law school model needs to be a far more integrated one, where students are consistently moved back and forth between understanding and enactment, experience and analysis.[5]

The Carnegie findings were largely echoed in 2007 by University of South Carolina Law Professor Roy Stuckey, who chaired the Clinical Legal Education Association's "Best Practices for Legal Education" project. This six-year project culminated in a book calling on law schools to make a commitment to better prepare their students for practice, clarify and expand their educational objectives, improve and diversify teaching methods, and give greater attention to evaluating their success.[6] That message has resonated ever since in reports such as the American Law Institute–American Bar Association and the Association for Continuing Legal Education Summit,[7] and the April 2011 Report of my own State Bar Association's Task Force on the Future of the Legal Profession.[8] Most recently, I learned of a consortium of legal education reformers called Educating Tomorrow's Lawyers—part of the Institute for the Advancement of the American Legal System—which had its genesis in the 2007 Carnegie Report and now looks to new pedagogical models that blend and integrate the various skills required by contemporary law practice.[9]

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2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 63 (2007).

3. *See id.* at 87-125.

4. *See id.* at 126-61.

5. *See id.* at 192-93.

6. *See generally* ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

7. AM. LAW INST.-AM. BAR ASS'N CONTINUING PROF'L EDUC. & THE ASS'N FOR CONTINUING LEGAL EDUC., EQUIPPING OUR LAWYERS: THE FINAL REPORT OF THE CRITICAL ISSUES SUMMIT (2010), *available at* http://lawprofessors.typepad.com/files/finalreport.pdf.

8. N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION (2011).

9. Karen Sloan, *Action on Law School Reform; Consortium Pushes Legal Education Reform: Legal Educators Are Organizing to Finally Move Beyond the Talking Stage*, NAT'L L.J., Aug. 22, 2011.

A NEW CROSSROADS

So, here we are again—or more accurately still—at a crossroads, which I am now witnessing from a new perspective, what I call my Chief Judge "after-life," back in the world of lawyering, now at the law firm of Skadden, Arps.

I use the word "back" advisedly. Yes, I did leave the New York City law firm world to join the State's high court on September 12, 1983. And yes, after twenty-five years, three months, nineteen days and twelve precious hours on the court (fifteen of those years as Chief Judge of the State of New York, in happy association with your great Chief, Randy Shepard) I am once again in a law firm in New York City. But to be frank, there is very little that is "back" about it. No surprise: the world is dramatically different. So are law firms in the City of New York, and throughout the world.

And I do want to pause here for a few disclaimers. First, it's pretty terrifying to be addressing the subject of legal education in the presence of one of the icons on the subject, Jim White, and I'd put your Chief Justice in that category too. I distinctly remember the years when Chief Justice Shepard passed up the opportunity to head the Conference of Chief Justices and the National Center for State Courts (which ultimately he did) because of his dedication to the American Bar Association's focus on legal education and professional standards. So I want to underscore that what you will hear are my personal views, with hardly the expertise of Jim, Randy and so many of you assembled here today.

Second, in the interest of full disclosure, you should know that I still bear the scars of New York State Dean-Chief Judge encounters on the subject of the bar exam and admission requirements, which in New York are under the aegis of the state court system as well as the American Bar Association. Those subjects invariably made the deans angry—some have even urged doing away entirely with the bar exam. I especially remember one national meeting—confrontation is a better description—in Phoenix, at a Chief Justices' conference with all the deans, which gave me some comfort, though small, that the fervor was not limited to New York.

And finally, on the subject of disclaimers, I recognize that big law firms hardly define the world of lawyering today, but it is my focus because it is the sliver of lawyer life that I know best. I think, additionally, that the big firm is a good model to draw on, given the resources and opportunities perhaps uniquely available in that universe, which in many ways (good and bad) has become a model for law practice generally. On the good side, I refer to my firm's wholehearted dedication to pro bono service, in order to better serve our profession and society, and to our relatively new two-month full-time training program for new associates in cross-pollination of the firm's practice areas and in business and finance, in order to better serve our clients. Clearly, we are part of the continuum in traditional on-the-job mentoring roles, and now more actively with a formal training program.

A SNAPSHOT OF TODAY

So against that backdrop, I briefly address the subject of my return to the world of lawyering at New York City firms today.

I could start with numbers—number of lawyers, number of partners, number of offices. Suffice it to say that my firm today—and we're hardly alone—has 2000 lawyers, of whom 432 are partners, with twenty-three offices around the globe. I don't need to give you examples of large law firms in 1983 for you to know that the difference is immense. But it's more than just numbers I'm talking about. I've lived in a large city all my adult life. I know that neighborhoods, communities, affiliations, even the high specialization within the profession today, can make the hugest enterprise familiar, home-like. For me, the two greatest differences are geography and technology.

Just to put a concrete example on the table, I recently returned from arbitrating in London—now a commonplace phenomenon (both arbitrating and doing so in London). While there, in the hotel breakfast room I met a lawyer from a global firm centered in Missouri, in London to defend his clients in depositions. His clients are from Dubai, and the lawsuit is pending in the United States District Court for the Eastern District of New York. That's Brooklyn. The messages that come across my firm email every single day can be about subjects as diverse as anti-suit injunctions in Argentina, Taiwan estates law, appeals in India, leasing transactions with foreign governments, and on and on. You name it, we've got it, including an amazing array of pro bono projects. Law practice in the world I now inhabit is around the globe, and therefore necessarily also around the clock, and the competition is intense.

The technological change may be even greater. As a young lawyer, and even an older one, I spent many days and nights in the library, immersed in books—treatises, case reporters, law reviews. I couldn't have imagined that within my own lawyer lifetime, I could type a case caption, a cause of action, a catch phrase, even a judge's name into a database and within seconds have a wealth of knowledge at my fingertips. Law libraries are obsolete and, at many law firms, extinct. Fortunately, at Skadden, I can still travel down to the 39th floor at 4 Times Square in New York City, take a deep breath and be intoxicated by the smell of real books. But it's more than the smell I am talking about. While these automated programs can generate information, they have not, and cannot, replace what the lawyer does best: understanding the information, analyzing it, and finding ways to apply it creatively and persuasively. That, after all, is how our law moves forward to accommodate a rapidly evolving society.

A CONTRAST TO THE PAST

And speaking of my early days as a lawyer, I harbor the fantasy of decades ago wandering down the hall in my old law firm to toss around an interesting legal question with a couple of associates. Turning the prism, I called it, to find new approaches to client problems. Today, the corridors are empty. If you have a question you simply email your next-door neighbor, or the whole firm, and you have the worldwide answer—including forms—in minutes. When I recently

addressed a group of young lawyers about how isolating and impersonal this all seemed, one of them took issue with me. In his view there is far more communication today—it's just in a different form.

I suppose that the young lawyer was correct: There is far more communication today—so much that this era has been dubbed the "communication revolution."[10] But I wonder, does *more* necessarily mean *better*? Once upon a time, face to face or by phone were our primary modes of interaction with one another. Now, we have the choice of communicating via voice, text, email, instant message, video, Facebook, Twitter—and the list goes on. Communication has become more efficient, but at what expense? Are students able to pay undivided attention to a law professor explaining a nuanced matter of law, while at the same time g-chatting with classmates down the aisle or friends in another country? Can attorneys give undivided attention to a client on a conference call while simultaneously emailing co-counsel on an unrelated case? It's common at meetings to see several lawyers prominently eyeballing their Blackberries, the balance of the group undoubtedly doing the same less prominently. I know a lady lawyer who has Blackberried her thumbs square.

So I leave open the question whether communication is better these days and turn particularly to law schools in the legal education continuum today—preparation for those magic moments of law practice that I've been describing. And I ask: Given our brave new world, are the skill sets today different from those identified two decades ago for practice in a client-centered public profession? And how are law schools doing in meeting today's needs?

As to the first question, my own suspicion is that the MacCrate Report's conclusions back in 1992 are still "right on," even in this dramatically changed world. Surely we still need that comprehensive list of essential problem-solving skills, perhaps now more than ever. The form of our communication today may be different, the forum of our dispute resolution today may be different, but our professional objectives remain unchanged and challenge the full range of human skills the Report identified. Surely the continuum known as legal education begins prior to law school and continues in practice. And finally, I think it is clearer than ever before that, in this rapidly changing world, we need to continue and even ratchet up our collaborations to secure the continuing vitality of our noble profession.

So it's not the first question—the identification of required skills—that at the moment troubles me as much as the second—the law school segment of the continuum, today at the center of a tornado. It shocked me as I prepared this lecture, time after time to find my research and ruminations that very day the subject of articles in the *New York Times*, *New York Law Journal* and *National Law Journal*, resolutions by the American Bar Association, even lawsuits, one filed in Michigan federal court against the Thomas Cooley Law School,[11] a

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10. *See generally* INSIDE THE COMMUNICATION REVOLUTION: EVOLVING PATTERNS OF SOCIAL AND TECHNICAL INTERACTION (Robin Mansell ed., 2002).

11. *See* Barton Deiters, *Cooley Law School Target of Federal Lawsuit Claiming It Cooks Its Books When It Comes to Employment Claims*, MLive.com (Aug. 13, 2011), http://www.mlive.com/

second in New York state court against New York Law School.[12] Additionally, in New York today, and I imagine elsewhere, there is lively ongoing debate regarding a practice-oriented versus theory-oriented approach between the bar examiners and the law schools. These are really and truly the hot issues of the day, nationwide, complex issues to be carefully addressed by knowledgeable people after significant inquiry. I will simply venture views on three subjects dear to my heart—practice-ready courses, legal writing, and law school debt. I do not, by these observations, intend to inject myself into the maelstrom. I'll leave that delightful prospect to Jim White and all of you.

PRACTICE-READY COURSES

As contemporary practice demands high quality service, law schools must produce competent, ethical professionals with a commitment to the rule of law who are able to do more with the knowledge they possess. It is not enough—if it ever was—to have substantive knowledge without also being able to persuade, collaborate, draft and advise. The demand for "practice-ready lawyers"—lawyers who must "know how to do useful things with the law to help solve client problems"[13]—is one that is only going to continue to grow with the present economy.

What exactly does "practice-ready" mean? It means that students must graduate with more than just successful completion of, say, courses on contract law. They also need the skills to negotiate an agreement, draft a contract and make an oral presentation. Plainly, while the core curriculum of law schools—courses in contracts, civil procedure, torts, property, constitutional law, criminal law—constitute the foundation of legal education, they are not alone sufficient in preparing competent, ethical professionals to practice law today.

Without question, one way to shape students into "practice-ready" lawyers is by also moving the class a bit outside of the classroom—where, through clinics, students meet with and interview clients, represent their interests in court, and apply their skills in a practical setting. Clinics, and other professional skills programs, have received well-deserved attention lately—even the *U.S. News* magazine has established a special ranking category. I was pleased to learn of some of the more fascinating legal clinics offered today, such as Cornell's Water Law Clinic, Columbia's Sexuality and Gender Law Clinic, Duke's Guantanamo Defense Clinic, University of Washington's Tribal Court Public Defense Clinic, and of course, Indiana's Health and Human Rights Clinic. In addition to valuable skills, law students gain the opportunity, and hopefully the inspiration, to use their skills to help people in need and make the world a better place.

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news/grand-rapids/index.ssf/2011/08/cooley_law_school_target_of_fe.html.

12. *See* Sophia Pearson, *New York Law School Sued by Students over Claims About Graduates' Success*, BLOOMBERG (Aug. 10, 2011), http://www.bloomberg.com/news/2011-08-10/new-york-law-school-sued-by-students-over-claims-about-graduates-success.html.

13. John Caher, *State Bar Asks ABA to Support 'Practice Ready' Law School Education*, N.Y. L.J., Aug. 4, 2011, at 1.

It seems to me that all law students should be required to take some "practice-ready" courses, of which clinics are at the moment most familiar to me, as study of new pedagogy proceeds. To complement clinical work, capstone courses and projects should be encouraged, which also blend doctrinal study with real-world application. This experience allows students, with faculty supervision, to translate what they have learned during previous book study into practical legal skills.

Duke University School of Law, for example, offers third-year students an opportunity to develop a capstone project, where they work closely with a faculty member on a project of their design.[14] Although the parameters of each project vary, the program requires a substantial final written product, such as a scholarly article, or a draft complaint and supporting memorandum. In some cases, outside experts are brought in for assistance and mentorship.[15] In one recent project, a student worked with a professor to "evaluat[e] and recommend[] various mechanisms for improving procedures used by the North Carolina Office of Administrative Hearings, including evaluation of the office's docketing and case assignment system, [and] revising procedural mechanisms to ensure due process for litigants."[16]

The new model of *classroom-based* learning enriched and complemented by skills training is fascinating as well. I refer, for example, to an advanced contracts class at Southern California Gould School of Law where students work through real-world case studies as if they were lawyers and clients; and, to a labor relations course that not only teaches statutes and cases but also pits students against one another to play out real-life issues.[17]

Plainly, law school must be an interactive learning community, not a place to get a degree online in the shortest possible time. Opportunities such as these allow students to make sense out of ethical issues that are just theoretical in the classroom; learn how to identify issues in the real world, experience a niche field of law, and develop a rapport with clients—all while gaining course credit. A win-win, that's for sure.

Some years ago, I authored a snotty article regarding academic law review writing, in which I took law reviews to task for their concentration on meta-hermeneutics and other esoterica instead of subjects of use in the real world.[18] Though I stand by my thesis, I have come to regret it a bit. Law school is a place

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14. *See Capstone Projects*, DUKE L. ACAD., http://www.law.duke.edu/curriculum/capstone/procedure (last visited Feb. 6, 2012).

15. *See id.*

16. *Recent Capstone Projects*, DUKE L. ACAD., http://www.law.duke.edu/curriculum/capstone/recentprojects (last visited Feb. 6, 2012).

17. *See* Lori Craig, *Making Law Their Business*, USC L. (June 16, 2010), http://weblaw.usc.edu/news/article.cfm?newsID=3590; *see also, e.g.*, Arturo López Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132, 179, 194 (1998); *see generally* STUCKEY, *supra* note 6.

18. Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

to learn about meta-hermeneutics and jurisprudence, *and* to learn the essentials of tort law, *and* to learn how to research issues and draft documents. As we have incontrovertibly established over the recent decades, blended, integrated courses have an essential place in the law school curriculum. And, most importantly, the courses, as well as those who teach them, must be equally valued alongside the other course offerings, by students and faculty, by law schools and by universities.

I want to add just a word about a related phenomenon I am seeing—lawyers and judges in their 60s and 70s, "retired" from decades of active law practice, now affiliating with law schools to offer "boutique" seminars centered on their own unique skills and experiences. Just to give you a few examples, the former head of the Legal Services Corporation is now teaching a law school seminar on pro bono services;[19] a former General Counsel of a Fortune 500 Company is offering one on the business world; one former Court colleague, Judge Joseph Bellacosa, instructs on court administration and another, Judge Albert Rosenblatt, has a seminar on actually litigating in state courts (a too-long-neglected subject).[20] Judge Rosenblatt picks a case from the upcoming court of appeals docket, the students prepare to argue the case both orally and in briefs (which they write for both sides), and he critiques their performance. They then moot the lawyers who will actually present the arguments to the court; they conference the case just as the court does; they travel up to Albany to hear the argument; and they each draft the decision. Pretty terrific all around, for the so-called retired people now teaching and mentoring, for the students, and for the law schools.[21]

LEGAL WRITING

I next turn to a related subject especially important to me—writing. It was never my aspiration to be a lawyer. I always loved to write, and focused on a career equally ludicrous for a woman back in the 1950s—I aspired to be a maker and shaper of world opinion as a renowned international journalist. After all, how could the Editor-in-Chief of the Monticello High School and Barnard College newspapers fail? I learned.

When the only job I could land in the press world was social reporter for the *Hudson Dispatch* of Union City, New Jersey, I began scrambling around to rewrite my life, and hit on the idea of attending law school at night—NYU had

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19. *See Teaching Access to Justice*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/blueprints_for_better_access/teaching_access_to_justice.html (last updated Sept. 26, 2011).

20. All four examples are personal friends, and what follows is based on my conversations with them.

21. And by the way, the subject interests me greatly for another reason: How do we most effectively utilize the growing cadre of energetic, highly skilled so-called "retired" lawyers and judges who want to continue making a contribution? With the demands for legal services so huge today, this is plainly a wasted resource. A subject for another day.

one at the time. With a couple of years of law school under my belt, I felt that no self-respecting editor would deny me a job on the news side of the paper. As you see, law triumphed, thankfully. I've had a phenomenal career as a lawyer—I just cannot imagine a more challenging, satisfying life—and happily I missed the opportunity to be fired from one of the many newspapers I have seen collapsing around me. But I also believe that my success in law school was largely attributable to skills I honed as a journalist, like diagnosis—what are the core issues, what's most important, what's the lead paragraph—and clear, articulate expression in the English language. Incomprehensible though the news may sometimes be, you don't see a lot of semicolons and Latin on our front pages.

It hardly seems necessary to underscore the importance of written and oral communication in the law—especially for the audience gathered here this afternoon. In law, words matter. The effective usage of communication—precise, persuasive, cogent writing is an indispensable skill not only for success in law school, but also in legal practice itself. Words are critical to the practice of our profession; the better used the better the practice. And while technology may speed production of work and expand our access to information, word processing will never replace wordsmithing. As wordsmiths, lawyers engage in an intensely human endeavor. And it is only through such a human process that justice emerges.

Unfortunately, notwithstanding the importance of the ability to research and write well, law schools today may not be giving sufficient sustained attention to the subject. With the emphasis on grades, particularly during the first year, a pass/fail legal writing course in year one, taught by a part-time adjunct sends the message that it is acceptable—even recommended—to pay less attention to that course because the consequences of a lower score in a graded course can have a for more detrimental impact on one's future career.

What a pity! There are so many wonderful things I could say about the value of legal writing courses, starting with the fact that they allow for regular individual feedback and learning, as compared to more traditional law school courses, where the first and only evaluation that a student receives is a letter grade months after the end of the semester. It is an unfortunate reality that many law students have little motivation to meet with their contracts professor to understand why they earned a "B" on a long-forgotten exam, especially when they are already engrossed in new legal subjects with exams to prepare for. Educational theorists distinguish between formative assessment, which, like the legal writing course, occurs during learning and is designed to help students improve performance, and summative assessment, which, like traditional core classes, occurs at the end of a course and measures how much the student has learned. The key difference between these two models is that because feedback is an intrinsic component of formative assessment, students improve their learning at every juncture. This is a shining attribute of legal writing courses.

Brevity and clarity are also essential ingredients to strong writing, and qualities learned only through time and practice. I'm sure you've heard people say that a three-hour speech they could deliver immediately, but for a three-minute address they'd need time to prepare. A good attorney knows how to say more in fewer words, orally and in writing.

Bryan Garner, author and editor of a number of distinguished books on legal writing, explains that of all law school courses, legal writing is both the single most time-intensive subject and the least respected, and most often law school's biggest failure is the "dearth of seriously good skills courses, especially training in legal writing."[22] Garner also believes—and I concur—that the second and third years of law school should include more research, writing and editing, with short papers in every course—again, taught by professors who are respected by the students and by the institution.[23]

Finally, legal writing should teach students not only how to write briefs and present oral arguments, but also how to prepare documents that are essential in trial preparation and the general practice of law. It's part of preparing students to practice law effectively and responsibly in the contexts they are likely to encounter as new lawyers. This exercise does more than simply develop and enhance technical skills. It also aids the students' understanding of theory and doctrine, sharpens their analytical skills, improves their understanding of the legal profession, and even cultivates practical wisdom.[24] We reflect the importance of the skill, and the instruction, not only by more writing courses but also by the quality of and respect accorded to those who teach them. I rest my case.

DEBT

So I next turn to the final subject I've singled out from the many legal education issues at the center of the storm today: student debt. I've saved it for last both because it's the grimmest and because I have only one suggestion to offer: We need to talk.

The media, of course, have pounced on the issue. I was blown away by a *New York Times* headline some months ago: "Law School Economics: Ka-Ching!" and the response it set off.[25] Suffice it to say that the *Times* series—and the *Times* is not alone in this—is not at all flattering to today's law schools, which are portrayed as revenue centers. Bryan Garner's piece, also published in the *Times*, is titled "Three Years, Better Spent,"[26] the word "spent" meaning not so much the passage of time in law school as large profits law schools generate and coordinate debt for students.[27]

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22. Bryan A. Garner, *Three Years, Better Spent*, N.Y. TIMES, July 25, 2011, http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better.

23. *Id.*

24. *See* STUCKEY, *supra* note 6, at 109.

25. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1, *available at* http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html.

26. *See* Garner, *supra* note 22.

27. *See id.*

Some law schools are accused of misleading students by finessing surveys—managing the data—to secure spots on the life-determinative *U.S. News* and other rankings reports, keeping costs down through larger and larger classes—in effect indifferent both to the students and to the profession they will enter—and by false advertising of scholarships that merely lure students in and then dump them.[28] At the same time, law school tuition is outpacing the cost of an undergraduate degree. According to the National Association of Law Placement, the median debt among lawyers who joined the bar in 2000 was $70,000[29]—a figure one can only assume has risen as law school has become increasingly expensive.

And the personal stories now being publicized are absolutely hair-raising. Consider Adam and Jessica, both graduates of Cornell University Law School, now married and living in Los Angeles, whose monthly student loan repayment is about equal to their mortgage payment.[30] Or James, a recent law school graduate who anticipates that he will not be able to pay off his loans until he is close to sixty, even with an average lawyer salary.[31] Congress, too, has weighed in, seeking greater transparency and accuracy from the American Bar Association Section on Legal Education and Admissions to the Bar, given the taxpayers' ultimate responsibility for federally-supported loans when students default, a growing problem.[32]

Perhaps even more seriously from the perspective of the profession and society at large, law school debt impacts career choices, and by that I mean both people considering law school and law school graduates. Evidence indicates that rising law school debt may well affect the ability of public interest and government legal service providers to recruit and retain attorneys to serve clients' needs, and that the debt both compels law school graduates to pursue more remunerative private practice careers and deters them from transferring out of jobs that are lucrative but unfulfilling.

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28. David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, May 1, 2011, at BU1, *available at* http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=all.

29. GITA Z. WILDER, NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC. & NAT'L ASS'N FOR LAW PLACEMENT, LAW SCHOOL DEBT AMONG NEW LAWYERS: AN AFTER THE JD MONOGRAPH 11 (2007).

30. *See* Kathy M. Kristof, *Money Make-Over: Laying Down the Law on Spending Priorities*, L.A. TIMES, Oct. 2, 2001, http://articles.latimes.com/2001/oct/02/business/fi-52292.

31. *See Student Debt, Fool's Gold?*, N.Y. TIMES, June 15, 2009, http://roomfordebate.blogs.nytimes.com/2009/06/15/student-debt-fools-gold/.

32. *See* Philip Nannie, *Congress Wakes Up to Law School Transparency*, NASHVILLE POST, July 14, 2011, http://nashvillepost.com/blogs/postbusiness/2011/7/14/congress_wakes_up_to_law_school_transparency; Debra Cassens Weiss, *Will Senate Hold Hearings on Law Schools? Lawmakers' Data Collection Could Be Backdrop*, ABA J. (Nov. 14, 2011), http://www.abajournal.com/news/article/will_senate_hold_hearings_on_law_schools_lawmakers_data_collection_could_be/.

So what should be done? Some say cut the standards, cut the course of study, cut the bar exam. To which I say cut it out. I think that these responses are short-sighted and ill-advised. Address the deception and abuse? Absolutely. Eliminate the waste and inefficiency? For sure. But additionally we need to gather the data and find good, constructive ways to address these critical issues. And we cannot allow all the huckstering to skew the picture. What I have been reading is largely focused on advising students on how best to handle their debt and refinance their loans. All well and good, but managing debt is one thing; finding ways to reduce and eliminate it quite another. I know that many law schools are trying to tackle the issue through loan forgiveness programs and the like. Clearly we need to expand the conversation about how to address the issues surrounding student debt—a step that is essential to addressing this crisis.

CONCLUSION

The reality is that excellence in legal education requires cost, time and standards because legal education has immeasurable value for those who are serving, for those who are being served, and above all, for the future of this great nation, whose fundamental ideals have through the ages been secured by the great American bar. In response to the deluge of recent negative *Times* commentaries, University of Wisconsin law professor Linda Greene authored a counterpoint titled, "A Priceless Degree."[33] The important question, says Greene, is not cost, but access. "What will we do to insure that talented people from all groups in our society, especially those historically excluded, have access to this course of study . . . ?" she asks.[34] "And how do we insure that all groups in society, including our public and governmental institutions, enjoy the services of our brightest and best prepared?"[35] Green ends by saying, "When the history of legal education is written, the important question is unlikely to be, 'What was the cost of legal education?' Rather, it will be, 'Did our legal education system deliver equal justice under the law?'"[36] A great question and a great note on which to conclude, as I now do.

My only regret is that I will be unable to attend the next James P. White Lecture on Legal Education, which will be given on April 3, 2012 by E. Thomas Sullivan (an Indiana alum), former Provost and Senior Vice President for Academic Affairs at the University of Minnesota. Given his hands-on experience with the new models of legal education as well as the more traditional classroom models, I am most eager to hear his views on "The Transformation of the Legal

33. Linda Greene, *A Priceless Degree*, N.Y. TIMES, Nov. 7, 2011, http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/a-law-degree-is-priceless.

34. *Id.*

35. *Id.*

36. *Id.*

Profession and Legal Education." In all other respects, I have only boundless thanks for this extraordinary occasion, and to you especially Jim White, for keeping our attention always trained on the vital subject of legal education, plainly essential to the future of our profession.

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ARTICLES

CRISIS MANAGEMENT: PRINCIPLES THAT SHOULD GUIDE THE DISPOSITION OF FEDERALLY OWNED, FORECLOSED PROPERTIES*

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JOHN TRAVIS MARSHALL****

INTRODUCTION

Residential home values in the United States have fallen considerably from their highs in the mid-2000s. This has had profound effects on consumer wealth and spending, creating a significant drag on the U.S. economy. What is worse, this loss in values corresponded with a steep rise in unemployment, which started in late 2007,[1] and has yet to fall considerably. The loss in home values has wreaked havoc on household finances and bank ledgers, as the outstanding principles of the mortgages those banks hold and service all too often exceed the current value of the homes against which they are secured. This has proven a toxic mix, as foreclosure rates in residential homes in the United States have reached highs not seen since the Great Depression.[2] Foreclosures have

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* This Article is adapted, in part, from a policy paper drafted by the authors on behalf of the Eugene and Carol Ludwig Center for Community and Economic Development at Yale Law School in response to a Request for Information promulgated by the U.S. Department of Housing and Urban Development and other federal agencies. While the text and import of these documents are very similar, reference is made to that prior work here without further attribution.

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1. For an overview of unemployment during the most recent recession, see *Long-Term Unemployment: Causes, Consequences, and Solutions: Hearing Before the J. Econ. Comm.*, 111th Cong. 7-8 (2010) (statement of Dr. Lawrence F. Katz, Elisabeth Allison Professor of Economics, Department of Economics, Harvard University).

2. *Current Trends in Foreclosures and What More Can Be Done to Prevent Them: Hearing*

devastated families and whole communities. The surplus stock on the market, often available at depressed prices, means the housing market suffers from a glut of homes, further depressing sales and values.

Since the New Deal, the federal government has become involved in all aspects of housing policy—from providing affordable housing, spurring new housing construction, encouraging housing rehabilitation to promoting homeownership.[3] On the rental front, the federal government has built rental housing,[4] offered tax breaks for the construction of low-income housing,[5] funded rental assistance programs in the private rental market,[6] and regulated discrimination in rental practices through the Fair Housing Act of 1968.[7] On the homeownership front, the federal government's involvement is pervasive, particularly in the wake of the present financial crisis. The government's involvement ranges from federally backed mortgage loans and participation in the secondary mortgage market, to the regulation of mortgages, the provision of federal loan guarantees and the offer of new federal incentives to modify mortgages.[8] Given the extent of federal involvement in the home mortgage market, there can be no doubt that, at present, the federal government is the largest single actor in this market.[9]

One of the present features of this market and the result of the federal government's dominance in it, is that the U.S. government has under its control a large quantity of foreclosed housing stock—over one-quarter-million properties, many the result of failed federally backed mortgages.[10] Because the

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Before the J. Econ. Comm., 111th Cong. 8 (2009) (statement of Dr. Susan Wachter, Professor, Finance and Real Estate, The Wharton School, University of Pennsylvania).

3. For a brief, but comprehensive, history of federal housing policy and programs, see John D. Landis & Kirk McClure, *Rethinking Federal Housing Policy*, 76 J. AM. PLAN. ASS'N 319, 320-40 (2010).

4. For an overview of the history of the construction of public housing, together with an analysis of the extent to which such construction furthered racial segregation in housing, see Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993).

5. For an overview of the low income housing tax credit, see Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 877-84 (1993).

6. For an overview of rental assistance programs, see *Federal Rental Assistance: Overview of the Section 8 Program*, 76 CONG. DIG. 229, 229-31 (1997).

7. *See* 42 U.S.C. §§ 3601-19 (2006).

8. For an overview of the role of the federal government in promoting homeownership, particularly in the lead up to the financial crisis, see ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 54-77 (2009).

9. *See id.*

10. Many of these mortgages are a product of defaulted Federal Housing Agency (FHA) loans. *See* Nick Timiraos, *U.S. Weighs Renting Out Foreclosed Homes*, WALL ST. J., Aug. 10, 2011, at A2. For an overview of federal lending programs and how the federal government comes to foreclose on loans generated under such programs, see JOHN RAO ET AL., NAT'L CONSUMER LAW

federal government has guaranteed roughly 90% of the new home mortgages currently being written,[11] this number could grow if the housing market is not stabilized or the health of the overall economy does not improve. At the same time, there is increasing political pressure to end the federal government's role in the housing market, despite the fact that there are no viable alternatives at this time to step in to ensure access to credit and liquidity in the market. Given the size of federal holdings, figuring out an effective way to manage and dispose of this portfolio of housing stock is critical to preserving home values, protecting the financial interests of local communities and governments, and invigorating the home mortgage market.

This Article is an attempt to identify the principles and practices that should inform any ultimate response from the federal government to the backlog of foreclosed homes on its books,[12] as well as the current housing crisis, where millions of borrowers owe more on their mortgages than their homes are worth. We have identified these guiding principles by reviewing the lessons learned from government responses to several historical precedents to the current situation. The lessons learned from these precedents should offer insights into the best practices for addressing the current crisis. These historical precedents include the following: first, the federal government's response, through the Home Owners' Loan Corporation, to the foreclosure crisis that arose during the Great Depression; second, the actions of the Resolution Trust Corporation in response to the Savings & Loan Crisis of the 1980s; and third, the local response to the vacant properties crisis that grips New Orleans in the wake of Hurricane Katrina.

This Article proceeds as follows. Part I describes the current state of the crisis in the home mortgage and home sales markets. Part II provides an overview of government responses in three crises, which were, in large part, housing crises: (1) the creation of the Home Owners' Loan Corporation in the wake of the Great Depression; (2) the creation of the Resolution Trust Corporation in the wake of the Savings & Loan Crisis of the 1980s; and (3) the government response to the housing crisis in New Orleans in the wake of Hurricane Katrina. Part III then provides a series of lessons learned from the governmental responses to these crises. As set forth more fully below, any approach to dealing with the federal portfolio of foreclosed properties must be informed by several principles. These principles suggest that, in any response to the current crisis, the federal government must:

(1) Ensure an adequate return on investments for the federal government and preserve home values to the greatest extent possible by holding properties and converting them to rentals until the housing market

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CTR., FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 1.3 (3d ed. 2010 & Supp. 2011).

11. CONG. BUDGET OFFICE, FANNIE MAE, FREDDIE MAC, AND THE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET, at IX (2010), *available at* http://www.cbo.gov/ftpdocs/120xx/doc12032/12-23-FannieFreddie.pdf.

12. *See infra* notes 15-16 and accompanying text.

recovers;
(2) Consider more aggressive preventative strategies to reduce the number of foreclosures in the future, even incurring more federal debt if necessary;
(3) Give organizations the autonomy to operate flexibly and adjust to unexpected conditions;
(4) Decentralize operations to allow tailoring to individual housing markets, based on detailed market data, and to address significant regional obstacles to disposition;
(5) Clearly prioritize the creation of affordable housing;
(6) Partner with neighborhood-based leadership, resources, creativity, and initiative;
(7) Ensure local government and private sector entities charged with implementing programmatic objectives have basic core competencies; and
(8) Allow displaced homeowners to return to former homes.

I. THE MORTGAGE FORECLOSURE CRISIS

A. The Current State of the Crisis

There are approximately seventy-five million owner-occupied residential properties in the United States.[13] Less than 70% of those, roughly fifty-one million properties, have outstanding mortgages on them.[14] Of those, roughly one in eleven, nearly eight million, are presently in some stage of the foreclosure process, or are at least thirty days delinquent on a mortgage payment.[15] Furthermore, more than one in five mortgaged properties are presently "underwater"—that is, the owner owes more on the mortgage than the property is worth.[16]

However, these foreclosure and delinquency statistics tell only one part of the story. Residential foreclosures impact more than just the foreclosed homes and the families displaced from them. When a home is lost to foreclosure, it reduces the property values of neighboring properties. Estimates of the cost of foreclosures on neighboring properties suggest that such foreclosures reduce the property values of homes in close proximity to the foreclosed property (as far

13. *Selected Housing Characteristics: 2005-2009*, U.S. CENSUS BUREAU, http://factfinders2.census.gov/faces/tableservices/jsf/pages/productview.xthml?pid=ACS_09_5YR_DP5YR4&prodType=table (last visited Mar. 6, 2012).

14. *Id.*

15. *See* Press Release, Mortgage Bankers Association, Delinquencies Rise, Foreclosures Fall in Latest MBA Mortgage Delinquency Survey (Aug. 22, 2011), *available at* http://www.mbaa.org/NewsandMedia/PressCenter/77688.htm.

16. John Gittelsohn, *U.S. 'Underwater' Homeowners Increase to 28 Percent, Zillow Says*, BLOOMBERG (May 9, 2011), http://www.bloomberg.com/news/2011-05-09/u-s-underwater-homeowners-increase-to-28-percent-zillow-says.html.

away as one eighth of a mile) from .9% to 1.3% for each foreclosure.[17] One estimate puts the total loss to U.S. homeowners in property values as a result of the foreclosure crisis at nearly $2 trillion.[18] Local governments are also hit hard by foreclosures and falling home values, as municipal coffers are diminished by a reduction in the tax base at the same time that foreclosed properties create a drain on municipal services, like police and fire protection.[19] Already depressed home prices are further impacted by the simple laws of supply and demand. As more properties are foreclosed upon and enter the market as sale properties, the increase in the sale stock translates to lower prices generally.

B. Overview of Recent Government Programs to Address the Foreclosure Crisis

In response to the mortgage foreclosure crisis, the federal government has launched several major initiatives, including the Home Affordable Modification Program (HAMP),[20] the Emergency Homeowners' Loan Program, the "Short Refinance" Program, the Home Affordable Refinance Program (HARP), and the Neighborhood Stabilization Program.[21] Generally speaking, these responses were

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17. DAN IMMERGLUCK & GEOFF SMITH, THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), *available at* http://www.nw.org/foreclosuresolutions/reports/documents/TGTN_Report.pdf. For assessments of the impacts of foreclosures on neighboring properties and local tax bases, see generally, for example, WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (2005), *available at* http://www.995hope.org/wp-content/uploads/2011/07/Apgar_Duda_Study_Short_Version.pdf; John P. Harding et al., *The Contagion Effect of Foreclosed Properties*, 66 J. URB. ECON. 164 (2009), *available at* http://papers.ssrn.com/S013/papers.cfm?abstract_id=1160354.

18. *See* CTR. FOR RESPONSIBLE LENDING, SOARING SPILLOVER: ACCELERATING FORECLOSURES TO COST NEIGHBORS $502 BILLION IN 2009 ALONE; 69.5 MILLION HOMES LOSE $7,200 ON AVERAGE 2 (2009), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf.

19. *See* WILLIAM C. APGAR ET AL., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 10-11 (2005), *available at* http://www.995hope.org/wp-content/uploads/2011/07/Apgar_Duda_Study_Full_Version.pdf; *see also* APGAR & DUDA, *supra* note 17, at 11-12.

20. *See* PATRICIA A. MCCOY, BARRIERS TO FEDERAL HOME MORTGAGE MODIFICATION EFFORTS DURING THE FINANCIAL CRISIS 9-10 (2010), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/mf10-6.pdf.

21. The Bush and Obama Administrations have minted an array of programs responsive to the mortgage foreclosure crisis. This discussion focuses on still-extant programs. The Bush Administration's FHASecure program, which was started in August 2007, and Home for Homeowners (H4H) program, commenced in October 2008, are now defunct and not discussed. They are both generally considered to have "had a dismal rate of success." *Id.* at 5; *see also* Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts*, 95 ECON. REV. 1, 3-4 (2010). Other potential approaches to addressing the mortgage foreclosure crisis never made it through Congress. *See* MCCOY, *supra* note 20, at 9. In the spring of 2009, Congress considered a

formulated: (1) to prevent foreclosures by promoting loan modification or delaying mortgage payments without modification; and (2) to mitigate the secondary effects of the foreclosure crisis.[22]

HAMP was the centerpiece of the Obama Administration's efforts.[23] Launched in February 2009, HAMP was intended to help three to four million homeowners avoid foreclosure by lowering their monthly payments.[24] The program incentivizes "participating mortgage servicers [to] renegotiate terms with struggling homeowners, give them three months at a [reduced] trial rate, [and then] make the new terms permanent."[25]

But as the Troubled Assets Relief Program (TARP) Special Inspector General Neil Barofsky testified before the House Financial Services Committee: "HAMP has been beset by problems from the outset and, despite frequent retooling, continues to fall woefully short of meeting its original expectations. . . . [The program] benefits only a small portion of distressed homeowners, offers others little more than false hope, and in certain cases causes more harm than good."[26] As of March 2011, only 540,000 families had benefited from permanent ongoing modifications, and almost 800,000 trial and permanent modifications had been cancelled.[27] Many of these failed modifications left borrowers with more principal outstanding, less home equity, worse credit scores, and, in some cases, with back payments, penalties, and late fees.[28] Moreover, despite HAMP, foreclosures continued to climb. In fact, 2.9 million homes received foreclosure notices in 2010, as compared to 2.8 million in 2009 and 2.3 million in 2008.[29]

Critics attribute HAMP's troubled track record to what are perceived as several fundamental design flaws, as well as what is considered by some to have been a rushed, poorly planned rollout. The program is voluntary, and depends on the active participation of mortgage servicers, but government incentive payments to servicers have been insufficient to maximize participation.[30] The

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proposal to allow bankruptcy judges to modify mortgages, reducing the outstanding principal on first-liens. *Id.* The Senate defeated this so-called "bankruptcy cram-down" measure. *Id.*

22. *See id.* at 1.

23. *Id.* at 9.

24. *Legislative Proposals to End Taxpayer Funding for Ineffective Foreclosure Mitigation Programs: Hearing Before the Subcomm. on Ins., Hous., and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 112th Cong. 32 (2011) [hereinafter *Legislative Proposals to End Taxpayer Funding*] (prepared statement of Hon. Neil Barofsky, Special Inspector General, Troubled Asset Relief Program).

25. Ezra Klein, *Column: Four Ways the Foreclosure Mess Could Be Used to Help Homeowners*, WASH. POST, Oct. 15, 2010, http://voices.washingtonpost.com/ezra-klein/2010/10/column_four_ways_the_foreclosu.html.

26. *Legislative Proposals to End Taxpayer Funding*, *supra* note 24, at 31-32.

27. *Id.* at 2-3.

28. *See id.* at 24.

29. Editorial, *Giving Hamp the Hook*, WALL ST. J., Feb. 7, 2011, at A18.

30. *See* Neil Barofsky, Editorial, *Broken Promises*, N.Y. TIMES, July 11, 2011, http://www.nytimes.com/roomfordebate/2011/07/11/hanging-on-to-houses/the-treasurys-political-theater.

servicers, not the government, decide who is eligible for help, and banks routinely reject qualified applicants, often after stringing them along for up to a year.[31] Yet the U.S. Department of Treasury ("Treasury") has failed to impose meaningful sanctions on participating mortgage servicers who perform poorly or violate the program's rules. Treasury also consistently refused to adopt meaningful goals and benchmarks for HAMP.[32] Finally, the complexity of the program makes HAMP a challenge for servicers, housing counselors, and homeowners.[33]

The Treasury defends the program. The department claims that HAMP was intended to address foreclosures due to predatory lending, not the foreclosures due to unemployment and negative equity that currently predominate.[34] Furthermore, Treasury maintains that HAMP sparked private mortgage modifications—a claim for which there is no clear causal link.[35]

HAMP remains under intense political scrutiny, and according to Barofsky, the current debate centers "on whether the program should be terminated, replaced or revamped."[36] In late March 2011, in a largely symbolic move, the House of Representatives voted 252-170 to end HAMP, but the Senate did not take up the issue.[37]

Whereas HAMP was ostensibly aimed at subprime mortgage borrowers, the U.S. Department of Housing and Urban Development's (HUD) Emergency Homeowners' Loan Program targets victims of foreclosure's other chief cause—unemployment or underemployment.[38] The Emergency Homeowners' Loan Program assists homeowners who lack the financial resources to keep up with their mortgage payments.[39] The Program provides zero interest loans for up to $50,000.[40] This program has been criticized as too little, too late for the

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31. Chris Arnold, *TARP Watchdog Says Foreclosure Plan is Failing*, NPR, Feb. 18, 2011, http://www.npr.org/2011/02/18/133839730/tarp-watchdog-says-foreclosure-plan-is-failing.

32. *See* Barofsky, *supra* note 30 (recommending that the Department of Treasury instead make principal reduction mandatory in certain instances and impose meaningful penalties on infringing servicers).

33. Ruth L. Griffin, Editorial, *So Many Documents*, N.Y. TIMES, July 11, 2011, http://www.nytimes.com/roomfordebate/2011/07/11/hanging-on-to-houses/its-all-in-how-its-carried-out.

34. *See* Ezra Klein, *The Treasury's Defense of HAMP*, WASH. POST, Oct. 15, 2010, http://voices.washingtonpost.com/ezra-klein/2010/10/the_treasurys_defense_of_hamp.html.

35. *Id.*; *see also Legislative Proposals to End Taxpayer Funding*, *supra* note 24, at 12.

36. *Legislative Proposals to End Taxpayer Funding*, *supra* note 24, at 31.

37. Meredith Shiner, *House Votes to End HAMP*, POLITICO (Mar. 29, 2011, 7:05 PM), www.politico.com/news/stories/0311/52178.html.

38. *See* Andrew Martin, *For the Jobless, Little U.S. Help on Foreclosure*, N.Y. TIMES, June 5, 2011, at A1, *available at* http://www.nytimes.com/2011/06/05/business/economy/05housing.html?_r=1&pagewanted=all.

39. Alan Zibel, *Foreclosure Relief Effort Finally Kicks Off*, WALL ST. J., June 20, 2011, http://blogs.wsj.com/developments/2011/06/20/foreclosure-relief-effort-finally-kicks-off/.

40. *Id.*

estimated one million homeowners forced into foreclosure by unemployment.[41] The Dodd-Frank bill authorized the program in 2010, but HUD did not open applications to struggling homeowners until June 2011.[42] The application deadline was less than three months later.[43]

Upside down or underwater homeowners represent another category of borrowers highly susceptible to foreclosure,[44] and these homeowners require their own discrete government response. The 2007-2008 housing bust triggered a steep tumble in real estate values.[45] By June 2011, an estimated 10.9 million borrowers were underwater, meaning they owed significantly more on their mortgages than their homes' newly deflated fair market values and, therefore, had negative equity in their homes.[46] Many of these homeowners are pushed toward foreclosure if their personal financial situation deteriorates.[47] The Home Affordable Refinance Program (HARP) is the federal government's main program for assisting "underwater" homeowners.[48] HARP is available only to loans owned by Fannie Mae or Freddie Mac.[49] It allows those homeowners to refinance underwater loans, even if the loans secure values up to 125% of the home's current market value.[50] But the homeowner must be current on her home

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41. *See* Martin, *supra* note 38 ("Critics of the Obama [A]dministration's approach to preventing foreclosures have pressed for two years to get officials to focus more of their attention on unemployed homeowners, with meager results.").

42. *See* Zibel, *supra* note 39; *see also* Martin, *supra* note 38.

43. *See* Julie Schmit, *$1B Foreclosure Aid Program Helps Fewer Than Planned*, USA TODAY, Sept. 20, 2011, http://www.usatoday.com/money/economy/housing/story/2011-09-20/hud-foreclosures/50484090/1.

44. *See* Catherine Reagor, *More Owners Opt to Walk and Leave Mortgages Behind*, ARIZ. REPUBLIC, Mar. 17, 2010, http://www.azcentral.com/arizonarepublic/news/articles/2010/03/16/20100316homeowners-walk-away-from-mortgages.html (referring to homeowners who are financially able to make their payments, but elect not to because they owe more than the value of their home).

45. *See* Press Release, CoreLogic, New CoreLogic Data Reveals Q2 Negative Equity Declines in Hardest Hit Markets and 8 Million Negative Equity Borrowers Have Above Market Rates (Sept. 13, 2011), *available at* http://www.corelogic.com/about-us/news/new-corelogic-data-reveals-q2-negative-equity-declines-in-hardest-hit-markets-and-8-million-negative-equity-borrowers-have-above.aspx.

46. *Id.*

47. Nick Timiraos, *Government to Deploy Broader Mortgage Aid*, WALL ST. J., Sept. 4-5, 2010, at A5, *available at* http://online.wsj.com/article/SB10001424052748704323704575461920164400014.html.

48. *See* Mitchell Remy et al., *An Evaluation of Large-Scale Mortgage Refinancing Programs* 9 (Cong. Budget Office, Working Paper No. 2011-4, 2011) (discussing background of HARP).

49. *Home Affordable Refinance Program (HARP)*, MAKING HOME AFFORDABLE, www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx (last updated Jan. 6, 2012). HARP does not apply to FHA, VA, or USDA loans. *See* Remy et al., *supra* note 48, at 9 (noting that HARP "extends only to existing [government-sponsored enterprise (GSE)] . . . borrowers").

50. Remy et al., *supra* note 48, at 1.

loan.[51] Through the first quarter of 2011, the government had refinanced approximately 750,000 borrowers.[52] Significantly, 700,000 of the homeowners served—more than 93%—had homes with loan-to-value ratios (LTVs) of less than 105%.[53] Thus, only 7% of program participants had LTVs between 105% and 125%.[54] This underscores one of the ways in which HARP has fallen short of serving a large population of homeowners. According to the Congressional Budget Office (CBO), at the end of the fourth quarter of 2010, there may have been as many as five million underwater mortgages; that is, mortgages with a current LTV greater than 100%.[55] The CBO suggests that to bring meaningful relief to underwater homeowners, the Obama Administration needs to consider a refinance program that provides not only relaxed LTV requirements—allowing the program to serve homeowners with greater than 125% LTV—but also allows delinquent borrowers to participate in the program.[56]

The Federal Housing Administration (FHA) rolled out its own program for negative equity borrowers, the so-called "short refinance" program.[57] This program, which commenced in September 2010, assists homeowners still meeting their monthly payment obligations, but who owe more than their homes are worth.[58] Under this program, the bank or investor servicing the borrower's loan agrees to reduce the principal amount owed by at least 10% so that the new loan does not exceed 97.75% of the home's current value.[59] The servicer can then transfer the reduced loan to the federal government.[60] This FHA program has been criticized because it does not extend to loans held by Fannie Mae and Freddie Mac.[61] Further, mortgage servicers holding these underwater mortgages often cannot agree to modifying mortgages that are current—even if underwater—because the servicers' investors risk losing the beneficial terms of their investment.[62]

The mortgage foreclosure crisis' principal casualties are the millions who have lost, or will lose, their homes.[63] But bystanders to foreclosures also suffer

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51. *Home Affordable Refinance Program (HARP)*, *supra* note 49.

52. Remy et al., *supra* note 48, at 9.

53. *See id.*

54. *See id.*

55. *Id.* at 1.

56. *Id.*

57. Timiraos, *supra* note 47.

58. *Id.*

59. Nick Timiraos, *The FHA's 'Short Refinance' Program: Frequently Asked Questions*, WALL ST. J., Sept. 6, 2010, http://blogs.wsj.com/developments/2010/09/06/the-fhas-short-refinance-program-frequently-asked-questions/.

60. Timiraos, *supra* note 47.

61. *Id.*

62. *See id.*

63. *See* Editorial, *Homeowners Need Help*, N.Y. TIMES, Aug. 22, 2011, at A18, *available at* www.nytimes.com/2011/08/22/opinion/homeowners-need-help.html (noting that as of August 2011, nearly six million borrowers had lost their homes and that 3.5 million more borrowers were in some

significant harm.[64] The foreclosure crisis has precipitated widespread neighborhood disintegration marked by unoccupied and poorly maintained homes.[65] Congress conceived the Neighborhood Stabilization Program (NSP) to promote acquisition and redevelopment of vacant and abandoned properties, including properties shuttered following foreclosure.[66] It wanted HUD to make the most informed funding decisions possible.[67] Congress instructed HUD to deploy funds to communities based on hard data identifying neighborhoods harboring the greatest needs.[68] The NSP programs have deployed nearly $6.9 billion in three phased programs, NSP-1, NSP-2, and NSP-3.[69] The NSPs furnish funds to implement programs that promise to turn back the tide of neighborhood decline by redeveloping and rehabilitating vacant and abandoned properties.[70] The NSPs' ultimate goal is to ensure that the targeted neighborhoods become sustainable within a revitalized community.[71]

The Obama Administration continues to craft its response to the mortgage

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stage of foreclosure).

64. *See* MCCOY, *supra* note 20, at 3.

65. *See* Eric Dash, *As Lenders Hold Homes in Foreclosure, Sales Are Hurt*, N.Y. TIMES, May 23, 2011, at A1, *available at* www.nytimes.com/2011/05/23/business/economy/23glut.html (explaining that distressed properties depress home values and documenting the poor condition of properties going through the foreclosure process); *see also* ALAN MALLACH, STABILIZING COMMUNITIES: A FEDERAL RESPONSE TO THE SECONDARY IMPACTS OF THE FORECLOSURE CRISIS 3 (2009), *available at* http://www.brookings.edu/reports/2009/02_foreclosure_crisis_mallach. aspx (specifying the range of negative secondary impacts on neighborhoods that are associated with foreclosures); MCCOY, *supra* note 20, at 3 (noting that "[v]acant foreclosed homes . . . breed squatters, vandalism, and crime").

66. *See* MALLACH, *supra* note 65, at 2-3.

67. *See id.* at 3.

68. IRA GOLDSTEIN, MAXIMIZING THE IMPACT OF FEDERAL NSP INVESTMENTS THROUGH THE STRATEGIC USE OF LOCAL MARKET DATA, *in* REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION 65, 65 (Anne O'Shaughnessy et al. eds., 2010), *available at* http://www.bos.frb.org/commdev/REO-and-vacant-properties/index.htm.

69. *NSP Laws and Federal Register Notices*, NEIGHBORHOOD STABILIZATION PROGRAM: RESOURCE EXCHANGE, http://hudnsphelp.info/index.cfm?do=viewLawsandNotices (last visited Jan. 11, 2012). NSP1 provided for $3.92 billion in neighborhood stabilization programs and was created by the Housing and Economic Recovery Act (HERA) of 2008. *Id.* NSP2 was authorized by Division A, Title XII of the American Recovery and Reinvestment Act (ARRA) of 2009, and is expected to deploy $1.93 billion in funds. *Id.* NSP3 is the most recent NSP program. *See id.* It was funded as part of section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Id.* One billion dollars were allocated for NSP3 programs. *Id.*

70. Notice of Availability: Notice of Funding Availability (NOFA) for the Neighborhood Stabilization Program 2 Under the American Recovery and Reinvestment Act, 2009, 74 Fed. Reg. 21,377, 21,377 (May 7, 2009).

71. *See id.*; *see also* Alan Mallach, Thinking Strategically About the Neighborhood Stabilization (NSP) Program 14, *available at* www.stlouisfed.org/RRRSeries/event5/Event5_ Mallach.pdf.

foreclosure crisis. In August 2011, the Federal Housing Finance Agency (FHFA) issued a Request for Information seeking strategies to improve the real estate-owned (REO) asset disposition strategies of Fannie Mae, Freddie Mac, and the FHA.[72] Although the Administration's information request cast a broad net to identify all ranges of proposals to help it reduce the government's REO portfolios and diminish loan losses, the request focused specifically on strategies that would allow conversion of REO properties to rentals.[73] Early discussions concerning some of the request's responses suggest there are strong differences of opinion regarding the federal government's next steps.[74] Realtors and home builders generally support rental and lease-to-own disposition strategies and oppose bulk sales of REO properties for fear that such mass sell-offs will diminish real estate prices.[75] Meanwhile, some affordable housing advocates voiced support for large-scale dispositions.[76] Responses were due by September 15, 2011,[77] and it is anticipated that the Administration will use ideas presented in the request's responses to issue a request for proposals to implement one or more of the proposed REO disposition strategies. The authors responded to this information request;[78] and this Article is based, in part, on their submission.

It is in this context that the federal government's acquisition of roughly one-quarter of a million properties presents itself. The following discussion recounts three historical moments, and the government responses to those historical precedents. It is the authors' belief that these precedents can offer insights into some of the policy discussions moving forward.

II. HISTORICAL PRECEDENTS

The following section analyzes three historical precedents to the current crisis and the government responses to each.

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72. Fed. Hous. Fin. Agency, Request for Information: Enterprise/FHA REO Asset Disposition 1 (Aug. 10, 2011) [hereinafter REQUEST FOR INFORMATION], *available at* www.fhfa.gov/webfiles/22366/RFIFinal081011.pdf.

73. *See id.* at 2.

74. *See* Robbie Whelan, *Can the Foreclosure Crisis Be Solved?*, WALL ST. J., Sept. 22, 2011, http://blogs.wsj.com/developments/2011/09/22/can-the-foreclosure-crisis-be-solved/ (reporting that a U.S. Senate subcommittee convened a hearing to consider the range of ideas that may have been submitted to the Administration on September 15, 2011).

75. *Id*.

76. *Id*.

77. REQUEST FOR INFORMATION, *supra* note 72, at 4.

78. E-mail from Raymond Brescia, Professor, Yale Law Sch. Ludwig Ctr. for Cmty. & Econ. Dev. to Fed. Hous. Fin. Agency (Sept. 15, 2011, 20:36 EST) (on file with authors).

A. The Home Owners' Loan Corporation

Congress created the Home Owners' Loan Corporation (HOLC) in 1933.[79] The explicit goals of the HOLC, set forth in this statute, were as follows:

> To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States and for other purposes.[80]

In the deepest days of the Great Depression, the residential housing market was in shambles, mostly because of the state of the economy, but also because of the mortgage products used at the time, which were not suitable in settings where housing values were falling.[81] Residential mortgage products at the time were different from today, although some of their worst features were similar to some of the riskiest subprime products that proliferated throughout the country in the 2000s.[82] In the 1920s, a typical mortgage was non-amortizing, meaning the borrower made payments on interest and not principal.[83] At the end of the loan term, which was typically five years, the borrower had to make a large "balloon" payment to satisfy the outstanding principal balance.[84] All parties to the mortgage entered into the credit agreement with the belief that rising home values would permit the borrower to refinance his or her mortgage before the balloon payment became due.[85] When the stock market crashed and unemployment was rampant throughout the United States, property values fell, banks failed as borrowers could not make their mortgage payments, and those banks still in existence were unwilling to refinance existing mortgages where the home was worth less than the outstanding mortgage debt secured by the property.[86]

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79. Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128, 128 (1933) (codified as amended at 12 U.S.C. § 122a (2006)).

80. *Id.*

81. *See* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 94-95 (2005).

82. *Compare* Fred Wright, *The Effect of New Deal Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231, 232-38 (2005) (describing features of the U.S. home mortgage market immediately preceding the Depression), *with* Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 3-8 (2009) (describing features of the U.S. home mortgage market in the 2000s).

83. *See* Green & Wachter, *supra* note 81, at 95.

84. David C. Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression*, 90 FED. RES. BANK ST. LOUIS REV. 133, 138 (2008), *available at* http://research.stlouisfed.org/publications/review/08/05/Wheelock.pdf.

85. *See id.*

86. *Id.*

The HOLC utilized a range of strategies to help achieve the varied goals of protecting homeowners, supporting the financial system, reforming the home mortgage system and preserving home values.[87] HOLC played a critical role through a range of essential tactics.

First, the HOLC was created through the issuance of stock valued at $200 million, purchased by the Treasury, which served as initial operating funds ($3.46 billion in 2011 dollars).[88] More importantly, Congress granted HOLC the authority to issue debt in the form of bonds.[89] At its peak, HOLC issued bonds for the purposes of purchasing mortgages from lenders in the amount of roughly $3.1 billion.[90] In 2011, the size of the mortgaged residential real estate in the United States was ten times its size in 1933.[91] As a result, an equivalent bond issuance in today's economy, and in 2011 dollars, would amount to over $500 billion.[92]

This bond authority proved essential for HOLC to fulfill its primary function—relieving distressed homeowners from the burden of onerous debt they could not afford.

The bonds—HOLC's debt and the corresponding promise to pay—became the primary form of payment for outstanding mortgage debt on the books of mortgage lenders and other financial institutions reeling under the weight of non-performing loans.[93] HOLC would appraise the value of the property securing the outstanding mortgage using professional appraisal methods, which are described in detail below.[94] HOLC's authorizing statute limited the amount that could be

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87. *See* HOME LOAN BANK BD., FINAL REPORT TO THE CONGRESS OF THE UNITED STATES RELATING TO THE HOME OWNERS' LOAN CORPORATION 4-5 (1952) [hereinafter REPORT TO CONGRESS], *available at* http://fraser.stlouisfed.org/docs/publications/holc/hlc_final_report_1952.pdf; *see also* Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society,"* 79 S. CAL. L. REV. 45, 107-08 (2005) (providing background of the creation of the HOLC).

88. REPORT TO CONGRESS, *supra* note 87, at 4.

89. *Id.* at 4-5.

90. *Id.* at 3; *see also* C. LOWELL HARRISS, HISTORY AND POLICIES OF THE HOME OWNERS' LOAN CORPORATION 29-30 (1951).

91. As stated earlier, by recent count, the number of mortgaged residential units in the United States is fifty-one million. *See Selected Housing Characteristics: 2005-2009*, *supra* note 13. In 1930, it is estimated that there were approximately 4.7 million mortgaged residential units. *See* HARRISS, *supra* note 90, at 16 (estimating "that 45 percent of the country's 10.5 million nonfarm, owner-occupied one- to four-family dwellings were mortgaged in 1930").

92. There are a number of websites that can calculate a figure in present dollars. The figures used throughout this Article were calculated using the internet site of the U.S. Bureau of Labor Statistics. *See CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 12, 2012).

93. *See* HARRISS, *supra* note 90, at 11-12.

94. *See id.* at 25.

refinanced for any particular property to 80% of its appraised value.[95] Properties that exceeded $20,000 in appraised value ($347,500 in 2011) were ineligible for the program, and loans could not exceed $14,000 on any property ($243,300 today).[96] A lending bank would receive bonds equal to the amount of the outstanding debt on its books for any particular loan.[97] Typically, these bonds paid a decent return at the time: 4%.[98] By holding such bonds, banks were able to stabilize their balance sheets, as opposed to holding unperforming notes.[99] Furthermore, these bonds were easily sold by the banks on the bond market, allowing banks to liquidate these assets if necessary to free up capital.[100]

The second tactic deployed by HOLC involved issuing new mortgages for the borrowers whose loans HOLC had purchased from the banks using the bonds, as described above.[101] Initially, the terms of these mortgages represented a radical departure from the norm in the industry.[102] Mortgages were at low, fixed interest rates (mostly at 5% or below), and for fifteen years.[103] Payments were fixed throughout the life of the loan, and there were no variable rates or balloon payments at the end of the mortgage term.[104] Payments were applied to both the interest and principal, reducing the overall debt throughout the life of the loan.[105] Later, Congress created the FHA, which authorized the issuance of loans with twenty-year terms.[106] The overall purposes of this federal debt-induced, bond-for-mortgage transfer were varied: easing the mortgage debt on borrowers, thereby reducing the number of families losing their homes through foreclosure; aligning such debt with property values; and relieving the banks of burdensome, non-performing paper on their books.

HOLC's approach to appraising properties constituted a third tactic it deployed to fulfill its mission.[107] Similar to its mortgage reform, its appraisal approach brought reforms to an industry the practices of which helped to fuel the speculation that was rampant in, and which helped to later cause the collapse of, the housing market.[108] HOLC trained its own, in-house appraisers as well as a cadre of private appraisers in the methodology it would use in determining the

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95. *Id.*

96. REPORT TO CONGRESS, *supra* note 87, at 1.

97. *Id.*

98. *See id.* at 4-5.

99. *See generally id.* (providing information on interest return).

100. *See* HARRISS, *supra* note 90, at 25-29.

101. REPORT TO CONGRESS, *supra* note 87, at 1-3.

102. *See id.* at 22.

103. *Id.*

104. *Id.* at 21-22.

105. *See id.* at 1.

106. ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 15 (2008).

107. *See* HARRISS, *supra* note 90, at 45-48 (providing an overview of HOLC's appraisal methods).

108. *See generally id.* (providing an overview of lending practices).

value of homes that would serve as collateral on the mortgage refinance agreements it would write.[109] HOLC's formula took into account the present value of a particular property when assessing its value, but also considered the value of rent that could have been collected at the property over the previous ten years.[110] It is unquestionable that this methodology generated higher appraised values than any particular property could have garnered on the open market through an arms-length sale in the depth of the Great Depression.[111] As a result, HOLC was able to write refinance agreements that might have been larger than had it simply taken into account just the present value of the property, given the depressed state of the housing market.[112] Higher appraised values meant more families were able to obtain refinance agreements from HOLC.[113]

At this point, it is important to note that not all aspects of HOLC's appraisal processes were praiseworthy. HOLC's appraisers also color-coded neighborhoods based on perceived credit risks, often marking neighborhoods occupied by African Americans and immigrants with the color red, signifying a poor credit risk.[114] While some may debate the impact of these practices on the mortgage industry and mortgage lending per se, many attribute this color coding system as the origin of the term "redlining": the systematic exclusion of certain neighborhoods—typically communities of color—from banking and credit services.[115]

Because HOLC was dependent on the revenue from the loans it issued to satisfy its obligations to its bond holders, HOLC had to cut its losses on those refinanced loans that were underperforming.[116] In response to such delinquencies, the fourth tactic HOLC deployed was to foreclose on non-performing loans.[117] Consistent with its mandate, however, HOLC was extremely generous in dealing with delinquent borrowers. HOLC allowed borrowers to fall into arrears for up to one year before seeking to foreclose, and

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109. *See id*. at 42-44.

110. *Id.* at 41; *see also id.* at 41-48 (providing a description of the HOLC's appraisal policies).

111. *See* MARK K. CASSELL & SUSAN M. HOFFMANN, IBM CTR. FOR THE BUS. OF GOV'T, MANAGING A $700 BILLION BAILOUT: LESSONS FROM THE HOME OWNERS' LOAN CORPORATION AND THE RESOLUTION TRUST CORPORATION 16 (2009).

112. *See id.* at 15-17.

113. *Id.* at 15-16.

114. Amy E. Hillier, *Redlining and the Home Owners' Loan Corporation*, 29 J. URB. HIST. 394, 395 (2003).

115. For a discussion of HOLC's practices in terms of classifying communities, see KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 197-98 (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51-52, 199-201 (1993). For an argument that HOLC had little impact on any bank redlining practices, see Kristen B. Crossney & David W. Bartelt, *The Legacy of the Home Owners' Loan Corporation*, 16 HOUSING POL'Y DEBATE 547 (2005).

116. *See* HARRISS, *supra* note 90, at 71-81.

117. *See id.*

the foreclosure process itself often lasted another year.[118] Its generous forbearance practices likely kept tens of thousands of families from losing their homes. Yet, despite these practices, over the course of its existence HOLC foreclosed on nearly 200,000 homes for the borrowers' failure to maintain their obligations under their HOLC-issued refinance mortgages, or one in five mortgages it held.[119] Since HOLC held 20% of all outstanding mortgages at the time,[120] if the federal government's holdings were equivalent to the size of HOLC's holdings in the late 1930s, as a percentage of all outstanding mortgages, the federal government would hold two million foreclosed units of housing in its portfolio.[121]

One of the final tactics HOLC deployed when dealing with foreclosed properties in its portfolio was to hold properties and rent them out until the housing market stabilized.[122] This tactic is most pertinent to the question of what to do with the holdings currently on the federal books. The purpose behind this strategy was two-fold. First, attempting to sell these properties on the open market immediately after foreclosure would produce a glut on the market during a time where housing prices were depressed.[123] More supply would only drive prices down farther. Second, if HOLC sold these properties during the depths of the housing crisis of the 1930s, it would create a fire sale of federal properties, costing HOLC hundreds of millions of dollars as the value of the debt it held would far exceed the compensation it would receive at a sale.[124]

The following chart shows, first, the number of properties seized through foreclosure by year, and then the number sold in that same year. The net holdings column is an estimate of the federal holdings in any given year. Notably, the number of properties foreclosed on each year grew considerably during the worst years of the depression, then slowed considerably once the economy started to recover in 1939 and 1940.[125] Moreover, once market conditions warranted the sale of these foreclosed properties, HOLC began to divest itself of these properties at a much faster pace throughout the recovery, the war years and beyond.[126]

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118. *Id.* at 72-74.

119. *Id.* at 72.

120. *See id.*

121. As stated earlier, *supra* note 91, the number of mortgaged residential units in the U.S. in the 2000s was roughly ten times the number in the late 1920s.

122. *See* HARRISS, *supra* note 90, at 105-07.

123. REPORT TO CONGRESS, *supra* note 87, at 25-26.

124. *Id.*

125. *Id.* at 26.

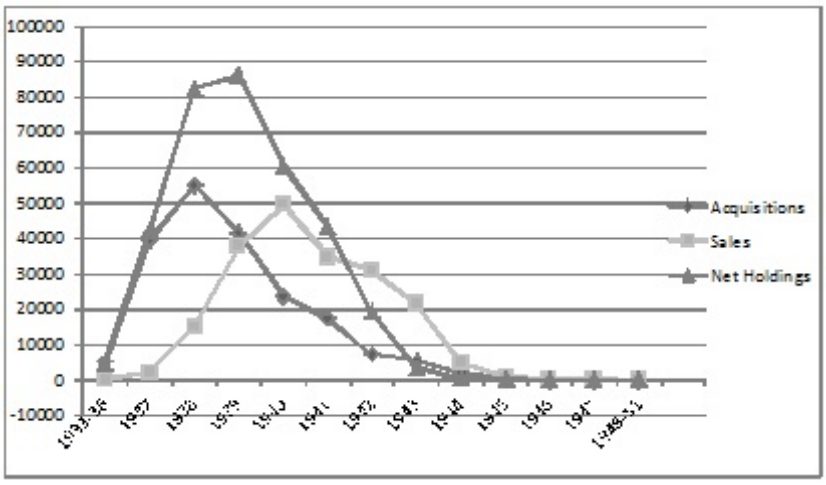
126. *See id.*

Table 1: Table of Federal Acquisitions, Sales, and Net Holdings[127]

Fiscal Year	Acquisitions	Sales	Net Holdings
1934-1936	5,275	142	5,133
1937	39,534	2,231	42,436
1938	55,190	15,159	82,467
1939	41,743	37,771	86,439
1940	23,826	49,716	60,549
1941	17,382	34,745	43,186
1942	7,241	30,857	19,570
1943	5,452	21,620	3,402
1944	1,963	4,990	375
1945	432	736	71
1946	84	173	-18*
1947	10	52	-60*
1948-1951	9	28	-79*
	198,141	198,200*	

* The discrepancies reflect that HOLC obtained a small number of properties through other means than foreclosure and an even smaller number of properties were destroyed and not sold.

Chart 1: Federal Government Acquisitions, Sales, and Net Holdings of Residential Properties, 1933-1951



127. *Id.*

Once again, the size of all mortgaged properties in 2011 is roughly ten times the number in the 1930s.[128] Thus, a comparable portfolio today to the HOLC's holdings of 1939, the peak in the portfolio, would be over 800,000 properties.

B. Resolution Trust Corporation

The 1980s savings and loans (S&L) crisis brought about the greatest collapse of U.S. financial institutions since the Great Depression.[129] Savings and loan associations, also known as S&Ls or thrifts, were historically solid institutions that accepted savings deposits and made mortgage, car, and personal loans to community members.[130] But in the S&L crisis, hundreds of thrifts made bad loans that led to a government takeover and bailout, and their eventual dissolution.[131]

Explanations for the S&L crisis are myriad, including: high and volatile interest rates and thrifts' resulting interest-rate risk; the 1980s elimination of the Federal Reserve's Regulation Q, which increased the costs associated with thrift liabilities; poor economic conditions in certain regions; state and federal deregulation that allowed depository institutions to enter riskier markets; the combination of deregulation and decreasing examiner resources; reduced regulatory capital requirements; increased chartering of thrifts; and the negative effects of the Tax Reform Act of 1986 on commercial real estate investments.[132] The simpler story is as follows. In the early 1980s, in response to thrifts' difficulties in attracting money, the federal government removed its caps on the interest rates that thrifts could offer on federally guaranteed accounts.[133] At the same time, state and federal deregulation allowed thrifts to diversify their investments.[134] These changes enabled a new, "aggressive" species of S&Ls.[135] The new S&Ls offered higher returns in order to attract large deposits, then used these proceeds to invest in junk bonds and real estate development, among other business ventures.[136] When the real estate boom came to an end, the thrift industry experienced unprecedented losses on loans and investments.[137] These losses, which were estimated at $60 billion by 1988 ($114.9 billion today), ultimately led to the failure of hundreds of thrift institutions and the eventual bankruptcy of the Federal Savings and Loan Insurance Corporation (FSLIC), the

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128. *See supra* note 91 and accompanying text.

129. Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, FDIC BANKING REV., 2000, at 26, 26.

130. *Savings and Loan Associations*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/savings_and_loan_associations/index.html (last visited Mar. 13, 2012).

131. *Id.*

132. Curry & Shibut, *supra* note 129, at 27.

133. *Savings and Loan Associations*, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

thrift industry's insurer.[138]

In 1989, in response to the worsening crisis, Congress abolished FSLIC and the Federal Home Loan Bank Board (FHLBB) and created the Resolution Trust Corporation (RTC).[139] The enabling legislation, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), tasked RTC with two functions: (1) shuttering failed small banks insured by FDIC or FSLIC and inherited by the government; and (2) liquidating the real estate and other assets of these thrifts.[140] By 1995, when it dissolved a year ahead of schedule, RTC had seized and resolved 747 savings and loan institutions (approximately 40% of the industry) with assets of over $465 billion in 1989 dollars ($807 billion today).[141] The eventual cost to taxpayers totaled $124 billion.[142] RTC was widely regarded as a success, for its timely asset disposition, the minimal costs it incurred, and the likelihood that it averted worse consequences.[143] Former Federal Reserve Chairman Paul Volcker, former Treasury Secretary Nicholas Brady, former Comptroller of the Currency Eugene Ludwig, and economist Paul Krugman, among others, therefore suggested RTC as a model for addressing the 2008 financial crisis: An RTC-like government entity would buy up bad assets of troubled banks in order to increase liquidity and restore market confidence.[144]

Apart from serving as a potential model for resolving the overall financial crisis, as some of these commentators have suggested, RTC's experience is also instructive for the Enterprises' and FHA's current efforts to enhance their REO asset disposition. Though also charged with resolving failed banks, RTC's primary responsibility—and biggest challenge—was to quickly dispose of the thrifts' assets at the best price possible with minimal dislocation in markets.[145] Forty-eight percent of RTC's assets were commercial and residential mortgages; the other half consisted of REOs "(properties foreclosed upon by failed banks as well as bank real estate such as branch locations), other loans, securities, and other assets."[146]

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138. *Id.*; *see also* Bert Ely, *Concise Encyclopedia of Economics: Savings and Loan Crisis*, LIBRARY OF ECON. & LIBERTY, http://econ.lib.org/library/Enc/SavingsandLoanCrisis.html (last visited Mar. 8, 2012).

139. *See Savings and Loan Associations*, *supra* note 130.

140. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified as 12 U.S.C. § 1441a (2006 & Supp. 2010)).

141. MARK CASSELL, HOW GOVERNMENTS PRIVATIZE: THE POLITICS OF DIVESTMENT IN THE UNITED STATES AND GERMANY 231 (Barry Rabe ed., 2002); Curry & Shibut, *supra* note 129, at 26.

142. Michael A. Hiltzik, *Is a Relief Agency the Right Answer?*, L.A. TIMES, Sept. 19, 2008, at A1, A20.

143. *See id.*

144. *See* Nicholas F. Brady et al., Op-Ed, *Resurrect the Resolution Trust Corp*., WALL ST. J., Sept. 17, 2008, at A27; Paul Krugman, Op.-Ed, *Wall Street Voodoo*, N.Y. TIMES, Jan. 19, 2009, at A25.

145. *See Savings and Loan Associations*, *supra* note 130.

146. Ellen Seidman & Andrew Jakabovics, *Learning from the Past: The Asset Disposition Experiences of the Home Owners' Loan Corporation, the Resolution Trust Corporation, and the*

The RTC employed an array of methods to dispose of assets: "direct sales, auctions, securitization, and a small number of joint ventures with private firms."[147] Its disposition strategy varied by asset and continually evolved.[148] RTC originally focused on individual and bulk sales of its assets. In response to the increasing number of bank failures, and therefore assets of which to dispose, RTC gradually transitioned to securitized sale of assets, particularly mortgage loans, and equity partnerships with private-sector firms.[149] RTC employed seven different equity partnerships, in which RTC served as a limited partner, contributed asset pools (usually sub-performing loans, non-performing loans, and earned real estate), and arranged financing.[150] The general partner invested equity capital and asset management services.[151] These equity partnerships were intended to yield higher values than conventional sales methods by harnessing the expertise of the private sector while reserving some of the profit from improvement for RTC.[152] In the FDIC's analysis, the RTC experience proved that "partnership programs [are] . . . a viable alternative to conventional methods of asset disposition."[153] The RTC also contracted with the private-sector through Standard Asset Management and Disposition Agreements (SAMDA).[154] SAMDA contracts paid management, disposition, and incentive fees to contractors in exchange for the management and sale of a portfolio of distressed assets of any size.[155]

By contrast, RTC originally relied on broker listings to dispose of real estate-owned (REO) properties, e.g., hotels, mini-warehouses, shopping centers, and nursing homes.[156] Though REOs constituted only a small percentage of RTC assets, RTC attracted criticism for holding REO properties too long. During RTC's early years, auctions were prohibited due to fears that auctions would worsen already distressed markets, reduce sale prices and surrounding property values, and further harm thrifts' financial standing.[157] But broker listings could not keep up with the volume of properties, and FIRREA's mandate that RTC sell

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Asset Control Area Program, 5 COMMUNITY DEV. INVESTMENT REV. 43, 46 (2009).

147. *Id.* at 47.

148. *See id.*

149. *See id.*

150. *See* Mary Ledwin Bean et al., *Partnership Programs*, *in* MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 1980-1994, at 433, 434-35 (1998) [hereinafter MANAGING THE CRISIS].

151. *Id.* at 433, 435.

152. *Id.* at 433-34.

153. John F. Bovenzi et al., *Evolution of the Asset Disposition Process*, *in* MANAGING THE CRISIS, *supra* note 150, at 289, 303.

154. *See* Henry W. Abbot et al., *Asset Management Contracting*, *in* MANAGING THE CRISIS, *supra* note 150, at 333, 333-34.

155. *Id.* at 354.

156. *See* Gary P. Bowen, *Auctions and Sealed Bids*, *in* MANAGING THE CRISIS, *supra* note 150, at 313, 328-29.

157. *Id.* at 328.

properties for no less than 95% of market value further slowed sales.[158] In order to speed asset disposition, Congress amended FIRREA to allow sales at no less than 70% of market values, and RTC began to rely primarily on national and regional auctions, rather than broker listings, to dispose of properties.[159] RTC's auctions of non-distressed properties were largely successful: average sale prices were around 90% of appraised values.[160] Assets generally brought a better price when RTC had good information with which to market properties to bidders, but the volume of assets and time constraints often precluded such information gathering.[161] In 1991, RTC also began offering seller financing to encourage sales.[162]

All residential real estate (0.5% of RTC assets) was funneled through RTC's Affordable Housing Disposition Program (ADHP), in keeping with FIRREA's mandate to increase the availability and affordability of homes for low- and moderate-income individuals.[163] Besides the Farmers Home Administration, no federal agency disposing of foreclosed properties had ever targeted so many properties as affordable housing.[164] RTC sold a total of 81,156 multi-family units and 27,985 single-family properties to, or for the benefit of, very low- to moderate-income families.[165]

Under ADHP's original incarnation, single-family and multi-family properties were sold with affordability deed restrictions to the highest bidder.[166] Any buyer pledging to rent at least 35% of units to low-income families and at least 20% of units to very low-income families for forty to fifty years could bid on multi-family properties.[167] Only qualifying low-income families (up to 115% of AMI) and nonprofits or public agencies agreeing to rent or sell to eligible households could purchase single-family properties.[168] The program was slow

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158. *Id.*

159. *Id.* at 329.

160. *See* John F. Bovenzi et al., *Evolution of the Asset Disposition Process*, *in* MANAGING THE CRISIS, *supra* note 150, at 305-06.

161. Gary P. Bowen, *Auctions and Sealed Bids*, *in* MANAGING THE CRISIS, *supra* note 150, at 330-31.

162. *Id.* at 326-27.

163. Seidman & Jakabovics, *supra* note 146, at 48; *see also* CASSELL & HOFFMANN, *supra* note 111, at 21 (describing the RTC's responsibilities, as required by FIRREA).

164. Stephen S. Allen & Deidra Young, *Affordable Housing Programs*, *in* MANAGING THE CRISIS, *supra* note 150, at 373, 373.

165. *Id.* RTC defined families as low-income if their household income was less than or equal to 80% of area median income (AMI), as defined by the U.S. Department of Housing and Urban Development (HUD). *Id.* "[V]ery low-income" families had household incomes below 50% of AMI. *Id.* at 374.

166. Seidman & Jakabovics, *supra* note 146, at 48.

167. Stephen S. Allen & Deidra Young, *Affordable Housing Programs*, *in* MANAGING THE CRISIS, *supra* note 150, at 376.

168. *Id.* at 375-76. The 1991 FIRREA amendments created an exception to that requirement, allowing current renters to purchase the single-family property, regardless of their income level, if

to be implemented, however, and early iterations did not produce substantial net gains in affordable housing. RTC was reluctant to discount pricing for low-income purchasers, as allowed under ADHP, citing responsibility to maximize sale prices in order to reduce cost to taxpayers.[169] By selling properties in bulk at auction and housing fairs, RTC favored for-profit buyers over non-profit purchasers, most of whom did not possess the technical, institutional, and financial capacity required for such a bulk sale and lacked the financial flexibility to gamble at auction on properties for which little information was available.[170] Critics attributed ADHP's lackluster track record to "the conflicting mandates to which the RTC had to respond and the relative strength of some interest groups in the operations and oversight structure of the RTC."[171]

In response to these criticisms, ADHP changed course. Among its new strategies were establishing seller financing, paying for repairs, providing technical assistance, reducing sales prices, establishing a donation program, and employing a tiered direct sales process in lieu of auctions.[172]

First, recognizing that many ADHP properties could not attract low-income and non-profit buyers and that they were often not eligible for conventional financing, RTC established a seller-financing program for both single- and multi-family properties.[173] The seller-financing program provided 97% financing to single-family buyers and 95% financing on multi-family properties sold to nonprofits and public agencies; it also covered closing costs for low-income purchasers.[174] RTC ultimately financed 25% of single-family properties and 33% of multi-family properties sold.[175] RTC also pledged up to $5000 to repair each of its single-family properties.[176]

Second, RTC employed local nonprofits to provide technical assistance in both its single-family and multi-family ADHP programs. These "technical assistance advisers" (TAAs) provided potential low-income, single-family buyers with pre-purchase financial counseling and post-purchase training on owner responsibilities like maintenance, insurance, etc.[177] TAAs assisted RTC with its

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they would occupy the property for at least one year. *Id.* at 375.

169. *See* Heather MacDonald, *The Resolution Trust Corporation's Affordable-Housing Mandate: Diluting FIRREA's Redistributive Goals*, 30 URB. AFF. REV. 558, 570-71 (1995).

170. *Id.* at 566; *see also* JOSIAH MADAR ET AL., NYU FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, TRANSFORMING FORECLOSED PROPERTIES INTO COMMUNITY ASSETS 22-24 (2008).

171. MacDonald, *supra* note 169, at 569. FIRREA required RTC to maximize returns and control losses, minimize asset disposition's potentially negative effects on local housing markets, and further affordable housing preservation. *See id.*

172. Stephen S. Allen & Deidra Young, *Affordable Housing Programs*, *in* MANAGING THE CRISIS, *supra* note 150, at 377-78.

173. *Id.* at 378; *see also* MacDonald, *supra* note 169, at 563.

174. Stephen S. Allen & Deidra Young, *Affordable Housing Programs*, *in* MANAGING THE CRISIS, *supra* note 150, at 379.

175. *Id.*

176. *Id.* at 380.

177. *Id.* at 378.

multi-family ADHP program by identifying nonprofits and public agencies interested in acquiring multi-family properties and helping these organizations conduct feasibility analysis and secure state and federal financing.[178] Through such actions, TAAs helped create a market for the sale of RTC's single- and multi-family properties.[179]

RTC also lowered its target sales price for residential properties. Whereas RTC had solicited bids and sold multi-family properties for the best offer, beginning in 1994, RTC set the purchase price at affordable market value (AMV) and transferred the property to the most qualified applicant.[180] To arrive at AMV, RTC decreased the appraised value to reflect lost income due to the 35% low-income set-aside, operating costs, interest rates, and physical condition.[181] The average AMV was 66.7% of appraised value.[182] For single-family properties, Congress had initially required a sales price of no less than 80% of appraised value but subsequently amended FIRREA to allow RTC to sell single-family properties to the most eligible buyer at no fixed price.[183] A 1991 amendment to FIRREA expanded the pool of eligible buyers by allowing the sale of a single-family property to the household currently renting the property, regardless of income, provided the household agreed to occupy the property for at least one year.[184]

Finally, RTC began to sell multi-family properties through a tiered sale process, giving first opportunity to public agencies, then local nonprofits, then the general public.[185] To facilitate this non-competitive, direct sale approach, RTC required each interested agency and nonprofit to submit a Notice of Serious Intent (NOSI).[186] This form detailed the organization's community service track record, experience with property ownership and management, legal status, and financing needs.[187] RTC then negotiated a sale with the organization with the highest total score.[188] If, after the tiered sales process, the property was still not purchased, then the residential real estate property could be sold outside of the ADHP program.[189] RTC also donated 1000 single-family and seventy-three multi-family assets of nominal value to nonprofit organizations and public agencies that pledged to use the properties as affordable housing, homeless shelters, open urban spaces, or for some other public good.[190]

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178. *Id.*
179. *Id.*
180. *Id.* at 381.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 375.
185. *See id.* at 380.
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* Seidman & Jakabovics, *supra* note 146, at 49.
190. Stephen S. Allen & Deidra Young, *Affordable Housing Programs*, *in* MANAGING THE

Though the commercial-backed mortgage security is RTC's best-remembered innovation, RTC deserves credit for its pioneering approaches in residential real estate and affordable housing, particularly its provision of technical assistance, use restrictions, the tiered sales process, and preference for nonprofits and public agencies.[191] Additionally, like HOLC, RTC provided seller financing and rehabilitation funds to upgrade properties.[192]

C. New Orleans

On August 29, 2005, Hurricane Katrina roared ashore.[193] It caused multiple levee failures in New Orleans that killed approximately 1500 people, flooded 80% of the city, and damaged 134,000 housing units—70% of all its occupied units.[194] The flood waters rushed through New Orleans's neighborhoods without regard to then-extant market conditions. More than two weeks following the levee failures the water had not yet receded completely.[195] It disproportionately impacted the city's poorest areas, but festered in a range of neighborhoods: those strong and vibrant and others weak, moribund, and blighted.[196] Some

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CRISIS, *supra* note 150, at 381.

191. *See* Seidman & Jakabovics, *supra* note 146, at 49.

192. *Id.*

193. DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 129-35 (2006) (describing in comprehensive detail Hurricane Katrina's catastrophic landfall in Mississippi and Louisiana).

194. Press Release, Greater New Orleans Cmty. Data Ctr., Hurricane Katrina Impact (Aug. 19, 2011), *available at* http://www.gnocdc.org/Factsforfeatures/HurricaneKatrinaImpact/index.html; *see also* Mary Foster, *Experts: Katrina Death Toll Still Rising*, WASH. POST, June 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/02/AR2007060200749.html.

195. Jodie Smith & James Rowland, *Temporal Analysis of Floodwater Volumes in New Orleans After Hurricane Katrina*, *in* SCIENCE AND THE STORMS: THE USGS RESPONSE TO THE HURRICANES OF 2005, at 57, 57-60 (G.S. Farris et al. eds., 2007) (analyzing satellite images showing that a wide swath of New Orleans neighborhoods proximate to Lake Pontchartrain were still sitting in floodwaters on September 15, 2005).

196. *Orleans Parish Sept 11th Flood Extent with Neighborhoods & Major Roads*, GREATER NEW ORLEANS COMMUNITY DATA CENTER (Nov. 2005), https://gnocdc.s3.amazonaws.com/maps/PDFs/flood_extent.pdf (showing flood waters covering the vast majority of the city's neighborhoods); *see also* Eugenie L. Birch & Susan M. Wachter, *Introduction: Rebuilding Urban Places After Disaster*, *in* REBUILDING URBAN PLACES AFTER DISASTER: LESSONS FROM HURRICANE KATRINA at 1, 2-4 (Eugenie L. Birch & Susan M. Wachter eds., 2006) (quoting *New Orleans Times Picayune* columnist Martha Carr's reflection that Katrina's flood waters had devastated the lives of all New Orleanians, destroying their homes or school or churches and depriving many of their jobs); Allison Good, *Lakeview Sees Flood of Young Homeowners, New Businesses Since Hurricane Katrina Nearly Wiped the Slate Clear*, TIMES-PICAYUNE, Sept. 27, 2011, http://www.nola.com/katrina/index.ssf/2011/09/lakeview_sees_flood_of_young_h.html (discussing the revitalization of one of New Orleans's large, wealthy neighborhoods that was almost completely destroyed by ten feet of standing flood waters); Bruce Katz, *Concentrated Poverty in New Orleans and Other*

neighborhoods' housing stock was historic,[197] some had 1960s brick ranch houses, and some consisted of newer construction.[198] All of the neighborhoods had in common that they lost all their residents and businesses—many temporarily and some permanently.[199]

Katrina turned the real estate market in New Orleans on its head overnight.[200] The national mortgage foreclosure crisis, in contrast, has unfolded over many months, progressively compromising neighborhood real estate markets nationwide.[201] The recovery from both crises will take years.[202] The local, state, and federal efforts to revitalize New Orleans have been ongoing for almost six years.[203] The government response to the neighborhood devastation in New Orleans offers at least five lessons that should be heeded as the federal government further implements its strategy for disposition of federally owned, REO properties.

The first is that efforts in New Orleans to revive neighborhoods through disposition of vacant properties suffered from a lack of detailed neighborhood-

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American Cities, BROOKINGS (Aug. 4, 2006), http://www.brookings.edu/opinions/2006/0804cities_katz.aspx (citing Brookings Institution research that suggests Katrina's flood waters had a disparate impact on the city's poorest, minority households).

197. BRING NEW ORLEANS BACK COMM'N, URBAN PLANNING COMM., ACTION PLAN FOR NEW ORLEANS: THE NEW AMERICAN CITY 9 (Jan. 11, 2006) (highlighting that New Orleans includes nineteen historic districts on the National Register, which contain 38,000 properties and Hurricane Katrina's winds and floodwaters damaged up to 25,000 of those properties); *see also* Michelle Krupa, *New Orleans Neighborhoods that Suffered Worst Flooding Lost Most Residents, Census Data Show*, TIMES-PICAYUNE, Feb. 6, 2011 [hereinafter Krupa, *New Orleans Neighborhoods*], http://www.nola.com/politics/index.ssf/2011/02/new_orleans_neighborhoods_that.html (discussing how flood waters spread persistent blight beyond older neighborhoods west of the Industrial Canal into the city's newer neighborhoods such as Gentilly and Lakeview).

198. *See* Krupa, *New Orleans Neighborhoods*, *supra* note 197.

199. *See id.*

200. *See* Press Release, *supra* note 194 (explaining that Katrina caused the displacement of nearly the city's entire population and a year after the storm was still less than half its pre-storm size, as evidenced by New Orleans's population falling "from 484,674 before Katrina . . . to an estimated 208,548 after Katrina").

201. *See Anatomy of a Meltdown: The Credit Crisis*, WASH. POST, http://www.washingtonpost.com/wp-srv/business/creditcrisis/ (last visited Jan. 14, 2012) (providing a detailed timeline of the events leading up to and chronicling the mortgage foreclosure crisis as beginning in 2006 and progressing from that date forward).

202. *See* Patrik Jonsson, *Private Dollars Leading Recovery of New Orleans*, CHRISTIAN SCI. MONITOR (June 27, 2007), http://www.csmonitor.com/2007/0627/p01s06-usec.html (noting that in 2007, the city's then-"recovery czar," Dr. Edward Blakely estimated that it could take twenty years for the city to recover); James Joseph & Phyllis Taylor, Editorial, *New Orleans Embodies Nation's New Spirit*, TIMES-PICAYUNE, Oct. 15, 2009, http://www.nola.com/opinions/index.ssf/2009/10/city_embodies_nations_new_spir.html (estimating that it will take ten years for New Orleans to recover from Katrina).

203. *See* Jonsson, *supra* note 202; Joseph & Taylor, *supra* note 202.

level market data.[204] Government agencies and nonprofits focused on revitalizing New Orleans's neighborhoods did not have the benefit of detailed data to guide their decisions on how best to return storm damaged homes to commerce.[205] New Orleans housing vacancy levels immediately after the flood were so high and widespread that pre-Katrina data concerning housing markets—recent sales, rental rates, housing prices, vacancy, and abandonment rates—were almost useless.[206] The upshot was that those responsible for deploying hundreds of millions in donations, subsidy, tax credits, and federal recovery funds earmarked for housing were largely flying blind.[207]

Not until 2010—five years after Katrina—was there a comprehensive study of neighborhood housing conditions and housing markets specifically addressing the impact of vacant homes and lots.[208] This study used housing sales and vacancy data to develop basic New Orleans neighborhood typologies.[209] The typologies suggested three general neighborhood classifications: "[l]ow-demand markets" (poorly performing neighborhood markets with significant existing vacancy and increasing vacancy rates), "[m]ixed markets" (significant number of vacant properties, but moderate rate of sales and moderate housing prices), and "[h]igh-priced markets" (low vacancy with strong sales prices).[210] These classifications were used as a tool both by the New Orleans Redevelopment Authority (NORA) to refine its strategy for 5000 Orleans Parish homes it was charged with disposing, as well as others committed to rebuilding the city's neighborhoods.[211]

In "high-priced markets" NORA is pursuing at least three strategies:

a. "Lot Next Door" and "Growing Home" Program Discounted Sales to Adjacent Homeowners.[212] This first order disposition strategy has been

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204. *See* ALLISON PLYER ET AL., OPTIMIZING BLIGHT STRATEGIES: DEPLOYING LIMITED RESOURCES IN DIFFERENT NEIGHBORHOOD HOUSING MARKETS 4 (2010) (reporting that the city lacked parcel-level real estate data necessary to develop "a rough typology of current market strengths across New Orleans neighborhoods").

205. *See* TRANSITION NEW ORLEANS TASK FORCE, HOUSING 19 (2010) (noting that during the Katrina recovery the city suffered from a "dearth of information" with which to make policy decisions regarding housing).

206. PLYER ET AL., *supra* note 204, at 10.

207. *See* TRANSITION NEW ORLEANS TASK FORCE, *supra* note 205, at 19, 28 (pointing to the lack of data city staff had in their possession to make coordinated decisions regarding allocation of limited federal disaster resources and recommending then Mayor-elect Landrieu's staff commit themselves to "data-based decision-making").

208. *See* PLYER ET AL., *supra* note 204, at 10-17.

209. *See id.*

210. *Id.* at 16-17.

211. *See* New Orleans Redevelopment Auth., Presentation to Select Committee on Recovery 4 (Mar. 24, 2010) [hereinafter Recovery Presentation] (on file with authors) (describing NORA's redevelopment strategy as "[n]eighborhood-specific" and "[t]ailored to address the varied levels of housing demand, rate of recovery and projected growth").

212. *Id.* at 19-20, 25 (highlighting the "Lot Next Door" and "Growing Home" programs as

implemented city-wide in strong, mixed, and low-demand neighborhoods. It is described in more detail below.[213]

b. Strategic Citywide Live Auction of Vacant Homes and Lots. To date, NORA has implemented its live auction strategy cautiously.[214] Auctions are commonly a forum where speculators make purchases.[215] NORA has avoided auctioning large numbers of properties in any one neighborhood at any single time to prevent "flooding" the neighborhood market, which could potentially diminish neighborhood housing prices and trigger lower neighborhood appraisals.[216] Further, NORA sells vacant properties via auction only on the condition that the purchaser: (1) agrees to maintain the property in accordance with the city's code or ordinances; (2) achieves substantial progress toward construction or rehabilitation of the property within 365 days of closing; (3) pays NORA a cash penalty for failure to timely commence construction or rehabilitation; and/or (4) allows NORA to revert the property to NORA's ownership for failure to commence repairs.[217]

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critical to NORA's redevelopment and blight fighting strategies in both high- and low-priced markets).

213. *See infra* notes 230-33 and accompanying text.

214. *See* Michelle Krupa, *NORA Auction of Vacant Homes Kindles Hopes for Eastern New Orleans*, TIMES-PICAYUNE, July 11, 2011 [hereinafter Krupa, *NORA Auction*], http://www.nola.com/politics/index.ssf/2011/07/nora_auction_of_vacant_homes_k.html (discussing NORA's measured approach to auctions, including sealed bid auctions).

215. *See* PARISH REDEVELOPMENT AND DISPOSITION PLAN FOR LOUISIANA LAND TRUST PROPERTIES 6 (2007) (on file with the authors) (enumerating NORA's key disposition principles for returning the Parish's 5000 Road Home properties to commerce, including its resolve to discourage speculation associated with auctions).

216. Krupa, *NORA Auction*, *supra* note 214 (discussing NORA's concern with avoiding any potential "flooding" of the real estate market). But there is disagreement regarding NORA's phased disposition approach. *See* David Hammer, *Officials Hope to Put Sale of Road Home Properties on the Fast Track*, TIMES-PICAYUNE, Aug. 4, 2011, http://www.nola.com/politics/index.ssf/2011/08/agency_short_on_money_unveils.html. The *Times-Picayune* reported in August 2011 that the state-created entity charged with maintaining Orleans Parish homes sold to the state by their owners following Katrina was running out of funds to maintain these homes a year earlier than anticipated. *Id.* That entity, the Louisiana Land Trust (LLT), proposed auctioning hundreds of Orleans LLT properties each month to make sure all properties were transferred from its ownership prior to running out of funds. *Id.*

217. *See* Agreement to Purchase and Sell (on file with authors), *available at* http://static.auctionservices.com/documents/34393/Agreement_20to_20Purchase_20and_20Sell_20NORA_20Auction_20LLT_20andC-Files_03-14-11_1_pdf. NORA, in conjunction with the Louisiana Land Trust (LLT), is responsible for the disposition of all properties that the State of Louisiana purchased from homeowners who wished to leave the city following Katrina and sell their home to the state. *See supra* note 211. NORA uses several distinct agreements to purchase and sell depending on the type of disposition, e.g., live auction, sealed bid auction, competitive request for proposals, or Lot Next Door Sale. Agreement to Purchase and Sell, *supra*; *see also* Michelle

c. Controlled neighborhood-specific sealed bid auctions. NORA has used this particular disposition mechanism in conjunction with efforts to incorporate neighborhood input on the terms of its vacant property dispositions, as well as to control sales prices and impose conditions on purchasers.[218] Sealed bid auctions have been staged over time to allow the strengthening of a neighborhood's real estate market.[219] The approach is described more fully below in mixed-market disposition strategies.

In mixed-markets, NORA employs strategies to achieve results where sales are moderate and vacant properties are a significant, but generally stable concern:

a. "Lot Next Door" and "Growing Home" programs sales to adjacent homeowners.[220]
b. Controlled neighborhood-specific sealed bid auctions. NORA moves properties in stages to avoid flooding and destabilizing the market.[221] This requires holding some properties for future sale. Sealed bid auctions sales are subject to the following restrictions:
    (1) stringent deadlines for rehabilitation or development;
    (2) requirement to maintain the properties according to city code;
    (3) minimum appraised value bidding requirements to avoid depressing neighborhood housing prices; and
    (4) a restriction against reselling the property for at least three years depending on the neighborhood's decision.[222]

A large number of properties NORA administers are located in low-demand markets.[223] These neighborhoods barely have a functioning real estate market.[224]

Krupa, *Brisk Sales of Abandoned Properties at Recent New Orleans Redevelopment Authority Auction*, TIMES-PICAYUNE, Apr. 12, 2011, http://www.nola.com/politics/index.ssf/2011/04/brisk_sales_of_abandoned_prope.html (noting NORA's requirements dictate, that among others things, prospective purchasers agree to rehabilitate homes on a strict timeline and occupy the homes after the rehabilitation is complete).

218. *See* Krupa, *NORA Auction*, *supra* note 214 (explaining that the east neighborhood of New Orleans wished to discourage investors and absentee landlords and endorsed NORA requiring owner-occupancy for at least three years following acquisition).

219. *See id.* (discussing the use of sealed bid auctions in the Lakeview and Gentilly neighborhoods).

220. *See infra* notes 230-33 and accompanying text.

221. Krupa, *NORA Auction*, *supra* 214 (explaining that NORA had previously completed sealed bid and live auctions in New Orleans's Lakeview, Gentilly, Mid-City and Uptown neighborhoods, but delayed auctioning New Orleans East homes to avoid depressing real estate market values).

222. *See generally* NEW ORLEANS REDEVELOPMENT AUTH., NEW ORLEANS EAST PHASE II—BID INSTRUCTIONS (2011), *available at* http://www.noraworks.org/public/files/general-uploads/NewOrleansEast_Phase2_Participation_Requirements.pdf (discussing the terms and conditions of NORA's New Orleans East neighborhood sealed bid auction, including the requirement that prospective purchasers bid at least the property's appraised value).

223. *See* Recovery Presentation, *supra* note 211, at 18 (showing graphic detailing two of the

They have historically suffered from blight or abandonment or have not gained traction in recovering from Katrina's flood waters.[225] There are three main aspects to NORA's strategy:

a. "Lot Next Door" and "Growing Home" program sales to adjacent homeowners.[226]
b. Package lots for sale at discount where those lots are proximate to substantial public or private investments, such as new schools, parks, transportation infrastructure, commercial projects, or institutional developments.[227]
c. Long term land stewardship. Where no plans exist for immediate disposition, hold the properties.[228] Although New Orleans does not currently have a public land bank, the Mayor has taken the position that a land bank must be established to address the city's serious challenge in addressing blight, abandonment, and vacancy.[229]

The second lesson is that the city's recovery and its disposition of vacant properties were advanced significantly by tapping neighborhood-based resources, creativity, and capital. New Orleans's "Lot Next Door" ordinances and "Growing Home" incentive programs provide the homeowners living immediately adjacent to improved *or* unimproved residential lots the opportunity to purchase vacant homes or lots at a discount.[230] In exchange, the neighbor agrees to make repairs to dilapidated structures and/or to green and fence the abandoned property.[231] In a little over two years, NORA signed 1000 purchase agreements (closing 560 sales, as of June 2011) to sell vacant homes and lots to

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low-price markets in which NORA holds properties: New Orleans Central City and Lower Ninth Ward neighborhoods).

224. *See* NEW ORLEANS REDEVELOPMENT AUTH., TRANSITION REPORT 6-7 (2010) [hereinafter TRANSITION REPORT], *available at* http://www.noraworks.org/resources/studies-and-analytics (describing a neighborhood type characterized by low housing prices and high incidence of blight; these neighborhoods suffered from homeowner neglect prior to Hurricane Katrina and the storm exacerbated the neighborhoods' poor conditions).

225. *See id.* at 5-7.

226. *See infra* notes 230-33 and accompanying text.

227. TRANSITION REPORT, *supra* note 224, at 8 ("Severely distressed areas . . . require comprehensive and narrowly targeted redevelopment efforts around strong anchors.").

228. *Id.* at 10 (recognizing that another tool for responsible redevelopment of "severely distressed communities" is "long-term . . . stewardship" of properties).

229. TRANSITION NEW ORLEANS TASK FORCE, *supra* note 205, at 26.

230. NEW ORLEANS, LA., ORDINANCE 22605 (2007), *available at* http://www.noraworks.org/public/files/general-uploads/LND_Ordinance1.pdf; *see also* NEW ORLEANS REDEVELOPMENT AUTH., LOT NEXT DOOR POLICIES AND PROCEDURES 6 [hereinafter LOT NEXT DOOR POLICIES AND PROCEDURES] (on file with authors) ("Through 'Growing Home' [Lot Next Door] purchasers can receive up to a $10,000 credit towards a qualifying Lot Next Door property for landscaping improvements . . . .").

231. *See* LOT NEXT DOOR POLICIES AND PROCEDURES, *supra* note 230, at 6-7.

adjacent homeowners and businesses.[232] This is a modest accomplishment in a city that may have as many as 48,000 vacant housing units.[233] However, it represents a meaningful tool in the larger toolbox that government uses to fight vacancy and blight.

The third New Orleans lesson acknowledges a fundamental oversight. New Orleans's pre-Katrina track record for coordinating deployment of federal funds should have foretold post-storm frustrations with slow project implementation.[234] Congress appropriated almost $13 billion in Disaster Community Development Block Grant (DCDBG) funds to help Louisiana rebuild.[235] Of that sum, $411 million in federal disaster funding was set aside for New Orleans's discretionary economic development and non-flood protection infrastructure recovery projects.[236] Prior to Katrina and the levee failures, the city faced challenges deploying its annual HUD entitlement funds, a mere fraction of the $411 million.[237] While there is no doubting that HUD, the State of Louisiana, the City of New Orleans's implementing agencies, and non-profit partners had the will to put these disaster recovery funds on the street, the city and its local partners struggled to coordinate with federal and state funding agencies.[238] In August 2009—four years after Katrina—major local philanthropic funders criticized that "effective use of . . . [federal recovery funds was] hampered by the regulations and policies governing them and by complications in lining up city, state, and

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232. Michelle Krupa, *Anti-blight Program Lot Next Door Reaches 1,000 Purchase Agreements in New Orleans*, TIMES-PICAYUNE, June 13, 2011, http://www.nola.com/politics/index.ssf/2011/06/anti-blight_program_lot_next_d.html.

233. *Id.*

234. *See* Kalima Rose & Laura Tuggle, *Community Action: Bringing People Home to Stronger Neighborhoods*, NEW ORLEANS INDEX FIVE, Aug. 2010, at 2-4, *available at* http://www.policylink.org/site/c.lkIXLbMNJrE/b.5160103/k.6C6A/New_Orleans_and_Gulf_Coast__Overview.htm (describing the city's pre-Katrina deployment of federal resources as often influenced more by ineptitude, carelessness, or at best, lack of strategic coordination).

235. Memorandum from the La. Hous. Alliance on Policy Recommendations About the LRA's Affordable Hous. Res. 1 (Apr. 16, 2010), *available at* http://www.policylink.org/atf/cf/%7B97c6d565-bb43-406d-a6d5-eca3bbf34af%7D/LRA%20MEMO%2004%2016%2010%20FINAL.PDF.

236. *See* Ariella Cohen, *'Reinventing' New Orleans? Landrieu Team Steers Dwindling Recovery Dollars to Humdrum Projects*, THE LENS (Apr. 4, 2011), http://thelensnola.org/2011/04/04/dcdbg-spending/.

237. Rose & Tuggle, *supra* note 234, at 3 (noting that prior to Hurricane Katrina, the City of New Orleans did not effectively spend the federal resources allocated to it and left funds unspent).

238. *See* Wayne Curtis, *The Savior of New Orleans?*, ARCHITECT (Aug. 6, 2007), http://www.architectmagazine.com/educational-projects/the-savior-of-new-orleans.aspx (quoting the City of New Orleans's chief hurricane recovery official in describing the federal government's role in the recovery as a "big[] disappointment" and the State of Louisiana as "total[ly] incompet[ent]"); Patrik Jonsson, *Private Dollars Leading Recovery of New Orleans*, CHRISTIAN SCI. MONITOR (June 27, 2007), http://www.csmonitor.com/2007/0627/p01s06-usec.html (noting that twenty-two months after Hurricane Katrina made landfall the City of New Orleans had not yet received any federal funds to promote neighborhood recovery).

federal governments to work together."[239] The City of New Orleans's pre-Katrina track record for timely spending federal block grant funds suggested that there was reason to doubt that local government could timely spend the allocated disaster block grant funds at the increased level and volume demanded by the crisis.

The fourth lesson recognizes that dramatically higher post-storm insurance rates were one of the substantial obstacles to disposition and redevelopment. Increased insurance costs in the wake of Katrina made buying and rehabilitating a home substantially more difficult for families and contributed to an increase in rental costs.[240] A recent study of the factors underlying insurance rates suggests that Louisiana property insurers may be charging homeowners more than two times the amount called-for based on the actuarial risk associated with hurricane wind damage.[241] The study also detailed minor adjustments that could be made to housing stock, such as using larger nails and larger quantities of nails, to decrease the property insurance costs for those homes.[242] It is important to note that higher insurance rates were not just a New Orleans problem. Homes located across the Gulf Coast states were subject to higher insurance rates due to the risk associated with hurricane wind damage.[243] Data from studies such as the one completed for New Orleans may furnish insurers with data necessary to offer lower rates for pools of homes that incorporate the recommended retrofits for mitigating wind damage.

The fifth lesson observes that displaced homeowners want to return to their former home, even when the circumstances causing them to vacate are traumatic. Attachment to neighborhood is a strong sentiment and motivator among those who have been displaced, particularly for the elderly and families with children.[244] The great majority of those displaced by the levee failures chose to return.[245] In most cases, the returning families lost their homes and almost all of their possessions; however, they were drawn back to the city by the promise of reuniting with their neighbors, schools, local parks, stores and libraries.

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239. Memorandum from La. Disaster Recovery Found. & Greater New Orleans Found. on Rethinking Fed. Urban Strategy: New Orleans as a Model City 6 (Aug. 17, 2009), *available at* http://www.gnof.org/wp-content/uploads/2009/06/nola-as-a-model-city.pdf.

240. *See* Kathy Chu, *New Orleans Home Sellers Struggle*, USA TODAY, July 27, 2007, http://www.usatoday.com/money/economy/housing/2007-07-24-katrina-real-estate_N.htm.

241. Rebecca Mowbray, *New Study Finds that Storm Risk Stats for New Orleans May Be Skewed*, TIMES-PICAYUNE, Feb. 20, 2011, http://www.nola.com/business/index.ssf/2011/02/new_study_finds_that_storm_ris.html.

242. *Id.*

243. *See* ROBERT W. KLEIN, HURRICANE RISK AND THE REGULATION OF PROPERTY INSURANCE MARKETS 48-55 (2009), *available at* http://rmictr.gsu.edu/Papers/WP09-1.pdf (noting that the 2005 hurricane season resulted in insurance rate increases in Gulf and Atlantic coast states).

244. Rose & Tuggle, *supra* note 234, at 2 (emphasizing that "New Orleans is a city of unique neighborhoods with long histories, deep loyalties, and family lineages over generations").

245. Birch & Wachter, *supra* note 196, at 4 (noting that a year after Katrina, 900,000 of the New Orleans metro area's 1.3 million residents had returned to re-establish their homes).

III. RECOMMENDATIONS FOR A REFOCUSED RESPONSE TO THE MORTGAGE FORECLOSURE CRISIS

As millions more face the threat of foreclosure or the impact of living in neighborhoods pocked with foreclosed properties, frustration is understandably high that the government response has not yet stemmed the tide of foreclosures. The Home Owners' Loan Corporation, the Resolution Trust Corporation, and the federal government's reaction to Katrina's levee failures each impart that there is no silver bullet solution to large scale real estate crises. They also teach that government responses to real estate crises unfold and are implemented over a course of years. Now roughly four years into the mortgage foreclosure crisis, this is a critical juncture for the Obama Administration to make further adjustments to its strategy. In crafting that strategy, it is important to heed historical and recent experiences in crisis response. The authors have distilled the following eight recommendations for incorporation into the Administration's comprehensive strategy:

Recommendation 1:

Preserve home values and protect taxpayer investments to the greatest extent possible by holding properties and converting them to rentals until the housing market recovers.

While not every tactic utilized by HOLC was profitable, when HOLC finally liquidated all of its holdings and closed its books, it paid back all of its debt to the U.S. Treasury and even returned a surplus of over $14 million ($122 million in 2011).[246] A critical aspect of HOLC's ability to remain solvent and actually turn a small profit for the federal government was the fact that it held and managed properties that it had foreclosed upon until property values strengthened and the national economy began to grow in the late 1930s and early 1940s. By not dumping properties onto an already saturated and depressed market in the mid-1930s, and choosing, instead, to hold onto many of its holdings, refurbish them as appropriate, and rent them out until housing values increased, the federal government was able not only to protect taxpayer investments in properties, but also to prevent a glut of properties from flooding the sale market, which would have only further depressed home values.

Recommendation 2:

Consider more aggressive preventative strategies to reduce the number of foreclosures in the future, even incurring more federal debt if necessary.

Another important lesson to be drawn from the HOLC experience bears noting. If not for HOLC's programs, which relieved roughly one million homeowners of onerous debt obligations, many more homeowners would have likely faced foreclosure. Such a flood of foreclosures would have meant a far more saturated sale market as those hundreds of thousands of homes entered the sale pipeline. Such an overburdened market might not have recovered as it did by the beginning of the 1940s. While the Obama Administration considers

246. REPORT TO CONGRESS, *supra* note 87, at vi.

strategies to dispose of properties it currently holds, there are still millions of American homeowners underwater on their mortgages and staggering under the weight of heavy mortgage debt and high monthly mortgage payments. Any initiative that seeks to improve the federal government response to the foreclosed homes it currently holds should consider more aggressive approaches that would limit the number of homes entering foreclosure, as many could easily end up in the federal portfolio given the enterprises' significant stake in the housing market. HOLC's debt-for-debt approach would seem to make sense in today's climate.

Of course, such an approach would require action by Congress to permit the issuance of such debt. If the most recent debt ceiling debate is any indicator of the willingness of Congress to increase the federal debt, such a foreclosure fix would appear doomed. Yet, as the HOLC experience shows, aggressive housing measures, even when fueled by debt, can help staunch the flow of foreclosures generally, in addition to the ultimate size of the federal housing portfolio, and can even pay for themselves, as was the case with HOLC's initiatives.

Recommendation 3:

Give organizations the autonomy to operate flexibly and adjust to unexpected conditions.

Several factors explain RTC's speedy and cost-effective asset disposition and offer lessons for the current situation. Most importantly, RTC possessed the autonomy and expertise necessary to operate flexibly and adjust to unexpected conditions or mistakes. For instance, faced with ballooning assets, RTC abandoned the direct sales approach and instead began to sell assets in bulk, pool large numbers of assets for transfer to private contractors, securitize real assets, and enter into joint ventures. The corporation's pay-for-performance wage structure and competitive compensation attracted qualified workers able to operate flexibly and incentivized to quickly dispose of assets.[247] Prior mortgage foreclosure programs have encountered unexpected conditions on the ground. RTC's autonomy and resulting adaptability seems key to the successful disposition of REO assets.

Recommendation 4:

Decentralize operations to allow tailoring to individual housing markets based on detailed market data and to address significant regional obstacles to disposition.

RTC's decentralized operations—85% of personnel worked at its four regional and fifteen consolidated field offices[248]—also deserve credit for its efficient asset disposition. The approach further hastened sales by cultivating regional buyers. Decentralization also allowed RTC to tailor disposition to individual housing markets and avoid dumping assets on the sale market. In high-cost markets, RTC could create much needed affordable housing.[249] In low-

247. *See* CASSELL & HOFFMANN, *supra* note 111, at 23.

248. *Id.* at 29; *see also* John F. Bovenzi et al., *Evolution of the Asset Disposition Process*, *in* MANAGING THE CRISIS, *supra* note 150, at 289, 297.

249. MADAR ET AL., *supra* note 170, at 21.

cost markets, RTC could hold on to properties for longer periods of time, explore development opportunities with adjacent parcels, and demolish or deconstruct undesirable homes.[250]

As New Orleans's experience illustrates, the benefits of decentralized operations can be maximized through careful collection and use of neighborhood-level data and awareness of regional obstacles to disposition. New Orleans underscores that each neighborhood containing vacant properties often possesses distinct characteristics from adjacent neighborhoods. Thus, one disposition strategy is unlikely to work for a single city, never mind a metro area or a particular state or region of the country. New Orleans's experience teaches that real estate data—particularly data on sales and vacancies—is critical to calibrating effective disposition strategies. The good news is that some cities fighting the foreclosure crisis already have highly developed databases that can be mined for indicia of strong and weak real estate markets. These cities include Cleveland, Philadelphia, Chicago, and Dallas.[251] Potential government REO partners must show how their proposed strategy is supported by existing local real estate market conditions. They must also construct disposition strategies on a neighborhood-by-neighborhood basis. The experience in post-Katrina New Orleans may provide helpful guidance regarding the particular strategies employed in the three neighborhood classifications outlined by Plyer, Ortiz, and Pettit.[252]

It is also important to consider how such detailed neighborhood-level information is used. Several overarching principles must guide data collection when formulating and implementing an REO disposition strategy: (1) REO property disposition strategies cannot be crafted without considering adjacent tax delinquent, blighted, or abandoned properties, and should complement the local government's efforts for addressing non-REO sources of vacant properties; and (2) the tipping point for recovering neighborhoods may be reached when approximately 80% of homes have been rebuilt or are in the process of being rebuilt.[253] Although the disaster recovery and mortgage foreclosure recovery contexts are distinct, the ability to document a neighborhood's momentum toward more complete recovery from foreclosure vacancies is critical for smart deployment of government and private sector resources now and in the future.

Further, successful disposition of REO properties could be augmented by addressing significant regional obstacles to disposition. Absorption of vacant properties nationwide may be limited by critical regional factors such as the high cost of insurance. Given that there may be tens of thousands of REO properties across particular regions, such as the Gulf Coast, the government and its REO disposition partners should examine what regional factors, if any, may contribute to increased dispositions costs. Additionally, they should work together to study

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250. *Id.*

251. PLYER ET AL., *supra* note 204, at 10.

252. *See generally id.*

253. Letter from Douglas Ahlers, Senior Fellow, John F. Kennedy Sch. of Gov't, to Capt. Ethan Frizzell, Area Commander, Salvation Army (undated) (on file with author).

ways to remove obstacles that substantially increase disposition costs. For example, using house construction retrofits recommended in the NORA-commissioned study[254] could enable the Enterprises and the FHA to substantially reduce the cost of insurance on those homes and create a competitive advantage for resale that could also benefit future owners or renters of those homes.

Recommendation 5:

Clearly prioritize the creation of affordable housing.

RTC quickly disposed of assets while incurring minimal losses, but the corporation mostly ignored its ancillary goals of providing affordable housing and employing women- and minority-owned businesses.[255] Only after a good portion of the assets had been sold did RTC make progress in developing its affordable housing program.[256] RTC's focus on asset disposition over other goals can be explained by politics between oversight agencies (the Department of Treasury exercised more authority over RTC than did HUD), organizational structure, weak oversight, the hiring of private-sector employees with a strictly profit mindset, and incentives rewarding asset sale rather than affordable housing goals, among other factors.[257] RTC began to emphasize affordable housing only after pressure from Congress.[258] The RFI for FHA and Enterprise asset disposal should clearly prioritize goals to avoid single-minded focus on profit and speed at the expense of other important social policy objectives. Based on RTC's experience, the Enterprises and FHA should also consider: giving first option to nonprofits and public agencies (as in ADHP's tiered sales process); accepting lower sales prices from qualified buyers promising to set-aside affordable housing; providing technical assistance to nonprofits, public agencies, and low-income buyers who might otherwise miss out on assets' sale; and donating unmarketable, low-value properties.

Recommendation 6:

Partner with neighborhood-based leadership, resources, creativity, and initiative.

The Enterprises and FHA should employ disposition strategies similar to the Lot Next Door and Growing Home programs to take advantage of existing neighborhood economic and social capital. The government's plan for REO inventory must consider opportunities to harness local neighborhood-based capacity for REO purchase or rental. The Enterprises and FHA should consider offering immediately adjacent homeowners the chance to purchase the adjacent house for a discounted price below the current fair market value. These programs tap the strong interest that families living next to vacant properties have in assuring that the properties are maintained and improved. Homeowners living next door to foreclosed properties have a strong interest to see those properties maintained to the highest possible standards. While mindful that foreclosed

254. *See supra* notes 230-33 and accompanying text.

255. CASSELL, *supra* note 141, at 5-6.

256. *Id.* at 6.

257. *See* CASSELL & HOFFMANN, *supra* note 111, at 32.

258. CASSELL, *supra* note 141, at 6.

homes are often situated in neighborhoods facing tough economic circumstances, the government should offer homeowners immediately adjacent to foreclosed properties the opportunity to purchase those homes for a significant discount in return for the homeowners' promise to:

(a) Complete specified repairs and energy efficiency upgrades (not to exceed half the amount of the discounted purchase price);
(b) Keep the home in compliance with local ordinances;
(c) Rent the home for a pre-determined affordable rate (adjusted yearly and not to increase by more than a set amount each year, e.g., 3% or 4%);
(d) Honor fair housing laws, and
(e) Not sell the property for a desired period of time (three to five years) to avoid flipping.

If the homeowner fails to honor any covenant, then the appropriate governmental entity could sue to rescind the sale or obtain liquidated damages in the amount of the discount provided at sale.

Recommendation 7:

Ensure local government and private sector entities charged with implementing programmatic objectives have basic core competencies.

Effective crisis response requires core competencies from local government and private sector entities who are implementing programmatic objectives. If the federal government's REO strategy ultimately requires partnerships with state and local governments, non-profit entities, or for-profit firms, then it is critical to conduct an early evaluation to ensure organizational capacity exists within such entities to implement programmatic objectives. Or, alternatively, such expertise can be timely developed with technical assistance from the federal government or qualified third parties. Well before the program implementation stage, the federal government must evaluate partners' capacity to the GSEs' chosen solutions. Such threshold questions that the federal government must answer include whether an implementing agency have adequate staffing, baseline policies and procedures, and basic legal and procurement documents in place to implement the mortgage foreclosure solution with minimal delay.

Recommendation 8:

Allow displaced homeowners to return to former homes.

Homeowners displaced by foreclosure should have the chance to return to their former home. Any plan to rent REO properties should include making initial offers to former owners to return at a rent that would be significantly below what their mortgage payment had been previously. Like New Orleans families, the families that suffered foreclosure have experienced great hardship, but it is likely that many former homeowners—particularly the elderly and families with children—would welcome the chance to return to their former home. As under RTC, the property's current renters should also be treated as priority buyers; these individuals are more likely to be invested in the home and could help contribute to the broader goal of neighborhood stabilization.

CONCLUSION

The mortgage foreclosure crisis threatens the health and vitality of thousands

of neighborhoods across the nation. Recent and historic precedents illustrate ways in which aggressive and creative government intervention succeeded, or could have been more effective, in stitching neighborhood fabric back together. The question is not whether, but when, we will turn back the distressing tide of vacancies brought about by the mortgage foreclosure crisis. We posit that there is a critical storehouse of national experience and precedent with current mortgage foreclosure issues, and that this precedent can teach us a great deal about how to craft the most effective response to the mortgage foreclosure crisis.

THE NEW FEDERAL CIRCUIT MANDAMUS

PAUL R. GUGLIUZZA*

This Article explores an ongoing revolution in the mandamus jurisprudence of the U.S. Court of Appeals for the Federal Circuit, the court of appeals with nearly exclusive jurisdiction over patent cases. Before December 2008, the Federal Circuit had never used the interlocutory writ of mandamus to order a district court to transfer a case to a more convenient forum, denying each one of the twenty-two petitions it had decided on that issue. Since that time, however, the court has overturned eleven different venue decisions on mandamus. Remarkably, ten of those eleven cases have come from the same district court, the U.S. District Court for the Eastern District of Texas. This use of mandamus to repeatedly overturn discretionary, non-appealable rulings of one district court is unprecedented in any federal court of appeals. What makes the Federal Circuit's cases particularly notable is that the court, not long ago, would grant mandamus only on issues governed by Federal Circuit patent law. Because transfer of venue is a non-patent issue controlled by regional circuit law, the recent cases plainly would not warrant mandamus under the court's prior, narrower standard. The court's focus on the Eastern District of Texas is also interesting because of the popular view that the Eastern District is biased in favor of patent holders and denies transfer motions with impunity.

This is the first article to analyze the Federal Circuit's retreat from its original, restrained view of mandamus. It begins by considering why the Federal Circuit initially believed it could grant mandamus on patent issues only, a question previously ignored by the literature. The Article then explores why, in its recent cases, the court has abandoned the view that Federal Circuit mandamus should be limited to issues of patent law. Surprisingly, the Federal Circuit has never explained its reasoning. The Article fills this analytical void and develops a doctrinal, theoretical, and pragmatic rationale for Federal Circuit mandamus on non-patent issues. The Article also offers possible explanations for the Federal Circuit's fixation on the Eastern District of Texas and proposes a new analytical framework for Federal Circuit mandamus—a framework that might emerge if the court were to critically examine its mandamus power.

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INTRODUCTION

The Federal Circuit's aggressive use of the extraordinary writ of mandamus is making headlines.[1] Under the final judgment rule, litigants in federal court must typically wait to appeal until the district court case is completely resolved.[2] By filing a mandamus petition with an appellate court, however, a litigant may seek immediate review of a district court ruling, even if the district court case remains ongoing.[3] Because mandamus provides an escape hatch from the final judgment rule and can significantly disrupt proceedings in the district court, the Supreme Court has warned that mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'"[4]

Consistent with this stringent legal standard, the Federal Circuit, the court of appeals with nearly exclusive jurisdiction over patent cases, grants only about ten

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1. *See, e.g.*, Elizabeth Durham, *Will All Roads Still Lead to the Eastern District of Texas? Transfer Practice After* Volkswagen *and* TS Tech, 21 INTELL. PROP. & TECH. L.J., July 2009, at 12; Patrick E. Higginbotham, Keynote Address, *EDTX and Transfer of Venue: Move Over, Federal Circuit—Here Is the Fifth Circuit's Law on Transfer of Venue*, 14 SMU SCI. & TECH. L. REV. 191 (2011); Josh Jacobson, *Venue Transfers and Writs of Mandamus: An Emerging Trend*, 30 A.B.A. APPELLATE PRAC. J., Spring 2011, at 11; Mark Liang, *The Aftermath of* TS Tech*: The End of Forum Shopping in Patent Litigation and Implications for Non-Practicing Entities*, 19 TEX. INTELL. PROP. L.J. 29, 30-32 (2010); Donald W. Rupert & Daniel H. Shulman, *Clarifying, Confusing, or Changing the Legal Landscape: A Sampling of Recent Cases from the Federal Circuit*, 19 FED. CIR. B.J. 521, 523-41 (2010); Recent Case, *Federal Circuit Heightens Standard for Plaintiff Presence That Will Weigh Against Transfer:* In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010)*, 124 HARV. L. REV. 632, 632 (2010); Jeremiah L. Hart, Note, *Supervising Discretion: An Interest-Based Proposal for Expanded Writ Review of § 1404(a) Transfer of Venue Orders*, 72 OHIO ST. L.J. 139, 174-78 (2011); Elizabeth P. Offen-Brown, Note, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to* TS Tech *and* Genentech, 25 BERKELEY TECH. L.J. 61, 62-63 (2010); Megan Woodhouse, Note, *Shop 'til You Drop: Implementing Federal Rules of Patent Litigation Procedure to Wear Out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227, 240-44 (2010); Li Zhu, Note, *Taking Off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket*, 11 MINN. J. L. SCI. & TECH. 901, 906-09 (2010).

2. *See* 28 U.S.C. §§ 1291, 1295(a)(1) (2006) (granting the courts of appeals jurisdiction to review "final decisions" of the district courts).

3. Mandamus is, of course, not the only way to appeal a non-final decision in federal court. Other methods of interlocutory appeal include: (1) pursuing an appeal under 28 U.S.C. § 1292, which explicitly permits interlocutory appeals from a defined class of district court orders; (2) pursuing an appeal under 28 U.S.C. § 1291 through the collateral order doctrine; (3) appealing an order on class certification under Federal Rule of Civil Procedure 23(f); and (4) appealing under any rule promulgated by the U.S. Supreme Court that provides an exception to the final judgment rule, as permitted under 28 U.S.C. § 1292(e). *See* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE 65-66 (3d ed. 1999).

4. Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004) (quoting *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947)).

percent of the mandamus petitions it decides.[5] One issue that parties frequently seek to have reviewed on mandamus is whether the district court properly granted or denied a motion to transfer a district court case to a more convenient venue under 28 U.S.C. § 1404(a).[6] Before December 2008, however, the Federal Circuit had never granted a mandamus petition to overturn a transfer decision, denying each one of the twenty-two petitions it had decided on that issue.[7] It is therefore surprising that the Federal Circuit has, on ten occasions since December 2008, granted mandamus to order the U.S. District Court for the Eastern District of Texas to transfer a patent case.[8] During this same time period, the Federal Circuit denied with prejudice ten other petitions from the Eastern District that challenged venue decisions.[9] This represents a comparatively astronomical grant rate of fifty percent. In reviewing the decisions of other district courts, by contrast, the Federal Circuit has largely continued its traditional reluctance to order transfer, denying all but one petition challenging a venue decision.[10]

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5. *See infra* note 16 and accompanying text.

6. *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3935.4 (2d ed. 2011); *see also* 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

7. *See infra* note 16 and accompanying text.

8. *See In re* Biosearch Techs., Inc., Misc. No. 995, 2011 WL 6445102 (Fed. Cir. Dec. 22, 2011); *In re* Morgan Stanley, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam); *In re* Verizon Bus. Network Servs. Inc., 635 F.3d 559 (Fed. Cir. 2011); *In re* Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011) (per curiam); *In re* Acer Am. Corp., 626 F.3d 1252 (Fed. Cir. 2010); *In re* Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010); *In re* Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009); *In re* Hoffmann-La Roche Inc., 587 F.3d 1333 (Fed. Cir. 2009); *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009); *In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008); *see also In re* Oracle Corp., 399 F. App'x 587, 590 (Fed. Cir. 2010) (granting mandamus, ordering the Eastern District of Texas to conduct a new § 1404(a) analysis under the proper legal standard).

9. *See In re* Apple Inc., Misc. No. 103, 2012 WL 112893 (Fed. Cir. Jan. 12, 2012); *In re* Simpson Strong-Tie Co., 417 F. App'x 941 (Fed. Cir. 2011) (per curiam); *In re* Google Inc., 412 F. App'x 295 (Fed. Cir. 2011); *In re* Wyeth, 406 F. App'x 475 (Fed. Cir. 2010); *In re* Vistaprint Ltd., 628 F.3d 1342 (Fed. Cir. 2010); *In re* Echostar Corp., 388 F. App'x 994 (Fed. Cir. 2010); *In re* Apple Inc., 374 F. App'x 997 (Fed. Cir. 2010) (per curiam); *In re* VTech Commc'ns, Inc., Misc. No. 909, 2010 WL 46332 (Fed. Cir. Jan. 6, 2010); *In re* Volkswagen of Am., Inc., 566 F.3d 1349 (Fed. Cir. 2009); *In re* Telular Corp., 319 F. App'x 909 (Fed. Cir. 2009).

10. The court granted mandamus in *In re Link_A_Media Devices Corp.*, 662 F.3d 1221 (Fed. Cir. 2011) (per curiam), ordering the case transferred from the District of Delaware to the Northern District of California. Since deciding *TS Tech* in December 2008, the court has denied eight mandamus petitions on venue matters in cases arising from courts besides the Eastern District. *See In re* Bd. of Regents of the Univ. of Tex. Sys., 435 F. App'x 945 (Fed. Cir. 2011); *In re* Xoft, Inc., 435 F. App'x 948 (Fed. Cir. 2011); *In re* Vertical Computer Sys., Inc., 435 F. App'x 950 (Fed. Cir. 2011); *In re* Leggett & Platt, Inc., 425 F. App'x 903 (Fed. Cir. 2011); *In re* Aliphcom, 449 F. App'x 33 (Fed. Cir. 2011); *In re* Voter Verified, Inc., Misc. No. 936, 2010 WL 1816686 (Fed. Cir.

The use of mandamus to supervise the decisions of one district court, the Eastern District of Texas, on one particular issue, transfer of venue, is unprecedented in any federal court of appeals. Indeed, it conforms to no theory of appellate mandamus currently recognized by the literature or by the courts. Commentators have previously identified a "supervisory" theory, under which mandamus serves a didactic purpose by correcting one instance of a significant, erroneous district court practice.[11] But the Federal Circuit's *repeated* correction of the Eastern District's discretionary transfer decisions does not fit the supervisory theory, as previously understood. Accordingly, I coin the phrase "supervisory plus" mandamus to describe the aggressive form of writ review recently employed by the Federal Circuit.

Not only is the Federal Circuit's use of supervisory plus mandamus historically unprecedented, it is at odds with the court's own case law. In its early days, the Federal Circuit at times disclaimed supervisory authority over district courts and refused to grant mandamus on any issue that did not implicate the court's patent law, including transfer of venue.[12] The court's focus on the Eastern District is particularly interesting because of the popular view that the Eastern District is biased in favor of plaintiff-patent holders and denies defendants' transfer motions with impunity.[13] Even Justice Scalia has criticized the Eastern District, calling it a "renegade jurisdiction[]" for habitually ruling in favor of patent-infringement plaintiffs.[14]

Remarkably, commentators have not explored the Federal Circuit's retreat from its original, restrained view of mandamus. In fact, this Article is the first comprehensive study of mandamus in the Federal Circuit.[15] To better understand the evolution of Federal Circuit mandamus, I reviewed every available mandamus decision that the Federal Circuit has issued since Congress created the court in 1982, amounting to over 400 cases.[16] This survey confirmed that

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May. 3, 2010); *In re* Affymetrix, Inc., Misc. No. 913, 2010 WL 1525010 (Fed. Cir. Apr. 13, 2010) (per curiam); *In re* Pfizer Inc., 364 F. App'x 620 (Fed. Cir. 2010).

11. *See* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 610 (1973) [hereinafter *Supervisory and Advisory Mandamus*].

12. *See In re* Innotron Diagnostics, 800 F.2d 1077, 1082-85 (Fed. Cir. 1986).

13. *See infra* Part III.A.

14. Transcript of Oral Argument at 11, eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (No. 05-130).

15. *Cf.* Charles L. Gholz, *CAFC Review of Interlocutory Decisions*, 67 J. PAT. & TRADEMARK OFF. SOC'Y 417, 422-37 (1985) (reviewing and critiquing mandamus decisions from the first three years of the court's existence).

16. To complete this survey, I reviewed every case (both precedential and not) in the Westlaw Federal Circuit database (CTAF) containing the word "mandamus." A complete list of the decisions reviewed is on file with the author and supports the statistical assertions made in this Article. Although the exact precision of the Article's calculations might be affected by decisions not contained in Westlaw's database, any gaps in coverage appear to be relatively minimal, especially for cases decided in 2000 and after. The research in this Article is current through February 2012.

mandamus has been and remains a difficult remedy to obtain in the Federal Circuit. From 2000 through 2010, the Federal Circuit granted only 23 of the 215 mandamus petitions it decided.[17] Considering the high legal standard for mandamus relief, which is reflected in this data, the Federal Circuit's supervision of the Eastern District's venue decisions is an aberration.

Before examining the Federal Circuit's recent interest in the transfer decisions of the "renegade" Eastern District, however, I begin by uncovering the origins of the Federal Circuit's initial view that it could consider only patent issues on mandamus, a task that no scholar has yet undertaken. I attribute that view in part to the limited appellate subject-matter jurisdiction of the Federal Circuit's predecessor, the Court of Customs and Patent Appeals, and in part to the Federal Circuit's idiosyncratic view that it does not derive its mandamus authority from the same source as the regional circuit courts of appeals.

I then explain why the Federal Circuit was wrong to limit mandamus to patent issues only. In recent years, the court has, in fact, issued mandamus on non-patent issues, such as transfer of venue and the attorney-client privilege.[18] But it has offered only strained readings and unpersuasive distinctions of its older case law, causing the leading treatise on federal jurisdiction and procedure to bemoan the "unsettled" relationship between Federal Circuit and regional circuit writ authority.[19] I fill the analytical void that the Federal Circuit has left by explaining why, as a normative matter, it is beneficial for the Federal Circuit to issue mandamus on non-patent questions. I suggest that Federal Circuit mandamus on these issues simplifies the Federal Circuit's jurisdictional inquiry, helps reduce forum shopping, provides valuable doctrinal guidance to district courts and other interested parties, and helps the Federal Circuit avoid undue specialization.

Because the Federal Circuit has not engaged fundamental questions about the proper scope of mandamus, the court has unthinkingly drifted toward a standard under which it will grant mandamus on any legal question, whether controlled by regional circuit law or Federal Circuit patent law, if the petition satisfies the substantive criteria established by the Supreme Court for granting the writ.[20] In other words, the Federal Circuit's mandamus analysis now resembles that of the regional circuits: The Federal Circuit immediately considers the merits of the

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17. *See supra* note 16 and accompanying text.

18. *See, e.g.*, *In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008) (granting mandamus on issue of transfer); *In re* Regents of the Univ. of Cal., 101 F.3d 1386 (Fed. Cir. 1996) (granting mandamus on issue of attorney-client privilege).

19. 15A WRIGHT ET AL., *supra* note 6, § 3903.1.

20. *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 380-81 (2004) (noting that "three conditions must be satisfied before [the writ] may issue": (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances" (second and third alterations in original) (citations omitted) (internal quotation marks omitted)).

petition without first considering any possible subject-matter limitation.

But, as the Federal Circuit's older mandamus case law recognized, the court is different from the regional circuits in two important respects. First, the Federal Circuit has a unique choice-of-law regime. It applies its own law to questions of substantive patent law, to procedural issues unique to patent law, and to questions of its own jurisdiction.[21] It applies the law of the relevant regional circuit to all other questions.[22] Second, the Federal Circuit has a unique jurisdictional structure, which is nationwide in geographic scope, but, as relevant to this Article, limited in subject matter to cases arising under the patent laws.[23] By skirting its older mandamus case law, rather than confronting it, the Federal Circuit has missed the opportunity to analyze whether these unique characteristics should inform the standard for mandamus relief.

The court's refusal to engage questions about its mandamus power is emblematic of a broader criticism of the Federal Circuit: The court refuses to acknowledge the policy questions that undergird its decisions, resulting in a jurisprudence that is insufficiently sensitive to economic and social concerns.[24] The court's hesitance to explicitly account for fundamental questions of policy leads to doctrinal problems that are well illustrated by the recent venue cases from the Eastern District of Texas: The lack of a clear normative objective may have led the Federal Circuit to vary the applicable legal rules from case to case and to reach different results in factually similar cases.[25]

If the Federal Circuit were to critically examine the role of mandamus in the federal scheme for resolving patent disputes, a clearer, more refined framework for granting the writ might emerge. This framework would account for the uniqueness of the Federal Circuit and the court's superior understanding of the realities of patent litigation. Under the reconceptualized framework for Federal Circuit mandamus that I propose, the court would freely grant mandamus to answer novel and important legal questions that are intertwined with the patent law and that regularly evade appellate review. As for non-patent questions, the Federal Circuit would capitalize on its unique position as the forum for nearly all patent appeals filed nationwide. It would issue mandamus when this unique perspective can provide a useful teaching moment for district courts.

Had the Federal Circuit applied this approach in its recent venue cases, it might have noticed that the Eastern District is, perhaps, not as much of a "renegade jurisdiction" as Justice Scalia and conventional wisdom perceive it to be. Recent studies have undermined the view that it is impossible for defendants

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21. *See* Joan E. Schaffner, *Federal Circuit "Choice of Law":* Erie *Through the Looking Glass*, 81 IOWA L. REV. 1173, 1192, 1201 (1996).

22. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1573-75 (Fed. Cir. 1984) (per curiam).

23. *See* 28 U.S.C. §§ 1295(a)(1), 1338(a) (2006).

24. *See, e.g.*, Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1671-75 (2003).

25. *See infra* Part III.B.

to obtain transfer out of the Eastern District.[26] Given the Federal Circuit's nearly exclusive jurisdiction over patent cases, this is something that the Federal Circuit should have known and that could have tempered its decision to take the unprecedented step of granting mandamus ten times in a little over three years. In three more recent venue cases, however, the Federal Circuit has correctly employed its extensive experience with the Eastern District's patent docket, identifying attempts by plaintiffs to manipulate the transfer analysis and recognizing that judicial familiarity with pertinent technology can outweigh considerations of convenience.[27] There is thus some reason to believe that a more thoughtful model of mandamus is emerging in the Federal Circuit.

That said, in December 2011, the court for the first time used mandamus to order a court *besides* the Eastern District of Texas to transfer a patent case.[28] And, in many recent cases, the Federal Circuit has granted or denied mandamus by analogizing or distinguishing its own case law, even though the petitions raise only non-patent issues supposedly governed by regional circuit law.[29] The potential for continued expansion in the Federal Circuit's use of the writ and the large body of precedent the court has created in such a short time underscore the need for a critical assessment of the proper role of mandamus in patent cases.

A brief word on the scope of this Article. The Federal Circuit reviews many decisions besides patent cases from the federal district courts.[30] For example, the court hears appeals from the Patent and Trademark Office, the Court of Federal Claims, and the International Trade Commission, among others.[31] The Federal Circuit sometimes fields mandamus petitions directed toward these other tribunals. And the Federal Circuit has, with very few exceptions, exclusive appellate jurisdiction over those tribunals.[32] By contrast, the authority to review district court judgments is split between the Federal Circuit (in cases arising under the patent laws) and the regional circuits (in all other cases).[33] It is this split of authority that creates the complex jurisdictional, legal, and policy issues that have caused confusion in the Federal Circuit about the proper standard for mandamus relief.[34] Accordingly, this Article focuses primarily on the Federal

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26. *See infra* Part III.A.

27. *See In re* Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011) (per curiam); *In re* Vistaprint Ltd., 628 F.3d 1342 (Fed. Cir. 2010); *In re* Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010).

28. *See In re* Link_A_Media Devices Corp., 662 F.3d 1221 (Fed. Cir. 2011) (ordering transfer from the District of Delaware to the Northern District of California).

29. *See, e.g.*, *In re* Apple Inc., Misc. No. 103, 2012 WL 112893 (Fed. Cir. Jan. 12, 2012); *In re* Biosearch Techs., Inc., Misc. No. 995, 2011 WL 6445102 (Fed. Cir. Dec. 22, 2011).

30. *See generally* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. (forthcoming 2012) (manuscript at 27-28) (summarizing the Federal Circuit's non-patent jurisdiction), *available at* http://ssrn.com/abstract=1945039.

31. *See* 28 U.S.C. § 1295(a) (2006 & Supp. 2010).

32. *See id.*

33. *See id.* §§ 1291, 1295(a)(1), 1338.

34. *See In re* Innotron Diagnostics, 800 F.2d 1077, 1083 n.10 (Fed. Cir. 1986) (noting that "[t]he problem of 'serving two masters' does not arise in" cases appealable only to the Federal

Circuit's mandamus jurisprudence in district court patent cases.

The Article proceeds in four parts. Part I provides an overview of mandamus, examining the writ's history from its royal genesis to its present day use as a mechanism of interlocutory appellate review. Part II uncovers the origins of the Federal Circuit's initial view that it could issue mandamus on patent issues only and shows how the Federal Circuit has abandoned that initial view without providing any reasons for doing so. Part III analyzes the Federal Circuit's recent, pathbreaking venue decisions, develops the theory of supervisory plus mandamus, and shows how the recent decisions underscore the need for a reconceptualization of Federal Circuit mandamus. Part IV outlines a rationale for Federal Circuit mandamus on non-patent issues, explores the benefits that would result if the court were to explicitly consider the justifications I outline, and considers some possible limitations on mandamus that are specific to the Federal Circuit. I conclude by urging the court to develop a mandamus framework that acknowledges the Federal Circuit's unique role in the federal system.

I. A PRIMER ON APPELLATE MANDAMUS

Mandamus, which literally means "we command,"[35] was one of the prerogative or extraordinary writs of the common law.[36] In short, mandamus requires the person or persons against whom it issues to take (or to refrain from taking) some specified action.[37] Mandamus can be issued by a court against a public official, or by a higher court against a lower court.[38]

Mandamus issued by a higher court against a lower court, referred to as appellate mandamus, is an extraordinary event, especially in the federal court system. By statute, the federal courts of appeals have jurisdiction to review only "final decisions" of the district courts.[39] Through mandamus, however, a litigant may obtain review of district court orders that do not finally resolve the case, often referred to as interlocutory orders. Mandamus thus provides an important escapeway from the final judgment rule. A mandamus petition is, however, potentially disruptive to judicial efficiency because the district court case continues while the appellate court decides the mandamus petition.

Because of this potential for disruption, appellate mandamus had a very limited role in the English common law system and, until the 1950s, in the

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Circuit).

35. BLACK'S LAW DICTIONARY 1046 (9th ed. 2009).

36. Other prerogative writs included prohibition, certiorari, quo warranto, and habeas corpus. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.9(1) (2d ed. 1993); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 527 (1923).

37. The extraordinary writ that restrains a person from taking some action is technically the writ of prohibition. But modern parlance has combined prohibition and mandamus under the label "mandamus." *See* TIGAR & TIGAR, *supra* note 3, at 185.

38. *See* DOBBS, *supra* note 36, § 2.9(1).

39. 28 U.S.C. § 1291 (2006).

American federal system. Appellate mandamus traditionally would issue only to fix errors of a "jurisdictional" nature.[40] Since the late 1950s, however, mandamus has served a much broader function in the federal appellate courts, issuing to correct significant or repeated district court errors on important questions of law, whether jurisdictional or not.[41] To appreciate the Federal Circuit's struggle with this broader function of appellate mandamus, it is important to first understand the writ's origins, its current use in appellate practice, and two prominent theories of modern appellate mandamus, "supervisory" and "advisory" mandamus.

A. Origins of Appellate Mandamus

1. Mandamus at Common Law.—The origins of the writ of mandamus are "very obscure," as one American court noted over a century ago.[42] Mandamus appears to have originated in the personal command (or prerogative) of the English King.[43] In the sixteenth century, however, mandamus emerged as a judicial remedy available to subjects and the Crown alike.[44] It issued on direct petition from the Court of King's Bench and typically ordered a public authority to carry out a legal duty.[45] This judicial writ "gradually supplanted the old[er] personal command of the sovereign."[46]

In the sixteenth and seventeenth centuries, "the writ of mandamus was used primarily to compel public authorities to return petitioners . . . to public offices from which they had been unlawfully removed."[47] Sir Edward Coke's 1615 opinion for the King's Bench in *Bagg's Case*,[48] which is often cited as the "well-head of [m]andamus,"[49] is emblematic of the early use of the writ for restorative purposes. James Bagg, one of the chief burgesses of the borough of Plymouth, had been removed from office for speaking ill of the mayor, Bagg's fellow burgesses, and other officials.[50] Issuing the writ, Coke emphasized that the borough had acted beyond its authority by removing Bagg without providing him

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40. 16 WRIGHT ET AL., *supra* note 6, § 3932.

41. *See infra* Part I.B.

42. *In re* Lauritsen, 109 N.W. 404, 408 (Minn. 1906).

43. *See* 1 CHESTER JAMES ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES § 2.00 (1987); Leonard S. Goodman, *Mandamus in the Colonies—The Rise of the Superintending Power of American Courts*, 1 AM. J. LEGAL HIST. 308, 309 (1957); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 40-41 (1951).

44. 1 ANTIEAU, *supra* note 43, § 2.00. S.A. de Smith notes that the first reported case involving a judicial writ of mandamus that served a similar purpose to the modern writ was *Middleton's Case*, (1573) 73 Eng. Rep. 752 (K.B.). *See* de Smith, *supra* note 43, at 50.

45. WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 616 (9th ed. 2004).

46. *Lauritsen*, 109 N.W. at 409.

47. 1 ANTIEAU, *supra* note 43, § 2.00.

48. (1615) 77 Eng. Rep. 1271 (K.B.).

49. Jenks, *supra* note 36, at 530 (italics omitted); *see also* 1 ANTIEAU, *supra* note 43, § 2.00.

50. *Bagg's Case*, 77 Eng. Rep. at 1275.

notice and an opportunity to object.[51]

By the early eighteenth century, the writ had developed a broader use than simply restoring public officials to office.[52] Mandamus would issue not only against executive officials, but also against inferior courts.[53] Just as mandamus in *Bagg's Case* restrained the *ultra vires* act of the borough, mandamus would restrain courts from exercising powers beyond their jurisdiction.[54] The writ would also compel courts to exercise jurisdiction with which they had been vested.[55] Blackstone explained:

> [Mandamus] issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by quickening their negligence . . . .[56]

Mandamus would not, however, lie to correct a decision that was *intra vires*, but erroneous.[57] In other words, mandamus was not a substitute for appellate review.[58]

2. American Beginnings.—Early American courts and the first U.S. Congress imported the view that mandamus was an extraordinary remedy designed to fix only jurisdictional errors. Sections 13 and 14 of the Judiciary Act of 1789 codified the federal courts' mandamus power.[59] Section 13 addressed, among other things, the power of the Supreme Court to issue extraordinary writs. It provided that "[t]he Supreme Court . . . shall have power to issue . . . writs of mandamus . . . in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[60] Section 14 similarly vested in the lower federal courts the power to issue mandamus, providing that they "shall have power to issue writs of scire facias, habeas corpus . . . and all other writs not specially provided for by statute,

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51. *Id.* at 1280-81.

52. *See* de Smith, *supra* note 43, at 51.

53. *Id.*

54. *See id.* at 56.

55. *See id.* at 51.

56. 3 WILLIAM BLACKSTONE, COMMENTARIES *110.

57. *See* The Queen v. Justices of London, [1895] 1 Q.B. 616, 637; The King v. Justices of Monmouthshire, (1825) 107 Eng. Rep. 1273, 1275 (K.B.); HALSEY H. MOSES, THE LAW OF MANDAMUS 29-30 (1878) (citing cases).

58. *See generally* WADE & FORSYTH, *supra* note 45, at 623 ("Refusal to consider a party's case . . . has to be distinguished from refusal to accept his argument. . . . If the inferior court or tribunal merely makes a wrong decision within its jurisdiction, . . . mandamus cannot be employed to make it change its conclusion.").

59. Judiciary Act of 1789, ch. 20, §§ 13, 14, 1 Stat. 73, 80-82.

60. *Id.* § 13, 1 Stat. at 81 (italics omitted).

which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[61]

In view of the requirement that mandamus issue only when consistent with "the principles and usages of law," the Supreme Court in the eighteenth and nineteenth centuries generally permitted the use of mandamus in the same manner as English courts at common law.[62] The Court also approved mandamus directed to judges of inferior courts.[63] But a litigant could not use a mandamus petition to challenge the correctness of a non-final decision. In other words, mandamus was not a means to evade the rule that only final judgments may be appealed.[64] As the Court noted in *Kendall*, "mandamus does not direct the inferior court *how* to proceed, but only that it *must* proceed, according to its own judgment, to a final determination," which could then be appealed.[65]

In 1911, Congress recodified the federal courts' power to issue extraordinary writs.[66] But this recodification simply confirmed the prevailing practice. The notes to the revised sections indicated that, under the new statute, mandamus would remain a means by which a court could "direct a subordinate Federal court to decide a pending cause,"[67] but would "not perform the office of an appeal or writ of error."[68]

Congress again reorganized and consolidated the judicial code in 1948.[69] In this recodification, the All Writs Act took its present form. Congress eliminated the separate provisions governing mandamus in the Supreme Court and the inferior courts and replaced them with 28 U.S.C. § 1651, which reads (in relevant

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61. *Id.* § 14, 1 Stat. at 81-82 (italics omitted).

62. *See, e.g.*, United States *ex rel.* Dunlap v. Black, 128 U.S. 40, 48 (1888) (noting that mandamus would issue when executive officials "refuse to act in a case at all" or refuse to exercise "a mere ministerial duty"); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614, 621 (1838) (approving mandamus directed toward the U.S. Postmaster General); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803) (holding that mandamus was the proper remedy by which William Marbury could seek to compel delivery of his commission as a justice of the peace).

63. *See, e.g.*, *Ex parte* Bradstreet, 32 U.S. (7 Pet.) 634, 648-50 (1833) (mandamus would order an inferior court to reinstate a case that it had dismissed); *Ex parte* Crane, 30 U.S. (5 Pet.) 190, 194 (1831) (mandamus would compel a judge to sign a bill of exceptions); *Ex parte* Wood, 22 U.S. (9 Wheat.) 603, 614-15 (1824) (mandamus would compel a district judge to conduct a trial on the issue of patent validity).

64. *See* Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828) (Marshall, C.J.) (noting that issuing mandamus to review an interlocutory order "would be a plain evasion of the provision of the Act of Congress, that *final* judgments only should be brought before this Court for re-examination").

65. *Kendall*, 37 U.S. (12 Pet.) at 622 (emphasis added); *accord* Gaines v. Relf, 40 U.S. (15 Pet.) 9, 17 (1841); *Ex parte* Hoyt, 38 U.S. (13 Pet.) 279, 290 (1839); *Ex parte* Whitney, 38 U.S. (13 Pet.) 404, 408 (1839).

66. Judicial Code of 1911, ch. 231, § 234, 36 Stat. 1087, 1156.

67. *Id.* § 234 note.

68. *Id.* § 262 note; *accord id.* § 234 note.

69. Pub. L. No. 80-773, 62 Stat. 869 (1948); *see* S. REP. NO. 80-1559, at 1 (1948).

part): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[70] Nothing in the legislative history suggests that Congress intended a substantive change to writ practice.[71] The Supreme Court confirmed that the All Writs Act did not affect the courts' power to issue mandamus.[72] Yet, less than a decade after Congress passed the Act, the federal courts began to use the new statute to justify appellate review of a wide variety of interlocutory orders previously unreviewable under the final judgment rule.

3. A Coda for the Traditional View.—As discussed, the Supreme Court had long limited appellate mandamus to (1) "confining" inferior courts to their "prescribed jurisdiction" and (2) "compelling" inferior courts to exercise jurisdiction "when it is [their] duty to do so."[73] The Court was not referring to "jurisdiction" in a technical sense, however. Rather, the Court's rule referred to a "more flexible notion of 'power.'"[74] If a district court "took some definable action [it] was not empowered to take . . . or refused to take some definable action [that] . . . was clearly required," the error was considered "jurisdictional," and mandamus would correct it.[75] For example, appellate mandamus would compel a district judge to sign a bill of exceptions (so that an appeal could be taken),[76] to issue a bench warrant,[77] and to unseal deposition testimony and exhibits.[78] In these cases, the lower court had not refused jurisdiction in the modern, technical sense, "*i.e.*, the . . . statutory or constitutional power to adjudicate the case."[79] It had simply refused to take an action that it had an

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70. 28 U.S.C. § 1651(a) (2006).

71. Rather, the legislative history suggests that Congress viewed as "unnecessary" the separate provisions governing Supreme Court mandamus and the more general writ power of the federal courts when it could accomplish the same effect through the more general and comprehensive language of the All Writs Act. *See* H.R. REP. NO. 80-308, at A144-45 (1947).

72. *See* La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957) ("The recodification of the All Writs Act in 1948 . . . did not affect the power of the [c]ourts of [a]ppeals to issue writs of mandamus . . . ."). *But cf. id.* at 265-66 (Brennan, J., dissenting) (noting that § 13 of the Judiciary Act of 1789 granted the Supreme Court power to issue writs of mandamus "in cases warranted by the principles and usages of law" and contrasting the All Writs Act, which is "restricted in its use to aiding the jurisdiction of the appellate court" (citing *In re* Josephson, 218 F.2d 174 (1st Cir. 1954) (Magruder, J.))).

73. *Ex parte* Peru, 318 U.S. 578, 583 (1943).

74. *Supervisory and Advisory Mandamus*, *supra* note 11, at 599.

75. *Id.*

76. *Ex parte* Crane, 30 U.S. (5 Pet.) 190, 194 (1831).

77. *Ex parte* United States, 287 U.S. 241, 250 (1932).

78. *Ex parte* Uppercu, 239 U.S. 435, 440-41 (1915).

79. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (emphasis omitted). *See generally* Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings*," 105 NW. U. L. REV. COLLOQUY 184, 184 (2011) (discussing the Supreme Court's recent "uninterrupted retreat from the . . . 'profligate' and 'less than meticulous' use" of the word "jurisdiction" (quoting

unassailable legal duty to take.[80]

Notwithstanding its loose understanding of "jurisdiction," the Court, throughout the first half of the twentieth century, insisted that mandamus could not be used to review mere errors of judgment.[81] Yet, at the same time, the Court's decisions began to hint that mandamus might lie for errors less serious than usurpations of power or ignorance of clear legal duties. In *Ex parte Peru*, for example, the Court, citing the case's "public importance and exceptional character," issued mandamus to compel the release of a Peruvian steamship, overturning a district court ruling on sovereign immunity.[82] And in *Los Angeles Brush Manufacturing Corp. v. James*, the Court held that it could issue mandamus to prevent a district court from referring most of its patent cases to a special master.[83]

B. Appellate Mandamus in the Modern Era

As the Court began to hint at a broader role for appellate mandamus, American civil litigation was beginning a dramatic evolution. The number of cases litigated to a final judgment after trial was declining.[84] Instead of going to trial, parties were increasingly using pretrial motions and the discovery process to "posture themselves for a hard-fought but unappealable settlement."[85] In other words, cases were increasingly being resolved in ways that, under a strict construction of the final judgment rule, would bypass the appellate courts.

It is therefore not surprising that exceptions to the final judgment rule evolved as well.[86] For example, in the mid-twentieth century, the Supreme Court

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Arbaugh v. Y & H Corp., 546 U.S. 500, 510-11 (2006))).

80. *See United States*, 287 U.S. at 250 ("The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it the power to decline to do so under the guise of judicial discretion . . . ."); *Uppercu*, 239 U.S. at 440 (noting the judge's "duty" to permit the records to be unsealed); *see also Crane*, 30 U.S. (5 Pet.) at 193 (noting that no precedent existed in which a court issued mandamus to compel a judge to sign a bill of exceptions "because no judge did ever refuse to seal a bill of exceptions; and none was ever refused, because none was ever tendered like this, *so artificial and groundless*" (emphasis added) (internal quotation marks omitted)).

81. *See* De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945) ("When Congress withholds interlocutory reviews, [mandamus] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but *usurpation of power*—the situation falls precisely within the allowable use of [mandamus]." (emphasis added)).

82. *Ex parte* Peru, 318 U.S. 578, 586 (1943).

83. L.A. Brush Mfg. Corp. v. James, 272 U.S. 701, 706 (1927).

84. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1257-58 (2005).

85. Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1241 (2007).

86. *See id.* at 1240.

created the collateral order doctrine, which permits immediate appeal of orders that resolve crucial issues that are independent of the case's merits.[87] And, in a pair of mid-twentieth century cases, the Court introduced two new models for interlocutory mandamus relief: "supervisory" and "advisory" mandamus. After discussing those models, I conclude this part with a summary of current mandamus doctrine and practice.

1. Supervisory Mandamus.—Supervisory mandamus corrects "established bad habits" of the lower courts.[88] This model of appellate mandamus first explicitly appeared in *La Buy v. Howes Leather Co.*[89] In *La Buy*, the Seventh Circuit had issued mandamus to vacate the order of a district judge referring certain antitrust cases to a special master for trial.[90] The district judge, Judge La Buy, referred the cases because of their complexity, the projected length of the trial, and the congestion of the district court's calendar.[91] The Supreme Court affirmed the grant of mandamus, noting that Judge La Buy's reference to a special master "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."[92]

Given that district judges have wide discretion in referring cases to special masters, the assertion that Judge La Buy abdicated his judicial role is questionable.[93] Indeed, in the final portion of its opinion, the Court explicitly acknowledged the idea of supervisory appellate mandamus—the notion that mandamus could be used to strike down "one instance of a significant erroneous practice [that] the appellate court finds is likely to recur."[94] The Court noted that the district court had repeatedly referred cases to special masters, that the

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87. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). While I refer to the collateral order doctrine as an exception to the final judgment rule, the Supreme Court has at times insisted that the doctrine "is 'best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it.'" Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)). *But see* FirsTier Mortg. Co. v. Investors Mortg. Ins. Co., 498 U.S. 269, 274 n.3 (1991) ("An *exception* to [the final judgment rule] . . . is the 'collateral order doctrine,' which permits appeals under § 1291 from a small class of rulings that do not end the litigation on the merits." (citing *Cohen*, 337 U.S. at 545-47) (emphasis added)); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) ("To come within the 'small class' of decisions *excepted* from the final-judgment rule . . . , the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." (citing Abney v. United States, 431 U.S. 651, 658 (1977) (emphasis added)).

88. 16 WRIGHT ET AL., *supra* note 6, § 3934.1.

89. 352 U.S. 249 (1957).

90. *Id.* at 250-51.

91. *Id.* at 253.

92. *Id.* at 256.

93. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 773-74 (1957).

94. *Supervisory and Advisory Mandamus*, *supra* note 11, at 610.

Seventh Circuit "for years" had admonished that trial courts should seldom refer cases to special masters, and that the Seventh Circuit was clearly at the "end of patience."[95] The Supreme Court thus approved the use of mandamus to supervise and correct the district court's bad habit, concluding that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system" and that "[t]he All Writs Act confers . . . the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."[96]

Supervisory mandamus thus serves a "corrective and didactic function."[97] As one commentator put it:

> If the court finds that the order represents a practice that is likely to be repeated, it can overturn it whether or not the reason the practice is disapproved is that the lower court may be said to have been without "power" to enter a class of orders into which the order falls.[98]

2. Advisory Mandamus.—Only five justices joined the opinion in *La Buy*. Seven years later, however, eight justices joined the Court's opinion in *Schlagenhauf v. Holder*,[99] which represented another expansion in the availability of mandamus. The case introduced the concept of "advisory" mandamus, which permits interlocutory review of novel and important legal questions.

Schlagenhauf arose from a tort suit by passengers of a bus that collided with a tractor-trailer.[100] The district court, on the motion of two defendants, had ordered a third defendant, the bus driver, to submit to a mental and physical examination.[101] The Seventh Circuit denied mandamus but the Supreme Court reversed.[102]

The Court noted in passing that the bus driver argued that the district court "lack[ed] . . . power" to order the examination.[103] But the Court emphasized that the challenged order was "the first of its kind," and that the case presented a "basic, undecided question," an "issue of first impression": whether a defendant could be ordered to undergo examination upon the request of his co-defendants.[104] Under these "unusual" circumstances, the Court determined, mandamus was proper.[105]

Whereas supervisory mandamus helps cure repeated errors in the lower

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95. *La Buy*, 352 U.S. at 258.
96. *Id.* at 259-60.
97. Will v. United States, 389 U.S. 90, 107 (1967).
98. *Supervisory and Advisory Mandamus*, *supra* note 11, at 610-11.
99. 379 U.S. 104 (1964).
100. *Id.* at 106.
101. *Id.* at 108-09.
102. *Id.* at 109.
103. *Id.* at 110-11.
104. *Id.*
105. *Id.* at 110.

courts, "advisory mandamus is reserved for big game"[106]: "systemically important issue[s] as to which [the appellate] court has not yet spoken."[107] Judge Bruce Selya, who has written several notable mandamus opinions,[108] has emphasized that mere novelty is not enough to justify advisory mandamus. Rather, the issue presented must also be "of great public importance, and likely to recur."[109] In his view, advisory mandamus "should primarily be employed to address questions likely of significant repetition prior to effective review, so that [the court's] opinion would assist other jurists, parties, or lawyers."[110]

3. Current Mandamus Doctrine and Practice.—Even though *La Buy* and *Schlagenhauf* were not the Supreme Court's final words on appellate mandamus, the supervisory and advisory models introduced by those cases form the theoretical backbone of modern mandamus doctrine. In the wake of those seminal cases, the Court appeared to retighten the availability of the writ, discounting the advisory rationale for issuing mandamus,[111] and contending that mandamus was inappropriate to review any discretionary decision of a district court.[112] In more recent cases, however, the Court has confirmed that mandamus is a proper remedy to supervise district court practices[113] and to overturn discovery orders that are adverse to claims of privilege.[114] Importantly, the courts of appeals have continued to use mandamus to resolve significant and novel legal issues,[115] and, contrary to the Supreme Court's instruction, to supervise district

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106. United States v. Horn, 29 F.3d 754, 770 (1st Cir. 1994) (Selya, J.); *see also In re* Bushkin Assocs., Inc., 864 F.2d 241, 247 (1st Cir. 1989) (Selya, J.) (advisory mandamus "is reserved for blockbuster issues, not merely interesting ones").

107. *In re* Atl. Pipe Corp., 304 F.3d 135, 140 (1st Cir. 2002) (Selya, J.).

108. *See In re* Sony BMG Music Entm't, 564 F.3d 1 (1st Cir. 2009); United States v. Green, 407 F.3d 434 (1st Cir. 2005); *Atl. Pipe*, 304 F.3d 135; *In re* Providence Journal Co., 293 F.3d 1 (1st Cir. 2002); *Horn*, 29 F.3d 754.

109. *Horn*, 29 F.3d at 769.

110. *Id.* at 770 (citation omitted) (internal quotation marks omitted).

111. *See* Will v. United States, 389 U.S. 90, 104 n.14 (1967) (distinguishing *Schlagenhauf*, noting that although the case presented "new and substantial" questions the issuance of mandamus was based "on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination").

112. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (per curiam); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 (1978) (plurality opinion); *see also* Kerr v. U.S. Dist. Court, 426 U.S. 394, 405 (1976) (denying mandamus on an order compelling the production of privileged documents because of the possibility of in camera review).

113. *See* Mallard v. U.S. Dist. Court, 490 U.S. 296, 309-10 (1989) (overturning district court program requiring attorneys to represent indigent litigants as a condition of bar membership).

114. *See* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 607-08 (2009); Cheney v. U.S. Dist. Court, 542 U.S. 367, 382-83 (2004).

115. *See, e.g.*, *In re* Asbestos Sch. Litig., 46 F.3d 1284, 1288 (3d Cir. 1994) ("Mandamus may be especially appropriate to further supervisory and instructional goals, and where issues are unsettled and important."); United States v. Bertoli, 994 F.2d 1002, 1014 (3d Cir. 1993) (noting that mandamus review is appropriate "when fundamental undecided issues . . . implicate not only

court decisions on matters of discretion.[116] Thus, the Supreme Court's post-*La Buy* and *Schlagenhauf* case law has, in general, not impacted the courts of appeals' continued use of supervisory and advisory mandamus.[117]

Of course, there is no categorical distinction between the two theories, as a novel ruling that could initially warrant advisory mandamus may easily become a repeated error appropriate for supervisory mandamus.[118] Conversely, if a lower court's recurring practice is sufficiently "bad" to warrant supervisory mandamus, the court of appeals might not have addressed the issue.[119]

In short, under modern doctrine, the federal courts of appeals will use mandamus to settle important, usually undecided, issues that are likely to arise again in future cases and for which post-judgment review would be inadequate, inefficient, or impossible. Mandamus, used in this fashion, gives lower courts appellate guidance so that mandamus review is unnecessary in future cases raising the same issue.[120] By using the writ sparingly, appellate courts preserve, at least in part, the writ's historically extraordinary character, avoiding undue interference in lower court proceedings but sending a forceful message when the writ does issue.

Appellate courts also continue to issue mandamus for traditional, "jurisdictional" reasons.[121] And since appellate mandamus is a discretionary remedy, different courts have formulated different tests for the writ's issuance. The Supreme Court, for example, has repeatedly stated that "three conditions must be satisfied."[122] First, the party seeking the writ must have "no other

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the parties' interests but those of the judicial system itself"); *In re* Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 123 (8th Cir. 1986) ("[M]andamus review may be appropriate to provide guidelines for the resolution of novel and important questions . . . that are likely to recur."), *vacated on other grounds sub nom.* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987).

116. Prime examples of cases reviewing on mandamus discretionary district court rulings are the venue decisions discussed in Part III.B, *infra*.

117. *See* TIGAR & TIGAR, *supra* note 3, at 193; 16 WRIGHT ET AL., *supra* note 6, § 3934.1.

118. *See* United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994).

119. *Cf. Supervisory and Advisory Mandamus*, *supra* note 11, at 611 (suggesting that advisory mandamus is merely a variant of supervisory mandamus).

120. *See* United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969), *vacated as moot sub nom.* United States v. Gifford-Hill-Am., Inc., 397 U.S. 93 (1970); 16A WRIGHT ET AL., *supra* note 6, §§ 3934, 3934.1.

121. *See supra* Part I.A; *see, e.g.*, Nixon v. Richey, 513 F.2d 427, 430 (D.C. Cir. 1975) (per curiam) (ordering that a district judge must immediately consider an application to proceed before a three-judge district court: "We intimate no view as to what in this regard the District Judge should decide. We hold only that he must decide, and decide now."); *see also* Sierra Rutile Ltd. v. Katz, 937 F.2d 743, 751 (2d Cir. 1991) ("Should the district court continue in its refusal to vacate the stay and to exercise jurisdiction over this action upon proper application, such may be the circumstances under which a petition for mandamus might be appropriately . . . granted." (alteration in original) (citation omitted) (internal quotation marks omitted)).

122. Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004); *accord* Allied Chem. Corp. v.

adequate means" to obtain the relief sought.[123] Second, the petitioner must show that its right to the writ is "clear and indisputable."[124] Finally, the court must be satisfied, in its discretion, that the writ is "appropriate" under the circumstances.[125] Perhaps because the "appropriate"-ness standard is rather amorphous, the lower courts have developed more detailed frameworks.[126]

Today, courts review on mandamus a litany of issues, including orders regarding discovery (in particular, the attorney-client privilege);[127] orders regarding transfer of venue;[128] orders on the consolidation or severance of cases for trial;[129] temporary restraining orders;[130] orders denying a jury trial;[131] and judicial and attorney disqualification orders;[132] among many others.[133] The varied function of mandamus in modern appellate practice illustrates the writ's evolution from its original use of fixing obvious "jurisdictional" errors to a mechanism for supervising district court practices and deciding novel legal issues. In the next part, I examine the evolution of mandamus in the Federal Circuit and how the Federal Circuit has struggled with the supervisory function of mandamus, both because of the court's unique nationwide jurisdiction and its position as successor to a court of very limited function.

II. MANDAMUS IN THE FEDERAL CIRCUIT

The limited appellate subject-matter jurisdiction of the Federal Circuit's predecessor, the Court of Customs and Patent Appeals (CCPA), caused the CCPA to adopt a unique, issue-based framework for evaluating its mandamus

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Daiflon, Inc., 449 U.S. 33, 35-36 (1980) (per curiam); Kerr v. U.S. Dist. Court, 426 U.S. 394, 403 (1976).

123. *Cheney*, 542 U.S. at 380-81.

124. *Id.* at 381 (quoting *Kerr*, 426 U.S. at 403).

125. *Id.* (quoting *Kerr*, 426 U.S. at 403).

126. *See, e.g.*, Bauman v. U.S. Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977) (requiring the court to balance five factors in deciding whether to grant mandamus: (1) whether the party seeking the writ has another adequate means to seek to the desired relief; (2) whether the petitioner will suffer harm that cannot be remedied on appeal; (3) whether the district court's order is "clearly erroneous as a matter of law"; (4) whether the district court's error is "oft-repeated"; and (5) whether the district court's order raises new or important problems or legal issues of first impression).

127. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001).

128. *See, e.g.*, *infra* Part III.B. *See generally* 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 204.06[3][a] (Daniel R. Coquillette et al. eds., 3d ed. 2011) ("[T]ransfer orders may be reviewed by mandamus."); 16 WRIGHT ET AL., *supra* note 6, § 3935.4 (discussing mandamus use in transfer of venue cases).

129. *See, e.g.*, Garber v. Randell, 477 F.2d 711, 715 n.2 (2d Cir. 1973).

130. *See, e.g.*, *In re* Vuitton Et Fils S.A., 606 F.2d 1, 3 (2d Cir. 1979).

131. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959).

132. *See, e.g.*, *In re* Aetna Cas. & Sur. Co., 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc).

133. *See* 16 WRIGHT ET AL., *supra* note 6, § 3935.7.

jurisdiction. Although the CCPA's jurisdictional limitations have no analogues in the Federal Circuit, the Federal Circuit nevertheless initially embraced a similarly limited conception of mandamus, stating that it would entertain only petitions that raised questions of patent law. I begin this part by examining the origins of this limited conception and showing how it proved unworkable. I then show how the Federal Circuit's more recent mandamus jurisprudence, which permits a broader use of the writ, fails to confront the rationale of the court's earlier decisions.

A. Mandamus in the Court of Customs and Patent Appeals

Congress created the CCPA in 1929 and merged it into the Federal Circuit in 1982, when the Federal Circuit was created.[134] The CCPA's subject-matter jurisdiction over patent cases was much more limited than the Federal Circuit's. The CCPA was, in general, limited to reviewing decisions of the U.S. Patent and Trademark Office (PTO); unlike the Federal Circuit, the CCPA did not have jurisdiction over appeals from district court judgments in patent infringement litigation.[135] In addition, CCPA review of PTO actions encompassed only two legal issues: (1) patentability (i.e., whether the patent application satisfied the statutory requirements that the invention be novel, useful, nonobvious, adequately described, and claim patentable subject matter)[136] and (2) priority of invention (i.e., the determination of which party first made the invention and is

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134. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 122, 96 Stat. 25, 36; 4 DONALD S. CHISUM, CHISUM ON PATENTS § 11.06[3][b][I] (2005). For historical discussions of the creation of the Federal Circuit and comparisons to its predecessor courts, the CCPA and the Court of Claims, see generally Marion T. Bennett, *The United States Court of Appeals for the Federal Circuit—Origins*, *in* UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY: 1990-2002, at 3, 3-15 (2004) [hereinafter FEDERAL CIRCUIT HISTORY]; Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).

135. *See* 28 U.S.C. § 1542 (1970), *repealed by* Federal Courts Improvement Act of 1982 § 122; Charles L. Gholz, *Patent and Trademark Jurisdiction of the Court of Customs and Patent Appeals*, 40 GEO. WASH. L. REV. 416, 417-20 (1972); Jeffery A. Lefstin, *The Constitution of Patent Law: The Court of Customs and Patent Appeals and the Shape of the Federal Circuit's Jurisprudence*, 43 LOYOLA L.A. L. REV. 843, 848-50 (2010). Near the end of the CCPA's existence, in 1975, Congress granted the court jurisdiction to review decisions of the International Trade Commission (ITC) in proceedings to prohibit the importation of devices that infringe U.S. patents, so-called § 337 proceedings. This jurisdiction gave the court a limited opportunity to consider patent infringement issues in addition to the validity issues it considered when reviewing PTO proceedings. *See* Trade Act of 1974, Pub. L. No. 93-618, § 341(a), 88 Stat. 1978, 2053-56. In addition to the court's patent and ITC jurisdiction, the CCPA also reviewed PTO decisions in trademark cases, as well as the decisions of the U.S. Customs Court (later renamed the Court of International Trade). *See* GILES S. RICH, A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS 1-2 (1980).

136. *See* 35 U.S.C. §§ 101-03, 112 (2006).

therefore entitled to the patent).[137] Because the CCPA lacked jurisdiction over district court patent cases, it did not decide issues of regional circuit law.[138] In addition, in appeals from interference proceedings (i.e., the contest through which the PTO determines priority of invention),[139] the CCPA could decide *only* questions related to the determination of priority.[140] It could not review PTO determinations on underlying matters such as the proper scope of discovery[141] or other matters of procedure.[142]

The CCPA, like other federal appellate courts, asserted authority to issue mandamus under the All Writs Act.[143] Because of its limited subject-matter jurisdiction, however, the CCPA, before deciding a mandamus petition on the merits, was careful to ensure that it would have appellate jurisdiction over the decision sought to be reviewed. In *Goodbar v. Banner*, for example, the petitioners sought a writ of mandamus directing the Board of Patent Interferences to vacate an order compelling the petitioners to produce certain documents in an interference proceeding.[144] The court immediately turned to the question of jurisdiction, noting that "[t]he All Writs Act is not an independent grant of appellate jurisdiction, and, therefore, the appellate jurisdiction which the writs are 'in aid of' must have some other basis."[145] As to what the "other basis" could be, the court wrote that it "must be found within the subject matter jurisdiction of this court."[146]

This discussion in *Goodbar* simply recognizes the elementary principle that

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137. *See id.* § 102(g); 28 U.S.C. § 1542 (1970), *repealed by* Federal Courts Improvement Act of 1982 § 122. For applications filed after March 16, 2013, priority will no longer go to the first person to make the invention, but to the first person to file a patent application. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3(b), 125 Stat. 284, 285-87 (2011) (to be codified at 35 U.S.C. § 102).

138. By contrast, when the Federal Circuit reviews a district court judgment in a patent case, it considers all issues that arose in the underlying proceeding, and applies regional circuit law to non-patent issues and procedural issues not unique to patent law. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574-75 (Fed. Cir. 1984) (per curiam).

139. *See* MANUAL OF PATENT EXAMINING PROCEDURE § 2301 (8th rev. ed. 2010). In 2013, when the priority rule changes from "first to invent" to "first to file," *see supra* note 137, interference proceedings will be replaced by "derivation" proceedings, which will determine whether a competing application was derived from the applicant's own invention. *See* Leahy-Smith America Invents Act § 3(I), Pub. L. No. 112, 125 Stat. 284 (2011) (to be codified at 35 U.S.C. § 135).

140. *See* 35 U.S.C. § 141 (2006).

141. *See* Goodbar v. Banner, 599 F.2d 431, 435 (C.C.P.A. 1979).

142. *See* Morris v. Tegtmeyer, 655 F.2d 216, 220-21 (C.C.P.A. 1981).

143. *See* Loshbough v. Allen, 404 F.2d 1400, 1405 (C.C.P.A. 1969); Charles L. Gholz, *Extraordinary Writ Jurisdiction of the CCPA in Patent and Trademark Cases*, 58 J. PAT. OFF. SOC'Y 356, 357-58 (1976).

144. *Goodbar*, 599 F.2d at 432.

145. *Id.* at 433 (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 23-26 (1943)).

146. *Id.* at 433-34 (emphasis omitted).

courts have mandamus jurisdiction if they could, at some point in the future, entertain an appeal.[147] For the regional circuits, this is usually not a complex inquiry. Since a regional circuit will eventually have appellate jurisdiction over almost any district court case in its circuit, it likewise has mandamus jurisdiction over almost any case. But for the CCPA in cases like *Goodbar*, the jurisdictional inquiry was more complex. The CCPA had jurisdiction to review only certain *issues* that arose in interference proceedings.

In *Goodbar*, for example, the court noted that the petition arose out of a discovery motion in a PTO interference proceeding and that it did not have appellate jurisdiction over PTO decisions on motions.[148] Its appellate jurisdiction over interference proceedings was limited to questions of priority of invention and other issues "ancillary to priority."[149] Because the discovery issue in *Goodbar* did not relate to the sequence of invention, the court concluded that it lacked jurisdiction over the petition.[150]

In several other cases, the CCPA applied the principle that it would hear on mandamus only issues that were within the court's appellate subject-matter jurisdiction.[151] When the petition presented an issue that the CCPA would decide on appeal, the court would exercise mandamus jurisdiction.[152] When the court did not have jurisdiction over a ruling presented by mandamus, the court would consider the petition only if the ruling had the effect of obstructing an appeal to the CCPA.[153] Thus, any petitioner seeking mandamus from the CCPA faced the threshold question of whether the issue was within the CCPA's narrow subject-matter jurisdiction. If not, the court would dismiss the petition.

In 1982, Congress replaced the CCPA with the Federal Circuit. Congress granted the new court appellate jurisdiction over a diverse set of tribunals,

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147. *See* Burr & Forman v. Blair, 470 F.3d 1019, 1027 (11th Cir. 2006) ("The [All Writs] Act does not create subject matter jurisdiction for courts where such jurisdiction would otherwise be lacking. Instead, the Act provides courts with a procedural tool to enforce jurisdiction they have already derived from another source." (citation omitted)).

148. *Goodbar*, 599 F.2d at 434.

149. *Id.* (citing Duffy v. Tegtmeyer, 489 F.2d 745 (C.C.P.A. 1974)).

150. *Id.* at 435.

151. *See, e.g.*, Morris v. Tegtmeyer, 655 F.2d 216, 220-21 (C.C.P.A. 1981) (holding that the court lacked jurisdiction over a petition challenging the PTO Commissioner's decisions about when particular issues would be decided); Godtfredsen v. Banner, 598 F.2d 589, 592-93 (C.C.P.A. 1979) (dismissing petition that sought an order directing the Commissioner to allow certain interference counts to proceed and to stop proceedings on other counts), *overruled on other grounds by* Hester v. Allgeier, 646 F.2d 513, 522 (C.C.P.A. 1981).

152. *See, e.g.*, McNally v. Mossinghoff, 673 F.2d 1253, 1254 (C.C.P.A. 1982) (exercising jurisdiction over a mandamus petition based on "petitioners' allegation that; but for the Commissioner's refusal to revive" the petitioners' patent application, the "application would properly be in interference" with certain other patents); Morris v. Diamond, 634 F.2d 1347, 1350 (C.C.P.A. 1980) (finding jurisdiction over a mandamus petition where the decision of the Commissioner sought to be reviewed was "ancillary to priority").

153. *See* Margolis v. Banner, 599 F.2d 435, 443-44 (C.C.P.A. 1979).

including the PTO, the Court of Federal Claims, the International Trade Commission, the Merit Systems Protection Board, and later, the Court of Appeals for Veterans Claims.[154]

In addition, Congress granted the new court jurisdiction over appeals from all district court cases arising under the patent laws.[155] Prior to the Federal Circuit's creation, district court patent cases were appealed to that court's regional circuit.[156] But in 28 U.S.C. § 1295(a)(1), Congress provided the Federal Circuit with power to hear appeals from final decisions of district courts if the district court's jurisdiction is based, in whole or in part, on 28 U.S.C. § 1338.[157] Section 1338, in turn, grants the district courts original jurisdiction to hear, among other matters, cases "arising under any Act of Congress relating to patents."[158] Rather than restricting the new court's jurisdiction over district court cases to certain "patent issues" (as was the case with the CCPA), Congress thus empowered the Federal Circuit to decide all issues presented on appeal, whether issues of patent law or not.[159]

To be sure, not all patent law issues are appealed to the Federal Circuit. For example, the Supreme Court has held that cases involving only patent law defenses do not "aris[e] under" the patent laws.[160] But given that the new Federal Circuit's jurisdiction covered the entirety of any case arising under the patent laws, it might have seemed likely that the CCPA's issue-oriented mandamus case law would become obsolete. The Federal Circuit, however, surprisingly perpetuated the CCPA's narrow conception of mandamus.

B. The Early Mandamus Decisions of the Federal Circuit

In its first opinion, the en banc Federal Circuit adopted as binding precedent the jurisprudence of its predecessor courts, including the CCPA.[161] The court had defensible reasons for embracing CCPA precedent. For one, it promoted doctrinal stability in the areas of law in which the Federal Circuit and the

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154. *See* 28 U.S.C. § 1295(a) (2006 & Supp. 2010); 38 U.S.C. § 7292(c) (2006). For a comprehensive overview of the cases over which the Federal Circuit has appellate jurisdiction, see Gugliuzza, *supra* note 30 (manuscript at 27-28).

155. *See* 28 U.S.C. §§ 1295(a)(1), 1338(a).

156. *See* 4 CHISUM, *supra* note 134, § 11.06[3][e].

157. 28 U.S.C. § 1295(a)(1).

158. *Id.* § 1338(a).

159. *See* Atari, Inc. v. JS & A Grp., Inc., 747 F.2d 1422, 1433-35 (Fed. Cir. 1984) (en banc), *overruled on other grounds by* Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 & n.5 (1998) (en banc in relevant part).

160. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808-09 (1988); *see also* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831-34 (2002) (holding that patent law compulsory counterclaims do not "aris[e] under" the patent laws), *abrogated by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(a), 125 Stat. 284, 331 (2011) (to be codified at 28 U.S.C. § 1338).

161. S. Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

CCPA's jurisdiction overlapped.[162] For another, it would have been burdensome for the Federal Circuit to start anew in areas in which many basic questions of law were settled.[163] But the wholesale adoption of CCPA jurisprudence also caused problems because the court was, for the first time, reviewing district court judgments in patent cases, rather than reviewing agency proceedings only.[164] In particular, the CCPA's narrow mandamus standard, which became the Federal Circuit's mandamus standard in district court patent cases, was incompatible with the new court's broader subject-matter jurisdiction.

In its first published order deciding a petition for a writ of mandamus from a district court, *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, the Federal Circuit concluded that it had jurisdiction to decide the mandamus petition because the district court's jurisdiction was based on § 1338, and the Federal Circuit would, accordingly, have jurisdiction over any appeal under § 1295(a)(1).[165] While the court's analysis was correct, its statement of the jurisdictional standard was problematic. The court wrote that "the petitioner must initially show that the action sought to be corrected by mandamus" was within the court's subject-matter jurisdiction.[166] Viewed in context, the reference to "action," is not a reference to the "civil action," i.e., the case commenced in the district court.[167] Rather, "action" refers to the specific action taken or order entered by the district judge and sought to be reviewed. This is made plain not only by the court's citations to CCPA cases, which focused on the *issue* presented via mandamus, but also by the court's explicit reference to the "action *sought to be corrected*."[168] Simply put, the Federal Circuit's standard seemed to ask the same jurisdictional question as the CCPA formerly did: whether the *issue* to be reviewed was within the court's subject-matter jurisdiction.[169]

Yet there was and is no statutory support for the Federal Circuit to frame a jurisdictional inquiry based on issues. As noted, § 1295(a)(1) grants the court jurisdiction to review all final decisions of the district courts, including all interlocutory orders leading to those final decisions, so long as the district court's jurisdiction is based on § 1338. Unlike in the CCPA's jurisdictional statute, there is no limitation as to which *types* of decisions in patent cases the court may review on appeal. The Federal Circuit, however, compelled at least in part by its wholesale adoption of CCPA precedent, imported the CCPA's narrow conception of mandamus jurisdiction into its case law.

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162. *Id.* at 1371.

163. *Id.* at 1370-71.

164. *See* Lefstin, *supra* note 135, at 868.

165. Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561, 1565 (Fed. Cir. 1983).

166. *Id.* (citing Godtfredsen v. Banner, 598 F.2d 589 (C.C.P.A. 1979); Duffy v. Tegtmeyer, 489 F.2d 745 (C.C.P.A. 1974)).

167. FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

168. *Baker Perkins*, 710 F.2d at 1565 (emphasis added).

169. *See Duffy*, 489 F.2d at 748-49 (exercising mandamus jurisdiction because "the *issue* involved here is one which we might have jurisdiction to decide in the context of our review of a decision of the Board of Patent Interferences" (emphasis added)).

To clearly see the confusion that ensued in the Federal Circuit's early mandamus jurisprudence, it is important to keep in mind that when a court of appeals considers a mandamus petition, it in theory answers three distinct questions (although most cases do not divide up the analysis so neatly). First, the court must decide whether it has jurisdiction over the case.[170] To answer this question in the mandamus setting, the court must decide whether it would have jurisdiction over an appeal at some point in the future.[171] Second, the court must decide if it has the remedial power to grant the writ.[172] The federal courts' power to issue appellate mandamus stems from the All Writs Act, § 1651(a).[173] Third, the court must answer the discretionary question of whether the writ is justified under the circumstances.[174] This final question is often referred to as the "propriety" question, as distinguished from the first two questions of jurisdiction and authority, respectively.[175]

The CCPA cases and *Baker Perkins* involved the first question, that of pure jurisdiction. In its early years, the Federal Circuit was also confused about the source of the courts of appeals' authority to issue the writ. In *Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp.*, for example, the court used mandamus to order a district court to enter summary judgment of patent invalidity on collateral estoppel grounds.[176] At the end of its order, the court noted that it issued the writ "pursuant to [its] authority under 28 U.S.C. § 1651(a)," the All Writs Act, because, "[u]nlike the other circuit courts of appeals, [it] ha[s] no general supervisory authority over district courts."[177] This language suggests a belief that when the regional circuits and the Supreme Court issue supervisory mandamus, they base their authority on a source besides the All Writs Act—a "general supervisory authority."[178] Around this same time, similar statements appeared in other Federal Circuit cases,[179] as well as in a law review article by

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170. *Cf. Baker Perkins*, 710 F.2d at 1565 ("The All Writs Act is not an independent basis of jurisdiction. . . .").

171. *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

172. *Cf.* Brittingham v. Comm'r, 451 F.2d 315, 317 (5th Cir. 1971) (noting that the All Writs Act "empowers" district courts "to issue writs in aid of jurisdiction previously acquired on some other independent ground").

173. *See* FED. R. APP. P. 21 advisory committee's note (1967 adoption).

174. *Cf.* Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004).

175. *Cf. Supervisory and Advisory Mandamus*, *supra* note 11, at 596 n.7 (distinguishing the propriety question from the jurisdictional question).

176. Miss. Chem. Corp. v. Swift Agric. Chems. Corp., 717 F.2d 1374, 1379-80 (Fed. Cir. 1983) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971)).

177. *Id.* at 1380.

178. *Id.*

179. *See In re* Precision Screen Machs. Inc., 729 F.2d 1428, 1429 (Fed. Cir. 1984) ("Petitioners apparently recognize that this court currently has no . . . supervisory authority over any district court under the Federal Courts Improvement Act of 1982, as might justify a writ of mandamus under certain circumstances by a regional circuit court. Accordingly, petitioners are reduced to proceeding under 28 U.S.C. § 1651, the All Writs Act." (citations omitted)); *accord*

Chief Judge Markey.[180] The primary rationale for this position seems to be that the Federal Circuit, unlike the regional circuits, did not have a judicial council to tend to administrative matters within the circuit.[181]

But regional circuits do not derive mandamus authority from the statute establishing a judicial council. They, like the Federal Circuit, derive it from the All Writs Act. The advisory committee's note to Appellate Rule 21 (which governs mandamus petitions) is clear: "The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. § 1651," the All Writs Act.[182] Yet the Federal Circuit still generally shied away from supervisory mandamus, based on the notion that the regional circuits have a more robust mandamus authority than the Federal Circuit.

Examining the remainder of the Federal Circuit's early mandamus case law only heightens the confusion. In contrast to cases disavowing supervisory authority and expressing jurisdictional limits on Federal Circuit mandamus are other cases that, on issues related to patent law, issued what appeared to be supervisory mandamus.[183] Moreover, the court regularly issued mandamus to serve its traditional purposes, such as reining in a court that was acting beyond its authority[184] or compelling a district court to exercise jurisdiction.[185]

In short, the model of mandamus adopted by the Federal Circuit in its early years was confused.[186] The court limited the issuance of the writ in its supervisory form to issues of patent law, in part because the model was tethered

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Petersen Mfg. Co. v. Cent. Purchasing, Inc., 740 F.2d 1541, 1552 (Fed. Cir. 1984), *overruled on other grounds by* Beatrice Foods Co. v. New Eng. Printing & Lithographing Co., 899 F.2d 1171 (Fed. Cir. 1990) (en banc).

180. *See* Howard T. Markey, *The Phoenix Court*, 32 CLEV. ST. L. REV. 1, 5 (1983) ("Under the All Writs Act, it may be necessary in a particular case to issue an appropriate order to a lower tribunal to preserve the jurisdiction of the court, but that is not, of course, an exercise of general administrative authority.").

181. *See In re* Oximetrix, Inc., 748 F.2d 637, 643 (Fed. Cir. 1984) (citing 28 U.S.C. § 332); Markey, *supra* note 180, at 5.

182. FED. R. APP. P. 21 advisory committee's note (1967 adoption).

183. *See, e.g.*, *In re* Newman, 782 F.2d 971, 974 (Fed. Cir. 1986) (vacating district court order that permitted the PTO to test a device for which Newman sought a patent but did not employ the "safeguards" of Rule 34 of the Federal Rules of Civil Procedure); *In re* Mark Indus., 751 F.2d 1219, 1221-22, 1224-26 (Fed. Cir. 1984) (granting mandamus to vacate district court order that based an inequitable conduct finding and a severe sanction on counsel's failure to follow a "custom" described by the opposing party).

184. *See, e.g.*, Miss. Chem. Corp. v. Swift Agric. Chems. Corp., 717 F.2d 1374, 1380 (Fed. Cir. 1983) (ordering district court to enter judgment on collateral estoppel grounds).

185. *See, e.g.*, *In re* Snap-On Tools Corp., 720 F.2d 654, 655 (Fed. Cir.) (granting mandamus to compel removal from state court to federal court), *order amended by* 735 F.2d 476 (Fed. Cir. 1983).

186. *See* Gholz, *supra* note 15, at 422-37 (arguing that the Federal Circuit had, in fact, accepted and exercised supervisory mandamus authority, and that the court had simply "'eschew[ed]' use of the phrase 'supervisory mandamus'").

to the views of the defunct CCPA. And the court insisted that it was "devoid" of supervisory authority over district courts, at least on issues of non-patent law, because of its lack of a judicial council.[187] To make matters even more confusing, the court sometimes suggested that it would *never* consider non-patent issues on mandamus.[188] At other times, the court somewhat tempered this restrictive view, suggesting that it would consider non-patent issues on mandamus, but only if the lower court decision prevented an appeal to the Federal Circuit.[189]

C. Innotron*'s Limit on Federal Circuit Mandamus*

By the time *In re Innotron Diagnostics*[190] reached the Federal Circuit, the court was obviously unsure about its jurisdiction over mandamus petitions, as well as its power to issue the writ. In attempting to clarify the court's case law and reconceptualize the role of mandamus in the Federal Circuit, the opinion in *Innotron* limited the writ in patent cases to issues implicating Federal Circuit patent law.[191] Issues of regional circuit law unrelated to the Federal Circuit's patent jurisprudence would not be eligible for mandamus review.[192]

In *Innotron*, Innotron Diagnostics filed an antitrust suit against Abbott Laboratories in the Central District of California.[193] Abbott then sued Innotron in the same court for patent infringement. The court consolidated the cases and, on Abbott's motion, ordered that Innotron's antitrust claims be severed for trial after trial of the patent issues.[194] The Federal Circuit denied Innotron's mandamus petition, but only after providing an extensive discussion of the role of mandamus in the Federal Circuit.[195]

Writing for the court, Chief Judge Markey noted that the "[u]se of mandamus in exercising 'supervisory authority' has been approved 'in proper circumstances' by the Supreme Court"[196] and increasingly used by the regional circuits.[197] But, he emphasized, those cases involved courts "having appellate

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187. *See In re* Int'l Med. Prosthetics Research Assocs., Inc., 739 F.2d 618, 619 (Fed. Cir. 1984).

188. *See* Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561, 1565 (Fed. Cir. 1983) (noting that "the action sought to be corrected by mandamus is within this court's statutorily defined subject matter jurisdiction," citing CCPA cases).

189. *See* C.P.C. P'ship v. Nosco Plastics, Inc., 719 F.2d 400, 401 (Fed. Cir. 1983) (denying mandamus, noting that "[o]ur jurisdiction to hear the appeal on the merits in this case is not affected by" the decision sought to be reviewed).

190. 800 F.2d 1077 (Fed. Cir. 1986).

191. *Id.* at 1083-84.

192. *See id.*

193. *Id.* at 1078.

194. *Id.* at 1078-79.

195. *Id.* at 1086.

196. *Id.* at 1081 (citing La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957)).

197. *Id.*

jurisdiction over judgments of district courts whose *location* is within its circuit," whereas the Federal Circuit's appellate jurisdiction "is determined by the basis for the district court's *jurisdiction*."[198] Chief Judge Markey noted that the Federal Circuit could clearly overturn via mandamus a district court order that would prevent an appeal to the Federal Circuit or that would "otherwise frustrate" the Federal Circuit's appellate jurisdiction.[199]

He then listed three categories of mandamus petitions for which the inquiry is more complicated:

> (1) [T]hose implicating responsibilities of regional circuit courts for supervising, administering, overseeing, and managing the courts within the circuit (e.g., assignment of judges, adjustment of calendars, transfer of case to another district, reference to master);
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> (2) [T]hose that arise in all types of cases, but do not directly implicate the patent or Little Tucker Act doctrinal jurisprudence of this court (e.g., disqualification of counsel); and
>
> (3) [T]hose that do directly implicate, or are intimately bound up with and controlled by, the patent and Tucker Act doctrinal jurisprudential responsibilities of this court (e.g., separate trial of patent issues; refusal to apply 35 U.S.C. § 282; court-ordered tests for utility).[200]

Because the Federal Circuit lacked supervisory authority over district courts, Chief Judge Markey wrote, "a writ would not be 'in aid of jurisdiction' if issued on petitions in categories (1) and (2)."[201] On the other hand, the court might "aid its jurisdiction" by hearing mandamus petitions on issues in category (3).[202] Because Innotron's petition "challenge[d] an order intimately bound up with and controlled by the law of patents (e.g., the relationship of patent infringement defenses to allegations in 'patent type antitrust' claims)," the court determined that Innotron's petition fell within category (3).[203] Based on this analysis, the court summarized the situations in which it would entertain petitions for a writ of mandamus in a patent case as "those, and only those, in which the patent

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198. *Id.*

199. *Id.* at 1082.

200. *Id.* Under the Tucker Act and Little Tucker Act, the federal government has waived its sovereign immunity from certain types of lawsuits, most notably, contract disputes. *See* 28 U.S.C. §§ 1346, 1491 (2006 & Supp. 2010). Because these cases are appealed almost exclusively to the Federal Circuit, *see id.* § 1295(a)(2)-(3), mandamus petitions filed in Tucker Act and Little Tucker Act cases do not implicate the same issues that arise in mandamus petitions in district court patent cases, which are reviewed by the Federal Circuit in some instances (patent cases), but not others. *See supra* text accompanying notes 30-34.

201. *Innotron*, 800 F.2d at 1082.

202. *Id.*

203. *Id.*

jurisprudence of this court plays a significant role."[204]

This limited conception mirrors the restrictions imposed by the CCPA. The court in *Innotron* cited CCPA opinions that asked whether the *issue* to be resolved was within the court's appellate jurisdiction[205] as well as earlier Federal Circuit cases that had themselves relied upon the CCPA's mandamus jurisprudence.[206] Interestingly, the *Innotron* opinion was written by Chief Judge Markey, who had served as Chief Judge of the CCPA,[207] authored one of the CCPA opinions dismissing a mandamus petition for lack of subject-matter jurisdiction,[208] and denounced a supervisory role for the Federal Circuit.[209]

The court's holding that it would decide only mandamus petitions in which the Federal Circuit's patent law plays a role raised an important practical question for prospective mandamus petitioners: How does one seek mandamus review of a question of regional circuit law in a case that would be appealed to the Federal Circuit after judgment? The *Innotron* court hinted that the appropriate tactic might be to seek relief in the regional circuit.[210]

As discussed in more detail below, however, this framework of bifurcated review on mandamus would be at odds with Congress's grant to the Federal Circuit of appellate jurisdiction over all issues raised in cases arising under the patent laws. On an appeal from a final judgment, the Federal Circuit would have jurisdiction over the entire case, including issues of regional circuit law, which the Federal Circuit would decide in accordance with the law of the appropriate regional circuit.[211] Yet, in *Innotron*, the court suggested that, on mandamus, those very same issues could be decided by petition to the regional circuit. In addition, the bifurcated framework proposed by *Innotron* is inconsistent with contemporaneous Federal Circuit precedent, which held that the Federal Circuit—and only the Federal Circuit—could issue mandamus in cases that were within the court's exclusive appellate jurisdiction.[212] In light of *Innotron*'s

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204. *Id.* at 1083-84.

205. *Id.* at 1082 n.8 (citing Godtfredsen v. Banner, 598 F.2d 589 (C.C.P.A. 1979); Duffy v. Tegtmeyer, 489 F.2d 745 (C.C.P.A. 1974)).

206. *See id.* (citing *In re* Mark Indus., 751 F.2d 1219, 1222 (Fed. Cir. 1984); *In re* Oximetrix, 748 F.2d 637, 643 (Fed. Cir. 1984); Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561 (Fed. Cir. 1983)).

207. *See Judge Howard Thomas Markey*, *in* FEDERAL CIRCUIT HISTORY, *supra* note 134, at 105-06.

208. *See* Fraige v. Parker, 610 F.2d 795, 796 (C.C.P.A. 1979).

209. *See* Markey, *supra* note 180, at 5.

210. *See Innotron*, 800 F.2d at 1084 n.13; *see also* 15A WRIGHT ET AL., *supra* note 6, § 3903.1 ("There may be an implication in the *Innotron Diagnostics* opinion that the Federal Circuit believes it appropriate for the regional circuits to exercise writ control of the matters foresworn by the Federal Circuit, even though interlocutory and final judgment appeals will go to the Federal Circuit." (emphasis added) (citation omitted)).

211. *Innotron*, 800 F.2d at 1084 n.13.

212. *See In re* Mark Indus., 751 F.2d 1219, 1222 (Fed. Cir. 1984) (noting that, because the district court's jurisdiction was based on § 1338, the Federal Circuit, "and only [the Federal

questionable reasoning and the odd procedural framework it embraced, it is not surprising that both the Federal Circuit and the regional circuits would strain to avoid its holding.

D. The Early Retreat from Innotron

For a short time, the Federal Circuit faithfully applied *Innotron* as its mandamus standard.[213] Three years after *Innotron*, however, the Ninth Circuit in *Kennecott Corp. v. U.S. District Court* faced a mandamus petition challenging a ruling that fell squarely within *Innotron*'s unreviewable category (2): an attorney-disqualification ruling in a patent case.[214] Even though the Federal Circuit in *Innotron* stated that it would not entertain mandamus petitions on that issue, the Ninth Circuit transferred the case to the Federal Circuit.[215]

Citing *Innotron*, the Ninth Circuit noted that "the Federal Circuit has taken a restrictive view on the scope of its authority to entertain petitions for mandamus which relate to procedural matters" and, thus, review via mandamus "is effectively unavailable in the Federal Circuit."[216] The Ninth Circuit observed, however, that in two recent cases involving interlocutory *appeals* under 28 U.S.C. § 1292, the Federal Circuit had reviewed attorney-disqualification issues.[217] Thus, even though the Federal Circuit, under *Innotron*, would not hear the disqualification issue on mandamus, the Ninth Circuit reasoned that the Federal Circuit would "quite likely" hear the issue on an interlocutory appeal.[218]

But even though the district judge had certified the issue for interlocutory appeal, the petitioner had filed only a mandamus petition in the Ninth Circuit.[219] Because the statutory deadline to file a new request for interlocutory appeal in the Federal Circuit had passed, the Ninth Circuit *transferred* the matter to the Federal Circuit with the apparent hope that the Federal Circuit would construe the mandamus petition as an application for interlocutory review.[220]

Kennecott illustrates the practical and doctrinal difficulties perpetuated by a restrictive view of Federal Circuit mandamus. First, the Federal Circuit would

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Circuit], has authority to issue a writ appropriately in aid of jurisdiction in this case").

213. *See In re* Calmar, Inc., 854 F.2d 461, 463 (Fed. Cir. 1988).

214. Kennecott Corp. v. U.S. Dist. Court, 873 F.2d 1292, 1292 (9th Cir. 1989); *see Innotron*, 800 F.2d at 1082 (disclaiming the ability to review on mandamus issues "that arise in all types of cases, but do not directly implicate the patent or Little Tucker Act doctrinal jurisprudence of this court (e.g., disqualification of counsel)").

215. *Kennecott*, 873 F.2d at 1293-94.

216. *Id.* at 1292-93.

217. *See id.* at 1293 (citing Atasi Corp. v. Seagate Tech., 847 F.2d 826 (Fed. Cir. 1988); Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332 (Fed. Cir. 1988)).

218. *Id.*

219. *Id.* at 1292-93.

220. *See id.* The Federal Circuit did as the Ninth Circuit hoped. *See* Kennecott Corp. v. Kyocera Int'l, Inc., Misc. No. 252, 1990 WL 28065, at *1 (Fed. Cir. Mar. 19, 1990) (accepting jurisdiction and affirming the disqualification decision).

unquestionably have exclusive jurisdiction over an appeal—even an interlocutory appeal—challenging an attorney-disqualification ruling in a case arising under the patent laws. Yet, under *Innotron*, the Federal Circuit would not consider that exact same issue via mandamus.

Second, the Ninth Circuit's decision to transfer the *Kennecott* case shows that, contrary to *Innotron*'s suggestion, it is highly unlikely that a regional circuit would or could grant mandamus when the district court's jurisdiction is based on § 1338. As discussed, the "[p]ower to issue writs of mandamus depends on power to entertain appeals when the case ends."[221] A regional circuit lacks the power to hear an appeal if a district court's jurisdiction is based on § 1338, so a regional circuit probably could not issue mandamus in that same case.[222] If the Federal Circuit were to persist in denying its mandamus power in such a case, perhaps a regional circuit would be persuaded to issue mandamus based on a pragmatic desire to avoid leaving the petitioner without any possible forum. But, as a purely doctrinal matter, such a practice would be hard to explain.

In light of these shortcomings, the Federal Circuit itself began to look for ways to avoid the framework of *Innotron*. In *In re Regents of the University of California*, the Regents sought mandamus review of an order of the Judicial Panel on Multidistrict Litigation consolidating five pending suits in the Southern District of Indiana.[223] In opposition to the petition, Genentech and Eli Lilly argued that the Federal Circuit lacked jurisdiction to review the transfer orders on mandamus.[224] Indeed, such orders fell squarely within *Innotron*'s unreviewable category (1).[225] But without citing *Innotron* on this point, the court rejected the jurisdictional argument.[226]

The court relied on the following syllogism:

(1) The Federal Circuit, as a general matter, has authority to issue mandamus in cases that fall within its appellate jurisdiction.[227]
(2) The Federal Circuit has considered questions of venue "when properly raised," citing cases in which the Federal Circuit considered the issue of venue *on appeal*.[228]
(3) Therefore, venue issues are within the Federal Circuit's jurisdiction

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221. *In re* BBC Int'l, Ltd., 99 F.3d 811, 813 (7th Cir. 1996).

222. I have been unable to locate any regional circuit decision granting mandamus on a non-patent issue in a patent case on the rationale that the Federal Circuit would not, under *Innotron*, consider that non-patent issue on mandamus.

223. *In re* Regents of the Univ. of Cal., 964 F.2d 1128, 1129 (Fed. Cir. 1992).

224. *Id.* at 1129-30.

225. *In re* Innotron Diagnostics, 800 F.2d 1077, 1082 (Fed. Cir. 1986) (disclaiming the ability to review on mandamus "transfer of [a] case to another district").

226. *Regents*, 964 F.2d at 1130.

227. *Id.*

228. *Id.* (citing Exxon Chem. Patents, Inc. v. Lubrizol Corp., 935 F.2d 1263 (Fed. Cir. 1991); VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990); Kahn v. Gen. Motors Corp., 889 F.2d 1078 (Fed. Cir. 1989)).

when raised on mandamus.[229]

This conclusion, however, is inconsistent with *Innotron*, which explicitly refused to entertain petitions regarding the "transfer of [a] case to another district."[230] Moreover, the syllogism is faulty on its face. The propositions (1) that the Federal Circuit has some mandamus authority and (2) that the Federal Circuit decides issues of venue on appeal do not invariably lead to the conclusion that the Federal Circuit will hear issues of venue on mandamus.

As I explain below, the restrictive view of Federal Circuit mandamus espoused by *Innotron* was ill-advised, and the broader view embraced by *Regents* is more desirable as a normative matter.[231] But that does not excuse the Federal Circuit from its institutional obligation to explain why it was departing from past precedent.[232] Moreover, by failing to engage the core question of *why* the court should issue mandamus on non-patent issues, the court missed the opportunity to more closely analyze and define the proper scope of Federal Circuit mandamus.

E. Innotron *Practically Overruled*

Although *Regents* initiated the demise of *Innotron*, two regional circuit decisions hastened it. In *In re BBC International Ltd.*, the Seventh Circuit transferred to the Federal Circuit a mandamus petition in a patent case that sought review of, among other things, a decision denying transfer of venue.[233] The court discounted *Innotron* by stating that *Innotron* did not deny authority to issue mandamus on non-patent issues, but simply expressed a "[dis]inclination to use [that] authority."[234] Likewise, the Ninth Circuit, in *Lights of America, Inc. v. U.S. District Court*, transferred a mandamus petition that challenged a district court action that fell within *Innotron*'s category (1): a reference to a special master.[235] Like the Seventh Circuit, the Ninth Circuit discounted *Innotron* by stating that it merely expressed a "(proper) reluctance" to issue extraordinary writs.[236]

In re Princo Corp.[237] presented the Federal Circuit itself with an opportunity

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229. *Id.* (citing *In re* Cordis Corp., 769 F.2d 733 (Fed. Cir. 1985)). In *Cordis*, a case decided a year before *Innotron*, the court denied a mandamus petition seeking dismissal for improper venue. *See Cordis*, 769 F.2d at 734.

230. *Innotron*, 800 F.2d at 1082.

231. *See infra* Part IV.A.

232. *See* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 31 (1976) ("The integrity of the process requires that courts state reasons for their decisions.").

233. *In re* BBC Int'l Ltd., 99 F.3d 811, 812 (7th Cir. 1996).

234. *Id.* at 813.

235. Lights of Am., Inc. v. U.S. Dist. Court, 130 F.3d 1369, 1370 (9th Cir. 1997); *see Innotron*, 800 F.2d at 1082 (disclaiming the ability to review on mandamus orders of "reference to master").

236. *Lights of Am.*, 130 F.3d at 1371.

237. 478 F.3d 1345 (Fed. Cir. 2007).

to confront *Innotron* and reconceptualize the scope of Federal Circuit mandamus. Despite the respondent's citation to *Innotron*, the court in *Princo* granted mandamus, holding that the district court had erroneously refused to stay a patent infringement case pending an investigation by the International Trade Commission.[238] The court acknowledged *Innotron*, but it framed the case not as a limit on Federal Circuit power, but rather as articulating a "discretionary exception" that, "if it exists at all, is exceptionally narrow."[239] Like the courts in *BBC* and *Lights of America*, the court in *Princo* focused on the negative task of explaining why *Innotron* did not apply instead of answering the positive question of why a broad use of mandamus by the Federal Circuit is normatively appropriate.

The lengths to which the courts have gone to distinguish and downplay *Innotron* make clear that its limitations on Federal Circuit mandamus are unworkable. Yet *Innotron* remains on the books and is cited in authoritative treatises.[240] Parties opposing mandamus in the Federal Circuit also continue to cite *Innotron* in support.[241] Given this conflicting case law, the preeminent treatise on federal jurisdiction and procedure laments the "unsettled" relationship between Federal Circuit and regional circuit writ authority.[242]

Not only is this current state of the law confusing to litigants, it reflects no thought about the doctrinal and policy considerations that might define the proper scope of mandamus in the Federal Circuit. The consequence of the Federal Circuit's incessant relegation of *Innotron* is that the court, without engaging in a conscious analysis of the optimal use of its mandamus power, has developed a *de facto* standard under which it will issue mandamus on *any* non-patent issue that arises in a patent case, so long as the petition meets the substantive requirements for the writ.[243] In the next part, I contend that the Federal Circuit's recent venue decisions illustrate the shortcomings of this broad, unthinking approach.

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238. *Id.* at 1347.

239. *Id.* at 1352.

240. *See* 16 WRIGHT ET AL., *supra* note 6, § 3932 (citing *Innotron* for the proposition that the Federal Circuit "will not . . . use [mandamus] to supervise or oversee the district courts, nor to resolve issues that arise in all types of cases and do not directly implicate the Federal Circuit's patent . . . jurisprudence"); *see also* ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 1206 nn.252 & 255 (8th ed. 2007).

241. *See, e.g.*, *Princo*, 478 F.3d at 1352; Lear Corp.'s Combined Petition for Panel Rehearing and Rehearing En Banc at 3-5, 10-12, *In re* TS Tech. USA Corp., 551 F.3d 1315 (Fed. Cir. 2009) (Misc. No. 2009-888), 2009 WL 329935; *see also* Reply in Support of Petition for a Writ of Certiorari at 4 n.4, 7, MedioStream, Inc. v. Acer Am. Corp., 131 S. Ct. 2447 (2011) (No. 10-1090), 2011 WL 1479065.

242. 15A WRIGHT ET AL., *supra* note 6, § 3903.1.

243. *See Princo*, 478 F.3d at 1352.

III. SUPERVISORY PLUS MANDAMUS

Although the Federal Circuit has never overruled *Innotron*, it continues to expand its use of mandamus. The court's recent, repeated grant of mandamus to overturn the venue decisions of the Eastern District of Texas is an unprecedented use of supervisory mandamus by the Federal Circuit. In pioneering this radical use of the writ, which I identify as a new "supervisory plus" theory of mandamus, the court has let pass by an opportunity to make a clarifying statement about mandamus in the Federal Circuit.

I begin this part with background on the Eastern District of Texas and its surprisingly large patent docket. I then summarize the Federal Circuit's recent venue decisions, highlighting the inconsistencies that flow from the lack of clear, guiding principles for Federal Circuit mandamus on non-patent issues. These inconsistencies, I contend, confirm the need for the reconceptualized model of Federal Circuit mandamus that I describe in Part IV.

A. Patent Litigation in the Eastern District of Texas—the "Renegade Jurisdiction"

Despite Congress's effort to curb forum shopping in patent cases by creating the Federal Circuit, the court decides only a small fraction of all patent cases.[244] Moreover, even in cases that are appealed, a district judge makes scores of discretionary decisions that are effectively unreviewable on appeal but that, when considered as a whole, significantly impact the outcome of the case.[245] Although district courts are required to apply Federal Circuit law to patent issues, little question exists that patent holders are more likely to win in certain federal judicial districts than in others.[246]

At the fore of the debate over forum shopping is the Eastern District of Texas.[247] One might not expect patent litigation to comprise much of the docket

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244. *See* Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 271 (2006) (noting that about fifteen percent of patent cases are terminated by an appealable court decision); *accord* Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 405 (2010). Thus, at most, only fifteen percent of all patent cases are appealed to the Federal Circuit, although the actual number is certainly smaller. *See* Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 397 tbl.6 (2000) (indicating that fifty-one percent of patent cases terminated after a trial were appealed).

245. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 340 (1996).

246. *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 892 (2001); *see also* Ted Sichelman, *Myths of (Un)certainty at the Federal Circuit*, 43 LOYOLA L.A. L. REV. 1161, 1171 (2010) (noting that, while the Federal Circuit has improved doctrinal uniformity, "forum shopping remains a pernicious feature of . . . patent litigation").

247. *See* Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 195 (2007).

of a court headquartered in Tyler, Texas, with judges also sitting in Marshall (where most of the patent cases are filed),[248] Texarkana, Plano, and Beaumont.[249] Yet, in the past decade, more patent cases have been filed in the Eastern District of Texas than in all but three other large, urban federal judicial districts that are technology centers: the Central District of California (Los Angeles), the Northern District of California (San Francisco), and the Northern District of Illinois (Chicago).[250] Indeed, patent litigation has helped revitalize Marshall's economy, which once thrived on the oil, natural gas, and railroad businesses, but had fallen on hard times by the late 1990s.[251]

Why would so many high-technology cases and high-powered litigants and lawyers end up in the self-proclaimed Pottery Capital of the World?[252] The literature offers two common explanations. The first attributes the Eastern District's patent docket to the court's judges and the local rules they have adopted. Patent cases are often high-stakes affairs that present challenging legal questions. As a result, the cases are highly desirable for judges in a relatively rural area like the Eastern District.[253] Moreover, the Eastern District's judges show great enthusiasm for patent cases.[254] And the court's system for assigning cases to its judges permits plaintiffs to predict with a great deal of certainty which judge will hear their case.[255] In addition, the court was one of the first districts to adopt

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248. *See* Julie Creswell, *So Small a Town, So Many Patent Cases*, N.Y. TIMES, Sept. 24, 2006, at B1.

249. *See* Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 120 (2008) [hereinafter Nguyen, *Renegade Jurisdiction*] (discussing the geography of the Eastern District); U.S. DIST. COURT E. DIST. TEXAS, http://www.txed.uscourts.gov (last visited Mar. 2, 2012) (providing information about the court and its judges).

250. Lemley, *supra* note 244, at 405.

251. *See* Creswell, *supra* note 248.

252. Barry Popik, *Pottery Capital of the World (Marshall Nickname)*, BIG APPLE (Mar. 20, 2008), http://www.barrypopik.com/index.php/new_york_city/entry/pottery_capital_of_the_world_marshall_nickname.

253. *See* Nguyen, *Renegade Jurisdiction*, *supra* note 249, at 136-38.

254. *See id.* at 136 n.116.

255. *See* General Order Assigning Civil and Criminal Actions 11-13 (E.D. Tex. Oct. 3, 2011) (indicating, for example, that 95% of patent cases filed in the Tyler division will be assigned to Judge Davis, that 100% of patent cases filed in the Beaumont or Lufkin divisions will be assigned to Judge Clark, and that all cases filed in Marshall and Texarkana will be assigned to Chief Judge Folsom), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20937. With Judge Folsom's retirement in March 2012, the ability to "judge shop" may be somewhat reduced. *See* General Order Assigning Civil and Criminal Actions 12-3 (E.D. Tex. Jan. 17, 2012) (indicating that civil cases filed in Marshall and Texarkana will be split between Judge Schneider and Judge Gilstrap), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=21694. Judicial assignments in the Eastern District might also be affected by the Eastern District's participation in the Patent Pilot Program, which, in essence, allows certain judges to express a preference for hearing patent cases and allows other judges to decline to hear patent cases. *See District Courts Selected for Patent Pilot Program*, ADMIN. OFF. U.S. CTS. (June 7, 2011),

special local rules for patent cases,[256] which have made the court's docket particularly fast-moving.[257] The court's enthusiasm for patent cases, coupled with the restorative effect of patent litigation on Marshall's economy, fueled the popular notion that the judges of the Eastern District were unduly reluctant to transfer patent cases to more convenient fora under § 1404(a).[258] But recent empirical studies have somewhat undermined this notion, suggesting that the Eastern District transfers about the same percentage of its patent cases as other judicial districts.[259]

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http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx; *see also* Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011).

Predictability in the assignment of cases has long been important for litigants choosing a venue in a patent case. In the 1990s, one of the most popular forums for patent litigation was the Alexandria division of the Eastern District of Virginia, due to its fast-moving docket and proximity to Washington, D.C. *See* Nguyen, *Renegade Jurisdiction*, *supra* note 249, at 132-34. The division's popularity quickly faded, however, after its district enacted a district-wide assignment system for patent cases, under which a patent case filed in Alexandria could be assigned to the Richmond, Newport News, or Norfolk divisions. *See* Michael W. Robinson, *Recent Developments in Patent Litigation in the Eastern District of Virginia*, VENABLE LLP (Jan. 1, 1999), http://www.venable.com/recent-developments-in-patent-litigation-in-the-eastern-district-of-virginia-01-01-1999.

256. *See* Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 476-77 (2010) [hereinafter Nguyen, *Dynamic Federalism*]; E.D. TEX. LOCAL R. app. M.

257. *See* Gregory A. Castanias et al., *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court*, 56 AM. U. L. REV. 793, 983 (2007); *see also* Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 305, 313 (2011) (comparing case-resolution times in the Eastern District and other popular patent districts over the past twenty years and concluding that "the Eastern District of Texas historically has had a relatively quicker time to jury verdict than many other popular patent districts" but that "[i]t has not been . . . the fastest"). For a discussion by now-retired Judge T. John Ward of the origins of the patent rules, see Symposium on Emerging Intellectual Property Issues, *The History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, to the First* Markman *Hearing, to the Present*, 14 SMU SCI. & TECH. L. REV. 253, 255-56 (2011).

258. *See* 28 U.S.C. § 1404(a) (2006) (permitting transfer "[f]or the convenience of parties and witnesses" and "in the interest of justice . . . to any other district or division where it might have been brought"); Robert A. Matthews, Jr., *Update—Transfer of Venue in the E.D. Texas*, PAT. HAPPENINGS, Dec. 2009, at 4, 4-7, *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=52cc121b-d1f4-4ad5-829b-21dc66802091; *accord* Durham, *supra* note 1, at 12; Leychkis, *supra* note 247, at 216; Offen-Brown, *supra* note 1, at 73-74; Zhu, *supra* note 1, at 905-06.

259. *See* Paul M. Janicke, *Venue Transfers from the Eastern District of Texas: Case by Case or an Endemic Problem?*, LANDSLIDE, Mar.-Apr. 2010, at 16, 18-19 [hereinafter Janicke, *Venue Transfers*] (arguing, based on data from 2006 and 2007, that the view that it was "impossible, or nearly so, to get a patent infringement case transferred out of the Eastern District of Texas . . . had

A second explanation for the Eastern District's popularity stems from the favorable results obtained by plaintiffs in that court. As the court's patent docket exploded during the early 2000s, the court developed a reputation for having juries and judges that were particularly favorable for patent holders.[260] In a famous exchange during oral argument in *eBay, Inc. v. MercExchange, L.L.C.*, Carter Phillips and Justice Scalia both took shots at the Eastern District. Phillips complained that a Federal Circuit rule providing for nearly automatic injunctions upon a finding of infringement was particularly harmful to defendants in the Eastern District because "no patent has ever been declared invalid in that jurisdiction, and no patent has []ever been found not to infringe."[261] Justice Scalia responded by stating, "that's a problem with Marshall, Texas" but that it might not be appropriate to strike down the automatic-injunction rule simply "because we have some renegade jurisdictions."[262]

In short, conventional wisdom offers two reasons for the attractiveness of the Eastern District as a patent-litigation forum: (1) a fast-moving docket, often attributed to the court's special patent rules (which stem from the judges' enthusiasm for patent cases) and (2) patent-holder-friendly judges and juries. Mark Lemley has suggested that, as an empirical matter, the basis for the first rationale is currently debatable—the Eastern District might no longer be a

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little validity"); Paul M. Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift?*, 11 N.C. J.L. & TECH. ONLINE 1, 19-23 (2009) [hereinafter Janicke, *Patent Venue*] (reaching a similar conclusion based on data from 2005 to 2008); *see also* Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, 80 GEO. WASH. L. REV. (forthcoming 2012) (unpublished manuscript on file with the author) (finding, consistent with Janicke's studies, that the Eastern District grants about forty-eight percent of transfer motions filed in non-declaratory judgment cases); Symposium on Emerging Intellectual Property Issues, *Tribalism and Customary Practices of the EDTX*, 14 SMU SCI. & TECH. L. REV. 239, 247 (2011) (providing discussion by Michael E. Jones, long-time practitioner in the Eastern District, regarding his personal success with transfer motions, noting that the "idea that the judges will never transfer the case is just not true").

260. *See* Michael H. Baniak et al., *IP Litigation in the 21st Century*, 6 NW. J. TECH. & INTELL. PROP. 293, 298 (2008); Donald R. Dunner, *The U.S. Court of Appeals for the Federal Circuit: Its Critical Role in the Revitalization of U.S. Patent Jurisprudence, Past, Present, and Future*, 43 LOYOLA L.A. L. REV. 775, 781-82 (2010); Leychkis, *supra* note 247, at 206; Daniel Fisher, *Plaintiff Paradise*, FORBES, Aug. 19, 2009, http://www.forbes.com/forbes/2009/0907/outfront-patent-law-texas-plaintiff-paradise.html.

261. Transcript of Oral Argument, *supra* note 14, at 10; *see also* Leychkis, *supra* note 247, at 211-12 tbl.7 (listing patent jury trials in the Eastern District from 1999 to 2006, and showing that no defendant prevailed until two defendants won in the summer of 2006).

262. Transcript of Oral Argument, *supra* note 14, at 10-11. If the Eastern District were truly a "renegade" in that it disregarded the law of patent infringement and validity, one would expect the court to be frequently reversed on appeal. But at least one study suggests that the Eastern District's affirmance rate is actually above average. *See* Iancu & Chung, *supra* note 257, at 306-07 (calculating that, from 1991 to 2010, the Federal Circuit affirmed in full 61% of appeals from the Eastern District, slightly above the national average for all Federal Circuit patent cases).

"rocket docket."[263] However, available data tends to support the notion that patent holders fare particularly well in the Eastern District. Out of judicial districts with more than twenty-five patent cases concluded in the past decade, the Eastern District ranks sixth in percentage of wins by claimants.[264] And, almost as importantly, patent cases make it to trial in the Eastern District more frequently than any other district besides the District of Delaware.[265] Because accused infringers in the Eastern District are particularly unsuccessful in prevailing on dispositive pre-trial motions,[266] more cases are ultimately decided by juries, which are relatively sympathetic to claims of patent infringement.[267]

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263. See Lemley, *supra* note 244, at 424 tbl.9, showing that the Eastern District of Texas ranks twenty-eighth among federal judicial districts in time to resolution in patent cases. Lemley reasons that the district's low ranking "is likely a function of congestion resulting from its popularity as a patent forum." *Id.* at 415. Lemley's statistics also show, however, that the Eastern District ranks seventh among judicial districts in time to trial. *Id.* at 419 tbl.7. In part because of the relatively average speed with which the Eastern District currently tries and resolves patent cases, Lemley concludes that the district is overvalued as a forum for patent holders. *Id.* at 428; *accord* Baniak et al., *supra* note 260, at 298. Patent holders may finally be catching on, as the number of patent cases filed in the Eastern District declined from 359 in the twelve-month period ending September 30, 2007, to 322 in the twelve-month period ending September 30, 2008, to 242 in the twelve-month period ending September 30, 2009. *See* JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 192 tbl.C-11 (2009); JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 197 tbl.C-11 (2008); JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 199 tbl.C-11 (2007); *see also* Offen-Brown, *supra* note 1, at 70 tbl.1 (documenting the Eastern District's patent case load from 2002 to 2009). *But cf.* Douglas C. Muth et al., *The Local Patent Rules Bandwagon*, 21 INTELL. PROP. & TECH. L.J., Aug. 2009, at 19 (arguing that the enactment of local patent rules in many other districts over the past four years has siphoned cases away from the Eastern District).

In 2010, however, the number of patent-case filings in the Eastern District increased to 446. *See* JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 195 tbl.C-11 (2010) [hereinafter 2010 AO REPORT]. Some of this number may be attributable to an increase in *qui tam* cases alleging false marking. *See* Forest Group, Inc. v. Bon Tool Co., 590 F.3d 1295, 1304 (Fed. Cir. 2009) (holding that the statutory fine under 35 U.S.C. § 292 for marking as "patented" an unpatented article must be imposed on each individual article falsely marked, up to the statutory maximum of $500 per article), *abrogated in part by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 16(b), 125 Stat. 284, 329 (2011) (to be codified at 35 U.S.C. § 292) (eliminating *qui tam* false marking suits). However, at least one commentator has concluded that, even excluding false marking cases, the Eastern District saw an increase in filings from 2009 to 2010. *See* James Pistorino, *Concentration of Patent Cases in Eastern District of Texas Increases in 2010*, 81 PAT. TRADEMARK & COPYRIGHT J. (BNA) 803 tbls.2-3 (2011) (using data culled from PACER).

264. Lemley, *supra* note 244, at 424 tbl.9.

265. *Id.* at 419 tbl.7.

266. *See* Iancu & Chung, *supra* note 257, at 317; Leychkis, *supra* note 247, at 216.

267. *See* Iancu & Chung, *supra* note 257, at 305.

In short, while the judges and juries of the Eastern District might not be as categorically pro-patent as advocates for infringement defendants might suggest,[268] the available data suggests that a patent holder will, as a general matter, fare better in the Eastern District than in many other district courts.

B. Federal Circuit Supervision of the Eastern District's Venue Decisions

Under the conventional view, the Eastern District protected its large patent docket by being disinclined to transfer cases to other districts.[269] Since December 2008, however, the Federal Circuit has seemingly tried to change the Eastern District's perceived reluctance to transfer. Seizing on an en banc opinion of the Fifth Circuit in a tort case,[270] the Federal Circuit has, since December 2008, granted ten mandamus petitions seeking transfer of patent cases out of the Eastern District, after having never ordered transfer on mandamus in the court's first twenty-six years of existence.[271] This dramatic expansion in the availability of an extraordinary writ, coupled with inconsistencies in the court's mandamus case law, warrants a clarifying statement by the Federal Circuit about the standards for mandamus. The need for a clarifying statement is underscored by the court's recent, pathbreaking decision to use mandamus to order a court *besides* the Eastern District of Texas to transfer venue.

*1. The Fifth Circuit Lays the Foundation (*Volkswagen*).*—The Federal Circuit's mandamus revolution began in the Fifth Circuit, with that court's en banc ruling in *In re Volkswagen of America, Inc.*[272] In a 10-7 decision, the Fifth Circuit granted mandamus and ordered the Eastern District of Texas to transfer to the Northern District of Texas a tort case that arose out of a traffic accident in the Northern District.[273] In reviewing the Eastern District's refusal to transfer,

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268. *Compare id.* (calculating that patentees win seventy-three percent of jury trials in the Eastern District, only slightly above the national average of sixty-eight percent), *and* Nguyen, *Renegade Jurisdiction*, *supra* note 249, at 138-39, 142-43 (discussing Eastern District rulings and verdicts in favor of accused infringers), *with* Sam Williams, *A Haven for Patent Pirates*, TECH. REV. (Feb. 3, 2006), http://www.technologyreview.com/printer_friendly_article.aspx?id=16280 (discussing the views of advocates for infringement defendants, concluding that "plaintiffs have such an easy time winning patent-infringement lawsuits [in the Eastern District] . . . that defendants often choose to settle rather than fight"), *and* Brief for Amicus Curiae American Intellectual Property Law Association in Support of Petitioners at 1, *In re* Volkswagen of Am., Inc., 545 F.3d 304 (5th Cir. 2008) (en banc) (No. 07-40058), 2008 WL 7789554 [hereinafter AIPLA *Volkswagen* Amicus Brief] (noting "the widespread belief that the Eastern District of Texas is a plaintiff-friendly venue that provides a substantial litigation advantage to a patent holder").

269. *See, e.g.*, Janicke, *Patent Venue*, *supra* note 259, at 4.

270. *Volkswagen*, 545 F.3d 304.

271. *See supra* note 16 and accompanying text; *cf. In re* Holmes, Misc. No. 352, 1992 WL 349347, at *1 (Fed. Cir. Oct. 14, 1992) (granting mandamus petition from denial of transfer, but ordering only that the district court reconsider its initial denial).

272. 545 F.3d 304.

273. *Id.* at 307.

the Fifth Circuit applied the eight public and private interest factors of *Gulf Oil Corp. v. Gilbert*,[274] a seminal forum non conveniens case.[275] To the Fifth Circuit, the most critical factors were (1) "the relative ease of access to sources of proof," (2) "the availability of compulsory process to secure the attendance of witnesses," (3) "the cost of attendance for willing witnesses," and (4) "the local interest in having localized interests decided at home."[276] The Fifth Circuit determined that the Eastern District had misapplied these factors, granted mandamus, and ordered transfer to the Northern District.[277]

Notably, on the "sources of proof" factor, the Fifth Circuit criticized the district court for emphasizing that technological advances in document storage and evidence transportation reduced the difference in convenience between the Northern and Eastern Districts.[278] Accusing the district court of "read[ing] the sources of proof requirement out of the § 1404(a) analysis," the court emphasized that all of the documents and physical evidence, as well as the accident site, were in the Northern District, favoring transfer.[279] Also, on the "cost of attendance for willing witnesses" factor, the Fifth Circuit stated that it had adopted a "100-mile" rule, which provided that "[w]hen the distance between an existing venue for trial . . . and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled."[280] Because the trial venue in the Eastern District was 155 miles from Dallas, the Fifth Circuit reasoned that this factor, too, weighed in favor of transfer.[281]

The Fifth Circuit's traditionalist view of the "sources of proof" factor and its formalistic 100-mile rule could be fairly criticized in an era when e-discovery and e-filing are the reality and travel costs vary based on many factors besides sheer distance.[282] Moreover, the plaintiffs lived in the Eastern District when the accident occurred, and many key witnesses remained there.[283] Although a full critique of *Volkswagen* is beyond the scope of this Article, the salient point as relevant to Federal Circuit mandamus is that the proper outcome of the § 1404(a) analysis was at least debatable. Whether the district court was right or wrong to deny transfer, it is hard to see how Volkswagen's right to transfer was "clear and

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274. 330 U.S. 501 (1947).

275. *Volkswagen*, 545 F.3d at 315.

276. *Id.* at 315-16 (internal quotation marks omitted). The other *Gulf Oil* factors include: practical problems making trial expeditious and inexpensive, court congestion, the forum's familiarity with the governing law, and the avoidance of unnecessary conflict-of-laws problems. *Id.* at 315.

277. *Id.* at 316-18.

278. *Id.* at 316.

279. *Id.*

280. *Id.* at 317 (quoting *In re* Volkswagen AG, 371 F.3d 201, 204-05 (5th Cir. 2004) (internal quotation marks omitted)).

281. *Id.*

282. *See id.* at 322 (King, J., dissenting).

283. *See id.*

indisputable," as the Supreme Court requires for mandamus to issue.[284] Yet the Fifth Circuit granted the writ.

*2. An Unprecedented Grant of Mandamus by the Federal Circuit (*TS Tech*) and Early Hints at Instability (*Telular *and* Genentech*).*—Although *Volkswagen* was a tort case, the American Intellectual Property Law Association appeared as amicus curiae, urging the Fifth Circuit to grant mandamus because the "plaintiff-friendly" Eastern District was too reluctant to transfer patent cases.[285] And indeed, *Volkswagen* has played a central role in the Federal Circuit's mandamus revolution. For one, it signaled to the Federal Circuit that the Fifth Circuit was willing to grant the writ in debatable circumstances, especially in cases from the Eastern District. Moreover, because the Federal Circuit had effectively abandoned any Federal Circuit-specific limitations on the availability of mandamus (such as those articulated in *Innotron*), granting mandamus to overturn Eastern District venue decisions now required no more than analogizing to *Volkswagen*, since transfer of venue is a non-patent issue that is controlled by regional circuit law.

That is exactly what the Federal Circuit did in its first mandamus decision granting transfer of venue, *In re TS Tech USA Corp.*, decided in December 2008.[286] In that case, Lear Corp. sued TS Tech in the Eastern District of Texas for patent infringement.[287] TS Tech filed a motion to transfer the case to the Southern District of Ohio, which the district court denied.[288] On TS Tech's petition for mandamus, the Federal Circuit ordered transfer.[289]

The Federal Circuit hewed very close to *Volkswagen*. In an order written by Judge Rader, the court determined that the Eastern District misapplied three of the four § 1404(a) factors that the district court had misapplied in *Volkswagen*.[290] Notably, on the "cost for witnesses" factor, the court stated that district court ignored the 100-mile rule by downplaying the significance of the additional distance between Texas and the key witnesses, who resided in Ohio, Michigan, and Canada.[291] Moreover, the Federal Circuit, like the Fifth Circuit in *Volkswagen*, determined that the district court "read[] out of the § 1404(a) analysis" the "sources of proof" factor, when it emphasized that many of the

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284. Cheney v. U.S. Dist. Court, 542 U.S. 367, 380-81 (2004).

285. AIPLA *Volkswagen* Amicus Brief, *supra* note 268, at 1-2. In response, a group of intellectual property lawyers from the Eastern District filed an amicus brief arguing against mandamus. *See* Brief for Amicus Curiae Ad Hoc Committee of Intellectual Property Trial Lawyers in the Eastern District of Texas in Support of Respondents at 21, *Volkswagen*, 545 F.3d 304 (No. 07-40058), 2008 WL 7789556 ("The Eastern District has unjustly garnered a reputation as a place where large corporations are dragged against their will, particularly in patent cases, and given a good thrashing. This reputation is largely a myth.").

286. *In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008).

287. *Id.* at 1318.

288. *Id.*

289. *Id.*

290. *Id.* at 1319-21.

291. *Id.* at 1320.

relevant documents were stored electronically.[292]

In the wake of *TS Tech*, the Federal Circuit faced an onslaught of mandamus petitions seeking transfer out of the Eastern District. The court's next mandamus decision was an unpublished order in *In re Telular Corp.*[293] In *Telular*, the court denied a petition seeking transfer from the Eastern District of Texas to the Northern District of Illinois.[294] Although the court again applied Fifth Circuit law, the court emphasized a stringent standard found only in a footnote in *Volkswagen* and found nowhere in *TS Tech*. The court noted that it will not grant a mandamus petition "[u]nless it is clear that the facts and circumstances are without any basis for a judgment of discretion."[295] The court continued: "In other words, we will deny a petition '[i]f the facts and circumstances are rationally capable of providing reasons for what the district court has done.'"[296]

If the courts had emphasized such a stringent standard in *Volkswagen* or *TS Tech*, those cases might have turned out differently. Perhaps the district courts reached the wrong result in those cases, but the courts certainly provided reasons for denying transfer that were at least rational. Justifications such as the ease of transporting evidence and witnesses might not be persuasive to an appellate court deciding the issue de novo, but surely they meet the minimal standard of rationality set forth in *Telular*.

Viewed together, *TS Tech* and *Telular* might hint that, although the Federal Circuit was applying Fifth Circuit law, its mandamus analysis was more dynamic. The Federal Circuit's next significant encounter with mandamus explicitly embraced a more context-sensitive analysis. In *In re Genentech, Inc.*, the defendants sought an order directing the Eastern District of Texas to transfer a patent infringement case brought by Sanofi-Aventis to the Northern District of California.[297] The district court had denied transfer.[298] While the defendants were headquartered in California and several witnesses lived in California, many other witnesses and documents were scattered throughout the United States and Europe.[299] So, the district court reasoned, Texas was a convenient, central location for trial.[300]

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292. *Id.* at 1320-21.

293. 319 F. App'x 909 (Fed. Cir. 2009).

294. *Id.* at 912.

295. *Id.* at 911 (citing *In re* Volkswagen of Am., Inc., 545 F.3d 304, 317 n.7 (5th Cir. 2008) (en banc)).

296. *Id.* at 911-12 (quoting *Volkswagen*, 545 F.3d at 317 n.7 (alteration in original)).

297. *In re* Genentech, Inc., 566 F.3d 1338, 1341 (Fed. Cir. 2009). On the same day the court issued *Genentech*, the court decided *In re Volkswagen of America, Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009), in which the court denied a mandamus petition seeking transfer from the Eastern District of Texas to the Eastern District of Michigan. The court emphasized that two other, similar infringement cases were already pending in the Eastern District of Texas. *Id.*

298. Sanofi-Aventis Deutschland GmbH v. Genentech, Inc., 607 F. Supp. 2d 769, 781 (E.D. Tex.), *mandamus granted sub nom. In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009).

299. *Id.* at 775-77.

300. *Id.* at 777.

The Federal Circuit disagreed.[301] Much of the Federal Circuit's opinion concerns the district court's analysis of the convenience to the parties and witnesses. The district court had strictly applied the 100-mile rule, noting that it would be more convenient for European witnesses to travel to Texas than to California.[302] The Federal Circuit criticized the district court on this point, noting instead that the 100-mile rule "should not be rigidly applied" in this case, because the European witnesses would have to travel a long distance regardless.[303] The court applied a similar analysis on the "sources of proof" factor, emphasizing that Sanofi's documents would have to be transported from Europe and the East Coast whether the case was tried in Texas or California.[304]

TS Tech, *Telular*, and *Genentech* reveal some doctrinal instability beneath the Federal Circuit's initial foray into reviewing the Eastern District's decisions on transfer of venue. In *TS Tech*, the court deferred to the Fifth Circuit's formalist transfer rules,[305] but in *Genetech* the court downplayed the rigidity of those rules.[306] And, in *Telular*, the court announced a "rationality" standard for mandamus relief[307] that the petitioners in *TS Tech* and *Genetech* would have been hard pressed to meet, had the court applied it.

*3. Instability Entrenched (*Hoffman-La Roche*,* Nintendo*,* VTech*,* Apple*, and* Acer*)*.—The court next granted transfer in *In re Hoffman-La Roche Inc.*[308] and *In re Nintendo Co.*[309] While *Hoffman-La Roche* presented a reasonably strong case for transfer,[310] *Nintendo* was closer. In *Nintendo*, Motiva, an Ohio corporation, sued Nintendo Co. (a Japanese corporation headquartered in Japan) and Nintendo of America Inc. (a Washington corporation headquartered in Redmond, Washington) (collectively, "Nintendo"), alleging that the Nintendo Wii infringed a patent owned by Motiva.[311] Nintendo sought transfer to the Western District of Washington.[312] Although the district court concluded that the "cost for attendance of willing witnesses factor slightly favor[ed] transfer, and the 'local interest' factor strongly favor[ed] transfer," the district court nevertheless denied transfer because, unlike in *Genentech* and *TS Tech*, Nintendo had not shown that the vast majority of documents and witnesses were located

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301. *See Genentech*, 566 F.3d 1338.

302. *Id.* at 1344.

303. *Id.*

304. *See id.* at 1346.

305. *See In re* TS Tech USA Corp., 551 F.3d 1315, 1320-22 (Fed. Cir. 2008).

306. *See Genentech*, 566 F.3d at 1344-46.

307. *In re* Telular Corp., 319 F. App'x 909, 912 (2009).

308. 587 F.3d 1333, 1335 (Fed. Cir. 2009).

309. 589 F.3d 1194, 1201 (Fed. Cir. 2009).

310. In *Hoffman-La Roche*, the Federal Circuit granted transfer from the Eastern District of Texas to the Eastern District of North Carolina. *Hoffman-La Roche*, 587 F.3d at 1335. As in *TS Tech*, the case had no connection to Texas. *Id.* at 1336-37. Rather, much of the evidence was located in North Carolina and many of the key witnesses lived there. *Id.*

311. *Nintendo*, 589 F.3d at 1196-97.

312. *Id.* at 1197.

near the transferee court.[313] Rather, there were witnesses and documents in Japan and at various locations throughout the United States.[314] The Federal Circuit disagreed and ordered transfer.[315]

The Federal Circuit's application of the "cost for witnesses" and "sources of proof" factors in *Nintendo* is debatable. The Federal Circuit claimed that the "cost for witnesses" factor "clearly" favored transfer,[316] but it is hard to see how this is so. Four potential witnesses lived in Washington, four lived in Japan, one lived in Ohio, and one lived in New York.[317] There is no doubt a Washington trial would have been more convenient for the four Washington witnesses. But given that the witnesses from Japan would have to travel a substantial distance regardless (an argument similar to that advanced by the Federal Circuit in granting transfer in *Genentech*) and that the Ohio and New York witnesses would have to travel *farther* for a Washington trial, it is hard to see how this factor "clearly" favored transfer.[318]

Similarly, on the "sources of proof" factor, the Federal Circuit gave substantial weight to Nintendo's claim that most of Nintendo of America's relevant documents were located in Washington.[319] But the record also showed that Nintendo's research and development documents were located in Japan.[320] Thus, many of the relevant documents would have to travel a significant distance, regardless of where the trial was held. Certainly, a trial in Washington may have been marginally more convenient. But it is hard to see how this factor weighed "heavily" in favor of transfer, as the Federal Circuit asserted.[321]

The court's emphasis on the two factors it viewed as particularly important suggests an analysis more complex than simply applying *Volkswagen*. Yet the face of the *Nintendo* opinion does not explicitly reflect consideration of issues specific to the Federal Circuit or to patent litigation. If the court had engaged in this reflection, it might have realized, for example, that it was setting an unusual precedent by granting mandamus a fourth time in six months on the same issue decided by the same district court.

Although the court denied the next two petitions it decided,[322] the decisions still do not reflect any introspection. Instead, they exhibit more doctrinal instability. In *In re VTech Communications, Inc.*, the court, as it had done in *Telular*, presaged its denial of the petition by framing the legal standard much

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313. Motiva LLC v. Nintendo Co., No. 6:08-CV-429, 2009 WL 1882836, at *6 (E.D. Tex. June 30, 2009), *mandamus granted sub nom. In re* Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009).

314. *Id.*

315. *Nintendo*, 589 F.3d at 1196.

316. *Id.* at 1199.

317. *Id.* at 1197.

318. *See id.* at 1199.

319. *Id.*

320. *Id.*

321. *Id.* at 1199-200.

322. *See In re* Apple Inc., 374 F. App'x 997 (Fed. Cir. 2010); *In re* Vtech Commc'ns, Inc., Misc. No. 909, 2010 WL 46332, at *1 (Fed. Cir. Jan. 6, 2010).

more stringently than in cases in which the court had granted petitions.[323] Then, in *In re Apple Inc.*, the court framed the standard in even more stringent terms:

> Applying Fifth Circuit law in cases arising from district courts in that circuit, this court has held that mandamus may be used to correct a patently erroneous denial of transfer. That standard is an exacting one, requiring the petitioner to establish that the district court's decision amounted to a failure to meaningfully consider the merits of the transfer motion.[324]

The court has repeated this new, "failure to meaningfully consider the merits" standard in at least two subsequent orders denying mandamus.[325] The stringent standards that the Federal Circuit has sometimes applied in denying mandamus are the simplest illustrations of the need for a clarifying statement by the Federal Circuit about its mandamus standards.

*4. Capitalizing on Federal Circuit Expertise (*Zimmer*,* Microsoft*, and* Vistaprint*).*—While the Federal Circuit may have thus far passed on opportunities to reframe the role of mandamus, some of the court's more recent decisions hint at a more refined analysis. In *In re Vistaprint Ltd.*, for example, the Federal Circuit disclaimed an interpretation of *Nintendo* that would prohibit denying transfer based on judicial economy when all of the convenience factors favor transfer.[326] The court upheld the Eastern District's denial of transfer because, even though many of the relevant witnesses and documents were located in the proposed transferee district (Massachusetts), the Eastern District had substantial experience with the patent-in-suit from prior litigation and a co-pending case involving the same technology and patent.[327]

The more context-sensitive holding of *Vistaprint*[328] built on the court's prior decision in *In re Zimmer Holdings, Inc.*,[329] which rejected a plaintiff's attempt to manipulate venue by establishing an office in the Eastern District—at the same location as another of its litigation counsel's clients.[330] The district court had denied Zimmer's motion to transfer, refusing to consider whether the plaintiff

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323. *VTech Commc'ns*, 2010 WL 46332, at *1 ("Unless it is clear that the facts and circumstances are without any basis for a judgment of discretion, we will not proceed further in a mandamus petition to examine the district court's decision. In other words, we will deny a petition '[i]f the facts and circumstances are rationally capable of providing reasons for what the district court has done.'" (quoting *In re* Volkswagen of Am., Inc., 545 F.3d 304, 317 n.7 (5th Cir. 2008) (en banc) (alteration in original))).

324. *Apple*, 374 F. App'x at 998-99 (citations omitted).

325. *See In re* Simpson Strong-Tie Co., 417 Fed. App'x 941, 943 (Fed. Cir. 2011); *In re* Echostar Corp., 388 F. App'x 994, 995 (Fed. Cir. 2010).

326. *In re* Vistaprint Ltd., 628 F.3d 1342, 1345-46 (Fed. Cir. 2010).

327. *Id.* at 1346-47.

328. *See id.*

329. 609 F.3d 1378 (Fed. Cir. 2010).

330. *Id.* at 1379.

was actually conducting any business in its Texas office.[331] The Federal Circuit granted mandamus. "Assess[ing] . . . the realities of the case," the court noted that the Eastern District was convenient only for the plaintiff's litigation counsel and that the plaintiff had no employees in Texas.[332] Rather, it was a Michigan limited liability corporation with two corporate officers who were both residents of Michigan, where all of its research and development took place.[333] The court found this to be a "classic case" of "gam[ing] the system by artificially seeking to establish venue."[334]

Similarly, in *In re Microsoft Corp.*, the court determined that the plaintiff's incorporation in Texas sixteen days before filing suit did not establish the Eastern District as a convenient place for trial.[335] The court made clear that it would not permit manipulation of the § 1404(a) convenience factors by pointing out that the plaintiff's argument against transfer "rest[ed] on a fallacious assumption: that this court must honor connections to a preferred forum made in anticipation of litigation and for the likely purpose of making that forum appear convenient."[336]

Cases like *Zimmer* and *Microsoft* represent a thoughtful use of mandamus by the Federal Circuit. The Federal Circuit is in a unique position to observe jurisdictional tricks employed by serial patent litigants, such as non-practicing entities[337] and their counsel. Because it hears nearly all appeals filed in patent cases nationwide, the court is uniquely situated to engage in a context-sensitive transfer analysis that accounts for considerations beyond the cold appellate record and formal legal doctrine. And the sometimes harsh language used by the Federal Circuit in *Zimmer* and *Microsoft* sends a clear teaching message (one of the primary purposes of mandamus) to the Eastern District that it should not permit manipulation of venue.

Similarly, as *Vistaprint* suggests, a context-sensitive analysis on mandamus can and should take account of factors beyond mere convenience that impact whether a case will be brought to a speedy and efficient resolution. Somewhat lost in cases like *Nintendo* and *Genentech*, with their emphasis on the importance of the "access to proof" and "cost to witnesses" factors, is that § 1404(a) makes transfer available not only "[f]or the convenience of parties and witnesses" but also "in the interest of justice."[338] When, in cases like *Vistaprint*, the court withholds mandamus on the ground that the district court's expertise with a particular patent or technology trumps convenience, the court hues more closely to the transfer statute.[339] And, of more importance to formulating a cogent theory

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331. *Id.* at 1380.

332. *Id.* at 1381.

333. *Id.*

334. *Id.*

335. *In re* Microsoft Corp., 630 F.3d 1361, 1365 (Fed. Cir. 2011).

336. *Id.* at 1364.

337. Or, more pejoratively, "patent trolls." *See* J. Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 368 (2010).

338. 28 U.S.C. § 1404(a) (2006).

339. *See In re* Vistaprint Ltd., 628 F.3d 1342, 1346-47 (Fed. Cir. 2010).

of Federal Circuit mandamus, the court capitalizes on its own familiarity with the process of patent litigation. A decision like *Vistaprint* recognizes, perhaps as only the Federal Circuit can, that it can be an extraordinary investment of judicial time and the parties' resources to educate a judge on the technology relevant to a particular case.

*5. A New Frontier in the Mandamus Revolution (*Link_A*).*—For the first three years of its mandamus revolution, the Federal Circuit focused exclusively on the Eastern District of Texas. Indeed, one might discount the importance of the Federal Circuit's mandamus cases by noting that they all apply Fifth Circuit law, which embraces a relatively robust role for mandamus in supervising venue decisions.[340] In December 2011, however, the court for the first time used mandamus to order a court besides the Eastern District of Texas to transfer a patent case.

In *In re Link_A_Media Devices Corp.*, Bermuda-based Marvell International had sued Link_A_Media Devices (LAMD) for patent infringement in the District of Delaware.[341] LAMD is incorporated in Delaware but has offices in California, Minnesota, the United Kingdom, and Japan.[342] Claiming that its principal place of business was in the Northern District of California, LAMD sought transfer to that district.[343] The district court denied the motion, but the Federal Circuit, applying Third Circuit law, granted mandamus and ordered transfer.[344] Much like in *TS Tech*, the case from the Eastern District that began the mandamus revolution, the Federal Circuit in *Link_A* criticized the district court for (1) placing too much weight on the plaintiff's choice of forum and (2) modernizing for an era of electronic discovery and air travel the § 1404(a) factors of "convenience of the witnesses" and "location of the books and records."[345] Interestingly, however, the leading Third Circuit case on transfer of venue (a case that the Federal Circuit cited frequently in *Link_A*) emphasizes that "the plaintiff's choice of venue should not be lightly distributed."[346] Moreover, that case instructs district courts to consider convenience for the witnesses "but only to the extent that the witnesses *may actually be unavailable* for trial in one of the

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340. *See generally* Danny S. Ashby et al., *The Increasing Use and Importance of Mandamus in the Fifth Circuit*, 43 TEX. TECH L. REV. 1049, 1050 (2011) (summarizing "[t]he current trend in the Fifth Circuit towards the increased issuance of writs of mandamus," which began in 2003 with the court's decision in *In re Horseshoe Entm't*, 337 F.3d 429 (5th Cir. 2003)).

341. *In re* Link_A_Media Devices Corp., 662 F.3d 1221, 1221 (Fed. Cir. 2011) (per curiam).

342. Marvell Int'l Ltd. v. Link_A_Media Devices Corp., Civ. No. 10-869-SLR, 2011 WL 2293999, at *1 (D. Del. June 8, 2011), *mandamus granted sub nom. In re* Link_A_Media Devices Corp., 662 F.3d 1221 (Fed. Cir. 2011).

343. *Id.*

344. *Link_A*, 662 F.3d at 1221.

345. *Id.* at 1223-24; *cf. In re* TS Tech USA Corp., 551 F.3d 1315, 1320-21 (Fed. Cir. 2008) (similar).

346. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (internal quotation marks omitted).

fora."[347] That case also indicates that the "location of books and records" factor should be "similarly limited to the extent that the files *could not be produced* in the alternative forum."[348] Despite this seeming flexibility in Third Circuit law and no indication that witnesses or evidence could not appear or be produced in Delaware, the Federal Circuit found that LAMD had a "clear and indisputable" right to transfer.[349]

It is too early to tell whether the expansion of aggressive mandamus review to cases outside the Eastern District of Texas is an emerging trend or an aberration.[350] For this reason, the remainder of this Article focuses mostly on the mandamus decisions arising out of the Eastern District. The potential for expanded use of mandamus supervision, however, reinforces the imperative for the Federal Circuit to critically assess the proper role of the writ in patent litigation, a task I begin in Part IV.

C. A Question of Motivation and a New Theory of Mandamus

Before analyzing the proper role for mandamus in patent litigation, however, I consider in more detail the factors that have instigated the Federal Circuit's mandamus revolution, focusing mainly on the ten cases from the Eastern District of Texas. In particular, I consider two important theoretical questions. First, why has the Federal Circuit singled out the Eastern District? And, second, must we develop a new theory of appellate mandamus, beyond the jurisdictional, supervisory, and advisory theories, to classify the Federal Circuit's unparalleled supervision of one district court?

1. The Federal Circuit's Motivation.—The Federal Circuit's aggressive review of the Eastern District's venue decisions raises questions about the Federal Circuit's motivation. Why is the Federal Circuit so closely supervising the venue decisions of the Eastern District? Why has the Federal Circuit not been as aggressive in reviewing venue decisions of other district courts? Although consideration of the court's motive is admittedly somewhat speculative, I briefly consider three possible explanations to spur conversation on the topic.

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347. *Id.* (emphasis added).

348. *Id.* (emphasis added).

349. *Link_A*, 662 F.3d at 1221.

350. Except for *Link_A*, the Federal Circuit has denied every mandamus petition challenging a venue decision by a court besides the Eastern District, *see supra* note 10 and accompanying text, even though some of those cases presented reasonably strong factual arguments for transfer. For instance, in *In re Affymetrix, Inc.*, the Federal Circuit denied a mandamus petition that sought transfer from the Western District of Wisconsin to the Northern District of California, even though the defendant's employee-witnesses, all six third-party witnesses, the development and marketing documents, and the accused product itself, were located in California. *In re* Affymetrix, Inc., Misc. No. 913, 2010 WL 1525010, at *1-2 (Fed. Cir. Apr. 13, 2010); *see also* Illumina, Inc. v. Affymetrix, Inc., No. 09-cv-277-bbc, 2009 WL 3062786, at *1-2 (W.D. Wisc. Sept. 21, 2009) (district court opinion denying transfer).

For a simple explanation of the court's aggressive actions, one might point to the Eastern District's poor reputation among patent-infringement defendants, who are often large corporations that frequently litigate before the Federal Circuit, and claim that the Federal Circuit has come to the rescue of the corporate interests that have captured the specialized court.[351] A second, more refined explanation might be that the Federal Circuit is displeased with the efforts of district courts, like the Eastern District of Texas, that have informally become judicial centers for patent litigation. One obvious way to fix the numerous perceived problems in modern patent law[352] would be for Congress to change patent law from the top-down. Difficulties with obtaining effective legislative reform,[353] however, have caused some scholars in recent years to explore the possibility of reforming the patent system from the bottom-up by enhancing trial-court familiarity with patent law.[354] Professor Xuan-Thao Nguyen, for example, suggests "local" reform of the patent laws through adoption of local patent rules and development of judicial expertise,[355] commending the Eastern District as "a case study of how a district court has actively transformed itself into a knowledgeable court with strong expertise in solving patent disputes."[356] She notes, however, that Congress and the Federal Circuit have attempted to punish these efforts at local reform, specifically citing the mandamus decisions from the Eastern District of Texas.[357] Indeed, the Chief Judge of the Federal Circuit, Randall Rader, has on multiple occasions expressed his "concern[] that patent litigation is becoming too centralized in a few districts."[358]

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351. *Cf.* CARRINGTON ET AL., *supra* note 232, at 168 (noting the problem that specialized courts can be dominated by the entities that frequently appear before it).

352. For comprehensive critiques of the modern patent system, see, for example, JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK (2008); DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009); ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT (2004).

353. *See* BURK & LEMLEY, *supra* note 352, ch. 10. Congress has made a handful of changes to the patent statute in the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 28 and 35 U.S.C.). Whether these changes will end the patent crisis remains to be seen, although some are skeptical. *See, e.g.*, *Talk of the Nation: Will Patent Reform Bill Help or Hurt Inventors?*, NPR (Sept. 12, 2011), http://www.npr.org/2011/09/12/140404985/will-patent-reform-bill-help-or-hurt-inventors (comments of James Bessen).

354. *See, e.g.*, Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1447-48 (2010); Nguyen, *Dynamic Federalism*, *supra* note 256, at 474-83.

355. *See* Nguyen, *Dynamic Federalism*, *supra* note 256, at 474-83.

356. Nguyen, *Renegade Jurisdiction*, *supra* note 249, at 114.

357. *See* Nguyen, *Dynamic Federalism*, *supra* note 256, at 488 n.254.

358. Interview by Laura Robinson & Erin Gibson with Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Fed. Circuit (Dec. 9, 2010) [hereinafter Interview with Randall R. Rader], *available at* http://www.dlapiper.com/ interview_with_the_honorable_randall_r_rader; *see also* Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, The State of Patent

This potential hostility to bottom-up reform might inform an analysis of the court's motive in its recent mandamus decisions. More broadly, aggressive Federal Circuit supervision of district court procedure fits a narrative that the Federal Circuit consistently maximizes its power at the expense of other bodies that interact with patent law, such as the district courts, the PTO, and even state courts. While commentators have studied the Federal Circuit's relationships with each of these other bodies individually,[359] future work could synthesize this scholarship into an institutional critique of the Federal Circuit.

In any event, Federal Circuit hostility toward bottom-up patent reform through trial-level expertise might explain why the recent mandamus decisions have been directed at the Eastern District of Texas and the District of Delaware. As Mark Lemley has noted, these two districts stand out among districts with the most patent cases because they are neither population nor technology centers. Rather, the Eastern District of Texas is simply a popular destination for patent plaintiffs, and the District of Delaware is the state of incorporation for many litigants.[360]

Finally, it is impossible to ignore the interest that Chief Judge Rader individually has taken in the Eastern District of Texas. Not only has he publicly expressed concern about the centralization of patent litigation in the Eastern District,[361] he was the author of the order in *TS Tech*, the first Federal Circuit case to order transfer out of the Eastern District.[362] Moreover, in 2010, Chief

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Litigation, Speech at the Fifteenth Annual Eastern District of Texas Bench and Bar Conference (Sept. 27, 2011), *in* 21 FED. CIR. B.J. 331, 341 (2012) ("[T]he best way for us to strengthen our judicial system is to share and promote other venues.").

359. *See, e.g.*, Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 272 (2007) (studying the relationship between the Federal Circuit and the PTO); William C. Rooklidge & Mathew F. Weil, Essay, *Judicial Hyperactivity: The Federal Circuit's Discomfort with Its Appellate Role*, 15 BERKELEY TECH. L.J. 725, 726 (2000) (studying the relationship between the Federal Circuit and the district courts); Christopher G. Wilson, Note, *Embedded Federal Questions, Exclusive Jurisdiction, and Patent-Based Malpractice Claims*, 51 WM. & MARY L. REV. 1237, 1239-40 (2009) (studying the relationship between the Federal Circuit and state courts).

360. Lemley, *supra* note 244, at 407. From 2000 to 2010, the Eastern District of Texas ranked fourth among all judicial districts in the number of patent cases litigated, and the District of Delaware ranked sixth. *Id.* at 405-06 tbl.2. The Central District of California ranked first, the Northern District of California ranked second, the Northern District of Illinois ranked third, and the Southern District of New York ranked fifth. *Id.*

361. *See, e.g.*, Interview with Randall R. Rader, *supra* note 358.

362. *In re* TS Tech USA Corp., 551 F.3d 1315, 1317-18 (Fed. Cir. 2008). Judge Rader also wrote the order granting mandamus in *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009), and was a member of the panel that issued a per curiam order granting mandamus in *In re Morgan Stanley*, 417 F. App'x 947 (Fed. Cir. 2011). In addition, Judge Rader was a member of the first panel to grant a mandamus petition seeking transfer from a district besides the Eastern District of Texas. *See In re* Link_A_Media Devices Corp., 662 F.3d 1221 (Fed. Cir. 2011) (per curiam).

Judge Rader sat by designation in a number of Eastern District patent cases.[363] Although the judge said that his motivation was benign,[364] others have speculated that he was sending a message that the Eastern District is too favorable to patent holders.[365]

There may, of course, be other factors animating the Federal Circuit's recent aggressiveness with the Eastern District of Texas.[366] But because these factors

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363. *See* Clearvalue, Inc. v. Pearl River Polymers, Inc., 704 F. Supp. 2d 584 (E.D. Tex. 2010); IP Innovation LLC v. Red Hat, Inc., 705 F. Supp. 2d 692 (E.D. Tex. 2010); Performance Pricing, Inc. v. Google, Inc., 704 F. Supp. 2d 577 (E.D. Tex. 2010); PA Advisors, LLC v. Google, Inc., 706 F. Supp. 2d 739 (E.D. Tex. 2010).

364. *See* Zusha Elinson, *Big Tech Shouts 'Yippee!,' Patent Bar Chattering as Rader Heads to Texas*, CORPORATE COUNSEL, Mar. 15, 2010 (quoting Judge Rader: "It's a place of importance in the patent world and as . . . incoming chief judge of the Federal Circuit, I wanted to make sure that I understand the forces at play . . . . I want to work under their rules and understand the pressures they deal with."); *see also* George C. Beighley, Jr., *The Court of Appeals for the Federal Circuit: Has It Fulfilled Congressional Expectations?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671, 727 (2011) (quoting Judge Rader praising the Eastern District's judges for being "'conscientious in their application of patent law'").

365. *See* Elinson, *supra* note 364 (discussing Judge Rader's rulings favoring patent-infringement defendants and suggesting that his presence spurred settlements in other cases). Federal Circuit Judge William Bryson has also been presiding over a small number of patent cases in the Eastern District. *See* Michael C. Smith, *How Many Baylor Lawyers Does It Take to Swear in a Federal Judge?*, EDTEXWEBLOG.COM (Dec. 20, 2011, 6:19 PM), http://mcsmith.blogs.com/eastern_district_of_texas/2011/12/how-many-baylor-lawyers-does-it-take-to-swear-in-a-federal-judge.html. Judge Bryson's visit appears designed at least in part to assist the Eastern District in processing the cases left behind by the retirement of Judge T. John Ward. *See* John Council, *Father and Son Reunion*, TEX. LAWYER (Oct. 24, 2011), http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202519747336&slreturn=1. This shortage of judges may be remedied with the recent confirmation of Judge Rodney Gilstrap. *See* Smith, *supra*.

366. For example, it is interesting to note that, when *TS Tech* was decided, proposals were percolating in Congress to amend the venue statute for patent cases. *See, e.g.*, S. 515, 111th Cong. § 8 (2009). These proposals were designed to limit the ability of patent holders to file infringement suits in districts that have only a modest connection to the case, like the Eastern District of Texas in some of the cases discussed in this Article. The recently passed patent reform statute, however, contains minimal revisions to the venue rules. *Cf.* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 9(a), 125 Stat. 284, 316 (2011) (to be codified in scattered sections of 35 U.S.C.) (changing venue for district court challenges to PTO decisions from the District of Columbia to the Eastern District of Virginia). The Federal Circuit's decisions in *TS Tech* and its progeny might be seen as a successful effort to forestall congressional meddling with the patent litigation system. It also fits a narrative of Federal Circuit hostility toward other entities' efforts to shape patent law. *See supra* note 359 and accompanying text. In fact, these venue cases are not the only recent example of the Federal Circuit directly addressing an issue on which Congress was considering passing legislation. *Compare, e.g.*, Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1335 (Fed. Cir. 2009) (reversing damages award of approximately $358 million as unsupported by substantial evidence), *with* S. 515, 111th Cong. § 4 (2009) (requiring the court to specifically identify the

are not discussed in the court's orders, a debate about motives is apt to lapse into speculation.

2. A New Theory of Mandamus.—As a theoretical matter, the Federal Circuit's aggressive review of the Eastern District's mandamus decisions does not fit neatly into the jurisdictional, supervisory, or advisory models of mandamus discussed above. Accordingly, I suggest that the Federal Circuit may have created a new, anomalous model of mandamus that I call "supervisory plus" mandamus. It is "supervisory" in the sense that it is mandamus issued to correct a significant, erroneous practice—the Eastern District's repeated misapplication of § 1404(a). But it is supervisory "plus" because the Federal Circuit is doing more than correcting one instance of the practice to send a message to the lower court. It is granting mandamus in every erroneous case it sees.

One example of the supervisory plus theory in action is the recent decision in *In re Verizon Business Network Services Inc.*[367] In that case, the Eastern District had denied a motion to transfer an infringement suit to the Northern District of Texas, emphasizing that the Eastern District had previously heard a suit involving the same patent and, during the course of that suit, had construed many of the patent's claims.[368] On mandamus, the Federal Circuit used the writ for what seemed to be pure error correction.[369] With regard to the fairness and convenience factors, the court emphasized simply that the case was "in many respects analogous to *Volkswagen*."[370] In addition, the court distinguished *Vistaprint* on its facts, noting that, in the case at hand, there was no co-pending litigation.[371] Rather, the prior litigation had concluded five years before the current case was filed.[372] Then, without any significant discussion of the extraordinary, unprecedented, or important nature of the case, the court granted the writ, ordering the case transferred a mere 150 miles west, from Marshall to Dallas.[373]

Not only is the court seemingly using mandamus for pure error correction, it is also now granting relief by simply analogizing to its prior mandamus decisions, even though transfer of venue is an issue supposedly controlled by regional circuit law. For example, in *In re Morgan Stanley*, the court ordered transfer from the Eastern District of Texas to the Southern District of New York.[374] The court pointed out that the plaintiff and twenty-seven of the forty-one defendants were "headquartered in or close by the transferee venue," similar to *Acer*, where the plaintiff and five of the twelve defendants were headquartered

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methodologies or factors for calculating damages that are supported by the evidence), *and* Leahy-Smith America Invents Act (containing no significant amendment to patent damages law).

367. 635 F.3d 559 (Fed. Cir. 2011).

368. *Id.* at 560-61.

369. *See id.* at 561-62.

370. *Id.* at 561.

371. *Id.* at 562.

372. *Id.*

373. *Id.* at 561-62.

374. *In re* Morgan Stanley, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam).

in the transferee venue.[375] The court also rejected the plaintiff's argument that, because half of the patents-in-suit had been asserted in a prior case in the Eastern District, judicial economy favored denial of transfer.[376] The court analogized to *Zimmer* and *Verizon*, cases the court read to embrace the principle that "the proper administration of justice may be to transfer to the far more convenient venue even when the trial court has some familiarity with a matter from prior litigation."[377] Similar to *Verizon*, the court's order of transfer based on analogy to prior Federal Circuit cases does not look like the grant of extraordinary relief under Fifth Circuit law, but simple interlocutory error correction under Federal Circuit law.[378]

This novel, case-by-case approach to the interlocutory remedy of mandamus is a dramatic reordering of appellate procedure. Liberalizing the standards for interlocutory relief can significantly undermine a trial court's authority, as its decisions are subject to immediate second-guessing on appeal. Indeed, the

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375. *Id.* at 948 (citing *In re* Acer Am. Corp., 626 F.3d 1252, 1254 (Fed. Cir. 2010)).

376. *See id.* at 949.

377. *Id.* (citing *Verizon*, 635 F.3d 559; *In re* Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010)).

378. As in *Morgan Stanley*, in *In re Biosearch Technologies, Inc.*, Misc. No. 995, 2011 WL 6445102, at *1 (Fed. Cir. Dec. 22, 2011), the Federal Circuit relied heavily on its own mandamus case law and ordered transfer from the Eastern District of Texas to the Northern District of California. *Id.* The court conceded that its prior mandamus decisions were only "persuasive authority for transfer." *Id.* at *3. But the court nevertheless emphasized that "[i]n analogous situations, where an invention has no connection with Texas, we have determined that the asserted geographical centrality of Texas did not outweigh the many aspects of convenience to the defendant," *id.* (citing *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009)), and that "in cases such as *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009) and *In re Hoffmann-La Roche*, 587 F.3d 1333 (Fed. Cir. 2009), this court ordered transfer from the plaintiff's chosen Eastern Texas forum, noting 'a stark contrast in relevance, convenience, and fairness between the two venues,'" *id.* (quoting *Hoffmann-La Roche*, 587 F.3d at 1336).

The court has also invoked its own precedent to deny transfer on mandamus. In *In re Apple Inc.*, Misc. No. 103, 2012 WL 112893, at *2 (Fed. Cir. Jan. 12, 2012), the court emphasized that "measured against cases like *Volkswagen*, *TS Tech*, *Genentech*, and *Acer*, there [was] a plausible argument that Apple," the party seeking transfer, "did not meet its burden of demonstrating . . . that the transferee venue [was] 'clearly more convenient.'" *Id.* The court emphasized that, "[a]s compared to those cases in which [it had] granted mandamus," there were "fewer defendants in the Northern District of California" (the proposed transferee district), "and potential evidence identified in the Eastern District of Texas." *Id.* In addition, in *Apple*, there were defendants and witnesses that, in the court's view, would "find it easier and more convenient to try th[e] case in the Eastern District of Texas" than in the Northern District of California. *Id.*

These decisions, based largely on the Federal Circuit's own case law, raise questions not only about mandamus theory, they more broadly illustrate problems in applying the Federal Circuit's choice of law principles. The court may have good reason to treat as the primary binding authority its own prior mandamus decisions on transfer of venue in the specific context of patent litigation, but under the current choice-of-law regime, it cannot do so.

limited data available suggests that litigants have begun to seek extraordinary relief from the Federal Circuit far more frequently after *TS Tech*. In the three years before *TS Tech*, litigants filed with the Federal Circuit twenty-nine petitions per year on average.[379] In the past two years, by contrast, the annual average has increased to 45.5, an increase of 56.9%.[380]

One might expect that the court would justify its pathbreaking approach—especially an approach that flouts a principle as venerable as the final judgment rule—through considered and explicit discussions of the legal and policy justifications for the new order. Indeed, the relatively permissive standard applied in recent mandamus decisions—fueled by the court's reliance on its own mandamus precedent—presents the possibility that the court, without critically and transparently weighing the costs and benefits of its approach, may soon find mandamus to be an acceptable means for interlocutory appeal of other significant pre-trial rulings, such as claim construction orders.[381] Yet, remarkably, the

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379. These figures were obtained from the statistics maintained by the Federal Circuit and the Administrative Office of the United States Courts (AO). *See Statistics: Appeals Filed, Terminated, and Pending*, U.S. CT. APPEALS FED. CIRCUIT, http://www.cafc.uscourts.gov/the-court/statistics.html (last visited Mar. 2, 2012).

380. *Id.* The jump in mandamus petitions filed in the Federal Circuit has been so dramatic that, in his usually pro forma annual report, the director of the AO specifically noted that the increase in petitions for writs of mandamus in the Federal Circuit was "related to petitions under 28 U.S.C. § 1404 to transfer patent cases out of the Eastern District of Texas." 2010 AO REPORT, *supra* note 263, at 18. This swell of appellate mandamus petitions was foreseen by civil procedure scholars who argued against transfer in the Fifth Circuit's *Volkswagen* case. *See* Brief of Civil Procedure Law Professors as Amici Curiae in Support of Respondents at 19, *In re* Volkswagen of Am., Inc., 545 F.3d 304 (5th Cir. 2008) (en banc) (No. 07-40058), 2008 WL 7789555 ("[T]he Panel's decision wrongly turns appellate courts into a defendant's ally by making appellate superintendence, by way of appeal or mandamus, a likely prospect following a trial judge's decision to deny transfer.").

381. Given the Federal Circuit's propensity to reverse district court claim construction orders at a high rate, *see* Sichelman, *supra* note 246, at 1175 fig.1, and the importance of claim construction orders to the determination of infringement, *see* Markman v. Westview Instruments, Inc., 52 F.3d 967, 989 (Fed. Cir. 1995) (en banc) (Mayer, J., concurring) ("[T]o decide what the claims mean is nearly always to decide the case."), *aff'd*, 517 U.S. 370 (1996), Congress and some commentators have proposed permitting more frequent pre-judgment appeals of those orders, *see* S. 515, 111th Cong. § 8 (2009); Craig Allen Nard, *Process Considerations in the Age of* Markman *and Mantras*, 2001 U. ILL. L. REV. 355, 372-77. Some Federal Circuit judges have seemed willing to allow interlocutory claim construction appeals, *see* Paul Michel, *Judicial Constellations: Guiding Principles as Navigational Aids*, 54 CASE W. RES. L. REV. 757, 765 (2004) ("[W]e have never taken a position as an institution that we simply will not grant a . . . discretionary interlocutory . . . appeal from a *Markman* ruling. We might . . . . We will do so when we get a convincing reason stated in the petition."); Kathleen M. O'Malley et al., *A Panel Discussion: Claim Construction from the Perspective of the District Judge*, 54 CASE. W. RES. L. REV. 671, 685 (2004) (quoting now-Federal Circuit Judge O'Malley, speaking when she was a district judge: "[S]everal of us have attempted to convince the [Federal Circuit] to take interlocutory appeals of

Federal Circuit has not explicitly addressed the broader implications of its aggressive supervision of the Eastern District. Nor has the Federal Circuit considered any Federal-Circuit-specific or patent-litigation-specific constraints on its decisions to order transfer of venue.

Because the court has not acknowledged the context in which the cases arise, the court seems to have overlooked that it might be overzealous in its supervision. Data compiled by Paul Janicke shows that in 2006 and 2007, motions to transfer venue were filed in only 8.3% of Eastern District patent cases,[382] suggesting that defendants do not view the Eastern District as particularly inhospitable. One might argue in response that defendants simply do not file transfer motions in the Eastern District because they have little hope of succeeding. But Janicke's study also raises doubts about whether obtaining transfer out of the Eastern District is as difficult as the conventional wisdom suggests. For example, Janicke shows that the Eastern District, even before *TS Tech*, transferred roughly the same percentage of its patent cases as other district courts.[383]

In any event, the Federal Circuit's analysis could better account for circumstances that it is in a unique situation to understand because of its position as the arbiter of almost all district court patent appeals nationwide. And the Federal Circuit could better explain the reasons for its sub silentio nullification of the final judgment rule in venue cases from the Eastern District.

The Federal Circuit's current model of supervisory plus mandamus is problematic not only from a policy and theoretical perspective. It is also rife with doctrinal inconsistency, such as the varying standard for mandamus relief discussed above. Some of this inconsistency stems from the Federal Circuit's

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certain claim construction decisions—those that are really critical, that are case-dispositive and that are done early in the decision making process."), even though the court as a whole seems reluctant to do so on a consistent basis, *see* Regents of the Univ. of Cal. v. Dakocytomation Cal., Inc., 517 F.3d 1364, 1371 (Fed. Cir. 2008) (granting permission for interlocutory appeal of claim construction order, noting that "[w]hile we have not generally certified motions for interlocutory appeal of claim construction, we determined that it was especially desirable in this case in view of the pendency of [a] related appeal on the denial of the preliminary injunction based on some of the same issues").

382. Janicke, *Patent Venue*, *supra* note 259, at 23. By comparison, in the Central District of California (a district Janicke describes as "a notoriously poor district" for patent holders), transfer motions were filed in 6.8% of cases. *Id.*

383. *Id.* at 19-23; Janicke, *Venue Transfers*, *supra* note 259, at 16. Nevertheless, one might further argue that the Eastern District's transfer rate should be much higher than the national average because the Eastern District is likely not a convenient forum for many of the cases filed there. *See* Janicke, *Patent Venue*, *supra* note 259, at 22-23; Janicke, *Venue Transfers*, *supra* note 259, at 16 (showing that the Eastern District denies a higher percentage of transfer motions than other leading patent districts). That argument may hold sway. But my point is merely that the Eastern District's transfer practice is not so clearly aberrational as to warrant supervisory plus mandamus without a frank assessment of the normative justifications for displacement of the final judgment rule.

obligation to apply the Fifth Circuit's formalist transfer law. But the Federal Circuit has shown a willingness to apply its own law in mandamus cases, and the court could use a review of its own case law as a platform for reexamining its own role in the system of mandamus review. More directly, the court could modify or overrule its current choice-of-law regime and transparently treat its own mandamus case law as binding. This way, the court could restart its mandamus law on a clean slate, and more directly engage the considerations that determine whether mandamus is warranted in the specific context of transfer of venue in patent litigation.

In *Innotron*, the court attempted to take account of the court's unique role in the federal judiciary by adopting Federal-Circuit-specific limitations on the writ.[384] The *Innotron* framework, however, was too restrictive. It deprived the public of the many benefits of Federal Circuit mandamus on non-patent issues.[385] By limiting Federal Circuit mandamus to patent-related issues, as the CCPA had done, the framework developed by the nascent Federal Circuit was not well-suited to the court's new role reviewing district court patent cases (as compared with the CCPA's role, which was to review only determinations of the PTO).[386] A reconceptualization would force the court to make sure that its mandamus standard accounts for the realities of modern patent litigation and the Federal Circuit's unique role in the federal system. Moreover, a bold statement regarding Federal Circuit mandamus would provide clarity to litigants and to the regional circuits, and would put *Innotron* to rest once and for all. Finally, in the specific context of transfer of venue, the court could make a clear, direct, and comprehensive statement about when transfer should be granted, hopefully reducing the need for case-by-case supervision of the Eastern District of Texas.

IV. A New Framework for Federal Circuit Mandamus

In this part, I consider what a reconceptualized version of Federal Circuit mandamus would look like. Setting aside for the moment any specific problems with the Federal Circuit's recent supervision of the Eastern District's venue decisions, I first argue that, as a normative matter, it is generally desirable for the Federal Circuit to issue mandamus on non-patent issues that arise in patent cases. I then outline considerations that might limit this general proposition—restraints the Federal Circuit might realize were it to stop skirting *Innotron* and asserting mandamus authority on all issues raised in patent cases. In outlining these limiting considerations, I return to the Federal Circuit's recent venue decisions and show how this refined standard could be applied to maximize the didactic function of mandamus while preserving district court autonomy and litigation efficiency.

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384. *See In re* Innotron Diagnostics, 800 F.2d 1077, 1080-84 (Fed. Cir. 1986).

385. *See infra* Part IV.A.

386. *See* Lefstin, *supra* note 135, at 868-69.

A. The Benefits of Federal Circuit Mandamus on Non-Patent Issues

There are clear benefits from a regime under which the Federal Circuit issues mandamus on non-patent topics, such as transfer of venue. These benefits are obscured by the current state of the law, where *Innotron* remains on the books, and the courts simply distinguish or, more frequently, ignore it. I focus on four benefits in particular in arguing that Federal Circuit mandamus on non-patent issues is, in general, desirable. As a practical matter, these benefits could be used in arguing that the court should overrule *Innotron* once and for all.

1. Jurisdictional Simplification.—By issuing mandamus on non-patent issues, the Federal Circuit simplifies the jurisdictional inquiry on a mandamus petition. As noted, on appeal, the Federal Circuit has jurisdiction so long as the district court's jurisdiction was based in whole or in part on § 1338.[387] The court in *Innotron* was unclear about whether the limitation on Federal Circuit mandamus was a limit on the court's jurisdiction, a question of remedial power, or a matter of discretion in resolving the merits of a mandamus petition.[388] Taking *Innotron* (for the moment) to articulate a purely jurisdictional limitation, there would be a separate jurisdictional standard for mandamus petitions only, one that is found nowhere in the Judicial Code. The question is whether "the patent jurisprudence of [the Federal Circuit] plays a significant role" in the decision sought to be reviewed.[389] If that standard is not satisfied, the Federal Circuit has no mandamus jurisdiction, even if the court would have jurisdiction on appeal.

This multi-track jurisdictional scheme is needlessly complex and inefficient.[390] It is one thing to have a higher merits standard for obtaining the extraordinary, interlocutory relief of mandamus than to obtain error correction on appeal. The higher mandamus standard deters frivolous filings and promotes an efficient adjudication process, while still allowing room to answer important questions that regularly evade appellate review. It is quite another thing to create a standard that makes it difficult for litigants and courts to determine *where* a mandamus petition should be filed. Such a standard would lead to extensive argument over the threshold question of the proper court to hear the petition. This argument will, in most instances, be quite wasteful because of the high standard for obtaining mandamus relief on the merits. The standard also engenders delay—not only because the court will have to take time to examine its jurisdiction, but also because cases would sometimes be transferred to or from a regional circuit and rebriefed in the new court.

To be sure, parties sometimes fiercely litigate the question of whether an

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387. 28 U.S.C. § 1295(a)(1) (2006).

388. *See Innotron*, 800 F.2d at 1084.

389. *Id.*

390. *Cf.* Beatrice Foods Co. v. New Eng. Printing & Lithographing Co., 899 F.2d 1171, 1178 (Fed. Cir. 1990) (en banc) (Newman, J., concurring in the judgment) (arguing, based on considerations of judicial economy, "that there should not be separate appellate routes depending on the claims or issues of a case").

appeal should be heard in a regional circuit or the Federal Circuit.[391] But in the mine-run of patent infringement cases, it is clear that the district court's jurisdiction is based at least in part on § 1338, so there is no serious question of appellate jurisdiction.[392] Conversely, when the jurisdictional inquiry is framed as whether the Federal Circuit's patent jurisprudence plays a significant role, the courts will have to engage in difficult line-drawing exercises that will, in turn, introduce uncertainty into the law.[393]

Innotron itself provides an example of difficult line-drawing. The court decided to entertain the mandamus petition in that case because it involved severance of patent claims and patent-related antitrust claims for trial.[394] Yet the court just as easily could have emphasized that the question of severance arises under Federal Rule of Civil Procedure 42(b), which applies to all types of civil claims, patent or not, and thus falls within *Innotron*'s unreviewable category (2): issues that arise in all types of cases and do not directly implicate patent law.[395] The court also could have emphasized that a key consideration in construing Rule 42(b) is judicial economy—the minimization of expense and delay.[396] It could have reasoned that the regional circuit has a much better sense of docket congestion in the district courts in its circuit than the Federal Circuit does, so review of severance decisions is more akin to an administrative matter—properly reviewable in the regional circuit only. If, however, the court had simply held that it had mandamus jurisdiction because it had appellate jurisdiction, this line-drawing problem would not have arisen.

Adoption of the appellate-jurisdiction standard for mandamus petitions does not eliminate controversy about Federal Circuit jurisdiction. But uniting the Federal Circuit's mandamus and appellate jurisdiction standards at least reduces

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391. See, for example, *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 806-07 (1988), in which an appeal was transferred from the Federal Circuit to the Seventh Circuit and then back to the Federal Circuit, with each court claiming that it lacked jurisdiction. The Supreme Court, on certiorari to the Federal Circuit, ordered the case transferred back to the Seventh Circuit. *Id.* at 819.

392. *See* Christopher A. Cotropia, *"Arising Under" Jurisdiction and Uniformity in Patent Law*, 9 MICH. TELECOMM. & TECH. L. REV. 253, 275-76 (2003).

393. *Cf.* Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 GEO. MASON L. REV. 643, 677-78 (2009) (noting the importance of legal uniformity and predictability in the Federal Circuit's achievement of Congress's aims in creating the court). The difficulties in defining jurisdictional limits by the subject matter of the case involved are well documented. *See, e.g.*, Charles W. Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 MO. L. REV. 43, 68 (1984) ("[D]efining a court's jurisdiction in terms of subject matter can lead to wasteful litigation over jurisdictional limits, splitting single disputes between two or more courts, and conflicts with courts of overlapping jurisdiction.").

394. *Innotron*, 800 F.2d at 1083-84.

395. *Id.* at 1082.

396. *See* FED. R. CIV. P. 42(b) (permitting severance "[f]or convenience, to avoid prejudice, or to expedite and economize"); 9A WRIGHT ET AL., *supra* note 6, § 2388.

uncertainty and the possibility for manipulation through framing choices made by the court and the parties.[397]

2. Elimination of Forum Shopping by Preventing Bifurcated Appeals.—In creating the Federal Circuit, Congress sought to reduce forum shopping by restoring uniformity to the patent laws.[398] Federal Circuit mandamus on non-patent issues reduces the incentive to forum shop among district courts in different regional circuits.

Under a standard limiting Federal Circuit mandamus to issues implicating the court's patent jurisprudence, the range of issues considered on mandamus would be narrower than on appeal. On appeal, the Federal Circuit can decide every issue in an entire district court case, including non-patent law issues.[399] On mandamus, however, interlocutory rulings on non-patent law issues would be reviewable only in a regional circuit, if anywhere.[400] This bifurcated appeal process (in which an issue is decided by a regional circuit on mandamus, but by the Federal Circuit on a post-judgment appeal), would provide an incentive for a plaintiff to choose a district court in a regional circuit with a more favorable view on an issue reviewable via mandamus, such as transfer of venue. Thus, through the vehicle of mandamus, a litigant preferring to have the regional circuit decide a particular non-patent question could actually obtain review in a favored appellate forum by filing a mandamus petition, even if that question would be reviewable by the Federal Circuit on appeal from final judgment.

In addition to promoting forum shopping, a system of bifurcated review would encourage litigants to file more mandamus petitions. The denial of mandamus does not have law-of-the-case effect when the case is ultimately appealed.[401] So, under a bifurcated system, a dissatisfied litigant could have an issue reviewed by two different courts at two different times: first, in the regional circuit on mandamus, and second, on appeal in the Federal Circuit.

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397. *Cf.* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 59 (1989) ("The rule requiring the [Federal Circuit] to defer to regional law in nonpatent substantive areas does not work well: the line between patent and nonpatent issues is often illusory . . . ."); Field, *supra* note 393, at 652 (arguing that the Federal Circuit can choose either its own law or regional circuit law, whichever it prefers, "depending upon whether it defines the issue broadly or narrowly").

398. *See* S. REP. NO. 97-275, at 5 (1981); *see also* United States v. Hohri, 482 U.S. 64, 71-72 (1987); Atari, Inc. v. JS & A Grp., Inc., 747 F.2d 1422, 1435 (Fed. Cir. 1984) (en banc), *overruled on other grounds by* Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 & n.5 (Fed. Cir. 1998) (en banc in relevant part).

399. *See Atari*, 747 F.2d at 1433 ("In creating this court's jurisdiction, Congress had presented to it two choices: (a) granting this court appellate jurisdiction over only the patent issues in a case ('issue' jurisdiction); or (b) granting this court appellate jurisdiction over the entire case ('arising under' jurisdiction). Congress specifically and unequivocally rejected the former and chose the latter." (footnote omitted)).

400. *See Innotron*, 800 F.2d at 1084 n.13.

401. *See* Kennedy v. Lubar, 273 F.3d 1293, 1299 (10th Cir. 2001).

3. Valuable Doctrinal Guidance.—In addition, there are valuable doctrinal benefits from a regime in which the Federal Circuit issues mandamus on the same spectrum of issues it considers on appeal. This regime provides the Federal Circuit with more opportunities to rule on issues frequently arising in patent litigation, but not easily remedied on appeal. Questions of attorney-client privilege and change of venue are prime examples of issues that are practically impossible to remedy on appeal (because if they are erroneously decided they will likely be an unreversable harmless error)[402] but that can effectively be reviewed on mandamus.[403]

Rochelle Cooper Dreyfuss has argued that the Federal Circuit's insistence on applying regional circuit law to non-patent issues deprives the public of the court's valuable expertise on issues that, while not formally issues of patent law, the Federal Circuit likely has something useful to say.[404] A similar argument applies in the mandamus context. The Federal Circuit has extensive experience with issues of non-patent law, particularly procedural issues, that arise in patent cases and that might be reviewed on mandamus. If these issues were decided by the regional circuits (or by no court), as would be the case under *Innotron*, lower courts, litigants, and the public would be deprived of the Federal Circuit's input. The Federal Circuit, for example, is particularly well-versed in confidentiality and protective-order issues that arise in patent litigation,[405] as well as attorney-client privilege issues that are not necessarily unique to patent law.[406] Even though the Federal Circuit might formally apply regional circuit law to these issues, precedential Federal Circuit orders would provide valuable doctrinal guidance about how the issues should be resolved in the context of patent litigation.

4. Avoidance of Specialization.—A final benefit of Federal Circuit mandamus on non-patent issues is that it might help the court avoid potential problems arising from judicial specialization, such as interest-group capture, "tunnel vision" (i.e., losing sight of basic values at stake and instead developing arcane and intricate doctrine), a lack of prestige of the judicial positions, a lack of deference to trial judges, and a lack of incentive to fully and clearly express legal reasoning.[407] The large number of lower tribunals reviewed by the Federal

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402. *See In re* Nat'l Presto Indus., Inc., 347 F.3d 662, 663 (7th Cir. 2003).

403. *See, e.g.*, *In re* Seagate Tech., LLC, 497 F.3d 1360, 1366-67 (Fed. Cir. 2007) (en banc) (reviewing via mandamus issues of attorney-client privilege and work product protection).

404. *See* Dreyfuss, *supra* note 397, at 59.

405. *See, e.g.*, *In re* Jenoptik AG, 109 F.3d 721, 723 (Fed. Cir. 1997) (applying Ninth Circuit law to confidentiality issue).

406. *See, e.g.*, *In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1374 (Fed. Cir. 2001) (applying Eighth Circuit law to privilege issue).

407. *See* CARRINGTON ET AL., *supra* note 232, at 168; Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 234-35 (1975). Congress recognized these potential dangers when creating the Federal Circuit. *See* H.R. REP. NO. 97-312, at 19-23 (1981); S. REP. NO. 97-275, at 6 (1981).

Circuit would seemingly help alleviate specialization problems.[408] Yet some still believe the Federal Circuit has fallen prey to the pitfalls of specialized courts.[409] By considering non-patent issues on mandamus, the Federal Circuit broadens the subject matter of issues it decides and varies the procedural posture in which it makes those decisions. The court's mandamus jurisprudence then develops not in a patent-focused tunnel, but with a broader sense of where the decisions fit in the legal landscape.

B. A More Refined Standard

I have argued that there are significant benefits from Federal Circuit mandamus on non-patent issues. These benefits, however, do not necessarily mean that the proper standard for mandamus in the Federal Circuit is to grant mandamus in every single case that a regional circuit would. Rather, the court should use the discretion inherent in mandamus adjudication to develop a standard that accounts for the court's unique role in the federal system.

In describing a Federal Circuit-specific framework, I begin with the basic premise that significant errors appropriate for mandamus relief (based on the substantive criteria for granting the writ) should not go uncorrected solely because an appeal lies to the Federal Circuit and not a regional circuit. Congress intended the Federal Circuit to have equal status with its sister circuits,[410] so the court should, in general, have the same remedial powers as those courts.[411] The primary differences between the Federal Circuit and its sister circuits are (1) the Federal Circuit's choice-of-law regime, under which it applies regional circuit law to non-patent issues and procedural issues not unique to patent law, and (2) the Federal Circuit's jurisdictional structure, which is nationwide in geographic scope, but limited in subject matter to cases arising under the patent laws. Any

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408. *See* John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 666, 675 (2009).

409. *See* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110 (2003); *see also* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and concurring in the judgment) ("[O]ccasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias."). Without offering a final judgment on this issue, I have suggested elsewhere that the mix of cases within the Federal Circuit's jurisdiction may not be ideal. *See* Gugliuzza, *supra* note 30 (manuscript at 29-61).

410. *See* S. REP. NO. 97-275, at 2-3 (noting that the Federal Circuit "is on line with other Federal courts of appeals that is, it is not a new tier in the judicial structure"); *In re* Roberts, 846 F.2d 1360, 1362 (Fed. Cir. 1988) (en banc) ("This court is a co-equal member of a system of thirteen appellate courts arranged in a single tier.").

411. *See* Beatrice Foods Co. v. New Eng. Printing & Lithographing Co., 899 F.2d 1171, 1179 (Fed. Cir. 1990) (en banc) (Newman, J., concurring in the judgment) ("I think it unlikely that the Federal Circuit was intended to have less authority under 28 U.S.C. § 2106 [which provides federal appellate courts with their general remedial authority] than did the courts that received patent appeals before our formation.").

Federal Circuit-specific considerations on mandamus review should flow from these unique characteristics.

I organize my discussion of these considerations around the separate (but sometimes overlapping) theories of mandamus. I first briefly discuss how the Federal Circuit should make full use of mandamus for its traditional, "jurisdictional" purposes. I then contemplate Federal Circuit-specific limitations on mandamus when the court uses the writ for advisory, supervisory, or supervisory plus purposes.

1. Jurisdictional Mandamus Consistent with § 1338.—As noted, the traditional role of appellate mandamus was to restrain a court from acting without authority and to compel a court to exercise authority with which it had been vested.[412] Similarly, perhaps the least controversial use of appellate mandamus under the All Writs Act is to ensure that a lower court action does not prevent an appeal—mandamus that is truly "in aid of" the appellate court's jurisdiction.[413] The Federal Circuit has regularly used mandamus for these "jurisdictional" functions when a district court's jurisdiction is based on § 1338.[414] The CCPA, likewise, would issue mandamus to set aside rulings obstructing an appeal to the CCPA.[415]

It is hard to see any reason why the Federal Circuit should not continue this practice. The use of mandamus to compel or restrain the acts of a lower court traces its roots to common law practice and serves the valuable function of ensuring that lower federal courts exercise the power given to them by Congress, nothing more and nothing less. The use of mandamus to ensure that district courts do not prevent an appeal to the Federal Circuit is similarly well-grounded. Where Congress has provided a right to appeal (as it has done for patent cases in § 1295), district courts should not be permitted to nullify that right through erroneous rulings.

2. Advisory Mandamus on Issues Intertwined with Patent Law.—An important purpose of this Article has been to critique the Federal Circuit's use of supervisory mandamus, that is, mandamus issued to correct an egregious district court error that is likely to recur. Yet the Federal Circuit, like the other courts of appeals, also issues advisory mandamus, that is, mandamus issued to answer important, unresolved legal questions. Before outlining a reconceptualized model of supervisory mandamus in the Federal Circuit, it is worthwhile to consider how the court's standards for advisory mandamus might also be clarified.

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412. *See supra* Part I.A.

413. *See* McClellan v. Carland, 217 U.S. 268, 280 (1910) ("[W]here a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.").

414. *See, e.g.*, *In re* Cont'l Gen. Tire, Inc., 81 F.3d 1089, 1090 (Fed. Cir. 1996) (vacating order compelling alleged infringer to file a reexamination request with the PTO); *In re* Snap-On Tools Corp., 720 F.2d 654, 655 (Fed. Cir.) (granting mandamus to compel removal from state court to federal court), *order amended by* 735 F.2d 476 (Fed. Cir. 1983).

415. *See* Margolis v. Banner, 599 F.2d 435, 443 (C.C.P.A. 1979).

The object of advisory mandamus is to answer questions of law that cannot await or regularly evade appellate review.[416] Thus, the Federal Circuit's choice-of-law rules are key to determining the optimal scope of advisory mandamus. On most non-patent questions, the Federal Circuit applies regional circuit law.[417] Because the Federal Circuit cannot definitively say what regional circuit law is, the court should be hesitant to issue advisory mandamus on questions of regional circuit law. This is especially true when the issue is completely unrelated to patent law, such as a purely procedural issue the regional circuit has simply not resolved. The Federal Circuit could of course provide some advisory guidance to the parties and the public on such a question, at least until the pertinent regional circuit decides the question. But the Federal Circuit's inability to definitively resolve the question substantially reduces the benefits of the disruptive interlocutory appeal without reducing its costs.

On the other hand, when the issue of regional circuit law is intertwined with the patent law, such as a question of how the attorney-client privilege applies in a patent-specific context, the benefits of the decision increase for two reasons. First, the Federal Circuit may be able to provide guidance that cannot be obtained elsewhere. Because the regional circuits now decide few patent cases, the Federal Circuit is practically the only court that can provide advice on issues of regional circuit law as they arise in patent litigation, such as disputes over the designation and disclosure of confidential technical documents. Second, and relatedly, a regional circuit is less likely to overrule the Federal Circuit's advice on an issue of regional circuit law as it applies in patent litigation. The court may not be presented with a patent case providing the opportunity to overrule the Federal Circuit, and even if it were, the regional circuit might defer to the Federal Circuit's expertise regarding patent litigation.

To be sure, there is no way to clearly define the class of issues that are intertwined with patent law. But the broader point is to focus the court on the costs and benefits of interlocutory review. Mandamus might not be justified on an issue of regional circuit law that is in no way a consequence of the patent claims in the case. The Federal Circuit's decision would provide no definitive guidance and could easily be overruled by the regional circuit. By contrast, when an issue is a direct consequence of the patent claims in the case, the Federal Circuit can provide useful guidance that might outweigh the costs of a disruptive interlocutory appeal.

On questions of pure patent law, the optimal standard for Federal Circuit advisory mandamus is clearer. With the exception of the U.S. Supreme Court, the Federal Circuit is the final judicial arbiter of questions of patent law. Accordingly, the Federal Circuit should issue advisory mandamus on important, unresolved issues of patent law that cannot effectively be reviewed on a post-judgment appeal, a normative recommendation that seems to accord with the

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416. *See supra* text accompanying notes 99-110.

417. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574-75 (Fed. Cir. 1984) (per curiam).

court's current practice.[418] The difficult consideration here is defining which questions are worthy of interlocutory review. The Federal Circuit has only briefly alluded to the factors it considers in deciding to issue advisory mandamus. But a reconceptualization of mandamus standards would permit a fuller discussion.

A framework for Federal Circuit advisory mandamus should be stringent enough to deter petitions that are frivolous or filed only as a delay tactic. Yet it should preserve mandamus as an option in cases where the benefits of interlocutory review outweigh the substantial costs of disruption to the trial process. Drawing in part from factors considered important in cases decided by both the Federal Circuit and other courts, a framework for advisory mandamus in the Federal Circuit should impose the following requirements:

(1) The question presented should be governed by Federal Circuit law or intertwined with the patent law.
(2) The question presented should be one of first impression. If not, the court should hear the petition only if it intends to reconsider its prior decision.[419]
(3) The issue should be likely to recur absent a definitive decision.[420]
(4) The question presented should regularly evade review.[421] A petitioner can satisfy this requirement by showing that the alleged error would likely be held harmless on a post-judgment appeal and is thus unlikely to be raised by a savvy appellant.[422]
(5) The petitioner should face a threat of immediate irreparable harm if the error is not corrected before appeal. This *immediate* irreparable harm should be something more than the fact that the error might be held harmless on appeal. Disclosure of documents protected by attorney-client privilege is a clear example of an immediate irreparable injury,[423] as is the disqualification of trial counsel,[424] and other examples may exist.
(6) The question presented should be important; district courts, litigants, and the public should derive significant guidance from its resolution.[425] A prime indicator for a question's importance, and the quantum of guidance that its resolution would provide, is the scope

418. *See, e.g.*, *In re* Deutsche Bank Trust Co. Ams., 605 F.3d 1373 (Fed. Cir. 2010) (patent-prosecution bar); *In re* Seagate Tech., LLC, 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (attorney-client privilege).

419. *See, e.g.*, *Seagate*, 497 F.3d at 1367.

420. *See* United States v. Horn, 29 F.3d 754, 769-70 (1st Cir. 1994) (Selya, J.).

421. *See id.* at 770.

422. *See* 28 U.S.C. § 2111 (2006).

423. *See In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1387-88 (Fed. Cir. 1996).

424. *See In re* Shared Memory Graphics LLC, 659 F.3d 1336, 1340 (Fed. Cir. 2011).

425. *In re* Bushkin Assocs., Inc., 864 F.2d 241, 247 (1st Cir. 1989) (Selya, J.).

of disagreement among the lower courts.[426]

An explicit discussion of these principles, which I have mostly synthesized from existing case law, would spur the court to consider the costs and benefits of an interlocutory decision on mandamus. Of course, it is not necessary for the Federal Circuit to adopt this six-element framework to conduct a thorough analysis of whether advisory mandamus is appropriate. And, because the lines between advisory and supervisory mandamus sometimes blur, the considerations I have outlined can be useful guideposts in deciding a wide array of mandamus petitions. Indeed, most of these elements would be useful to any appellate court refining the proper scope of mandamus, not just the Federal Circuit. My point is only that, if the Federal Circuit were to consciously reassess the role of mandamus, it could elaborate on specific considerations (such as the six I have outlined) that illuminate the costs and benefits of allowing a disruptive interlocutory appeal on an important, unsettled question of law.

3. Insightful and Didactic Supervisory Mandamus on Non-Patent Questions.—Returning specifically to supervisory mandamus, it is this use of the writ that has engendered the most confusion in the Federal Circuit, as shown by the courts' retreat from *Innotron*. If the Federal Circuit confronted *Innotron* and critically examined its own supervisory power, it might realize certain, limiting principles that could add significant coherence to the court's mandamus framework.

One possible limiting principle flows from the Federal Circuit's recent supervision of the transfer decisions of the Eastern District of Texas. Typically, courts use supervisory mandamus to fix one instance of an erroneous district court practice and to send a message that the practice is improper.[427] But, with the Eastern District of Texas, the Federal Circuit seems to have lost sight of the extraordinary nature of mandamus, granting the writ in ten similar cases.

This possible overuse of the writ is particularly problematic in the Federal Circuit. Because of the Federal Circuit's nationwide geographic jurisdiction, the court could provide significant guidance to all district courts through a judicious use of the writ. The Federal Circuit arguably dilutes the didactic message when it uses mandamus as what appears to be an error correction device, a perception that is exacerbated when the Federal Circuit grants mandamus by simply analogizing to its own case law on a matter that is supposedly governed by regional circuit law. One Federal Circuit case granting mandamus may be a teaching moment for district courts. For example, the Federal Circuit has made attention-getting statements in mandamus petitions dealing with attorney-client

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426. *See In re* BP Lubricants USA Inc., 637 F.3d 1307, 1310, 1313 (Fed. Cir. 2011) (holding that false marking claims must be pled with particularity, noting that this was a "question . . . of first impression" about which "trial courts have been in considerable disagreement"); *In re* Deutsche Bank Trust Co. Ams., 605 F.3d 1373, 1375 (Fed. Cir. 2010) (granting mandamus on "an important issue of first impression in which courts have disagreed").

427. *See supra* text accompanying notes 88-98.

privilege issues,[428] patent-prosecution bars,[429] and false marking claims.[430] Ten similar, fact-specific mandamus cases, however, may be too much to draw a district court's attention to the Federal Circuit's specific concerns.

The dilutive effect of this "supervisory plus" mandamus might be further enhanced in the Federal Circuit, which, as compared to the regional circuits, has fewer opportunities to informally reinforce the teaching points of its mandamus cases. Commentators have recognized the importance of informal interactions to supervisory mandamus, noting that "a petition for writ of mandamus may provoke one or more court[] of appeals judges to contact the district judge and informally suggest that he or she take steps to correct a problem."[431] While district judges regularly interact with their regional circuit judges outside of the adjudicative process (in circuit judicial conferences and on circuit judicial councils, for example), similar interaction with Federal Circuit judges historically has been rarer.[432] Thus, when issuing mandamus on issues of regional circuit law, the court should be very mindful of the writ's extraordinary character and use the writ carefully. This ensures that in the exceptional case when the writ does issue, district courts nationwide pay full attention to the guidance the Federal Circuit provides.

A counterargument to this point is that a small number of district courts, like the Eastern District of Texas, handle much, if not most, of the patent litigation in the United States. Those courts might understand the relevance of the Federal Circuit's pronouncements on important issues, even if the Federal Circuit is using mandamus so frequently as to make a mere footnote of the writ's extraordinary character. Moreover, the Federal Circuit's pronouncements might not be relevant to district courts that handle almost no patent cases. In short, it might not matter *how* the Federal Circuit is addressing the flaws it sees in certain courts' treatment of patent cases. The courts to which the Federal Circuit's decisions are relevant

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428. *See, e.g.*, *In re* Seagate Tech., LLC, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc); *In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 804 (Fed. Cir. 2000).

429. *See Deutsche Bank*, 605 F.3d at 1376.

430. *See BP Lubricants*, 637 F.3d at 1310-12.

431. TIGAR & TIGAR, *supra* note 3, at 193. While the authors concede that "[t]here is only anecdotal evidence on the prevalence of this 'informal mandamus jurisprudence'" they note that "it is frequently discussed at judicial conferences." *Id.* at 193-94.

432. Unlike in the regional circuits, district judges are not heavily involved in the Federal Circuit's judicial conference, *see CAFC Judicial Conference*, PATENT DOCS. (Apr. 9, 2010), http://www.patentdocs.org/2010/04/cafc-judicial-conference.html, and the Federal Circuit has no judicial council. That said, Chief Judge Rader's recent stint as a visiting judge in the Eastern District of Texas surely provided some opportunity for informal discussion. *See supra* notes 363-65 and accompanying text. Additionally, district judges who frequently hear patent cases, such as the judges of the Eastern District, have begun in recent years to sit by designation with the Federal Circuit. *See U.S. Court of Appeals for the Federal Circuit: Visiting Judges*, U.S. CT. APPEALS FED. CIRCUIT, http://www.cafc.uscourts.gov/images/stories/announcements/VJ_Chart_for_Website_8.pdf (last visited Mar. 2, 2012) (providing list of visiting judges who have sat with the Federal Circuit).

will invariably pay attention, and those that care little about patent cases will not.

But the simple fact that courts with patent-heavy dockets will likely pay more attention to the Federal Circuit should not excuse the Federal Circuit from maximizing the didactic function of mandamus. Even if the sheer quantity of mandamus petitions granted does not affect the writ's teaching function, the court could still better identify the issues on which supervisory mandamus is needed to teach a clear lesson to the district courts. One guide for the Federal Circuit could be to ensure that the writ issues only when it will effect real change in a district court's practice. In the Eastern District's venue cases, for example, some empirical evidence suggests that, contrary to conventional wisdom, the Eastern District transferred a proportion of its patent cases comparable to other judicial districts.[433] Consequently, special oversight of the court's venue decisions might not have been needed.[434]

By contrast, in other situations, the Federal Circuit's intimate familiarity with patent litigation and its major players might allow the court to see a need for supervision that other courts might miss. For example, in *Zimmer* and *Microsoft*, the court correctly identified the plaintiffs' attempts to manipulate venue.[435] Because the Federal Circuit is uniquely aware of the tactics employed by serial patent litigants (such as non-practicing entities and their counsel), it was not fooled by the plaintiff's establishment of an "office" in Texas[436] or pre-suit incorporation in the state.[437] Moreover, the court used appropriately aggressive language in making clear that plaintiffs may not game the system to establish venue.[438] This language sends a clear message to courts about when transfer should be granted in future cases—exactly what supervisory mandamus is supposed to do. Similarly, in *Vistaprint*, the court drew upon its understanding of the technological complexity of patent litigation to ensure that a patent case remained before a court that was familiar with the technology at issue.[439]

By considering whether its supervision can meaningfully impact a district court's practice, send a clear teaching message, provide unique insight into the

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433. *See* Janicke, *Patent Venue*, *supra* note 259, at 20-21.

434. To be sure, the data also suggests that the Eastern District denied a higher percentage of transfer motions than other leading patent districts. *See id.* at 22-23. But, for mandamus purposes, what the data shows is that the Eastern District was not so blatantly flouting the law of § 1404(a) as to unquestionably warrant supervisory plus mandamus.

435. *In re* Microsoft Corp., 630 F.3d 1361, 1365 (Fed. Cir. 2011) (per curiam); *In re* Zimmer Holdings, Inc., 609 F.3d 1378, 1381-82 (Fed. Cir. 2010).

436. *Zimmer*, 609 F.3d at 1381-82.

437. *Microsoft*, 630 F.3d at 1365.

438. *See id.* at 1364 (rejecting the plaintiff's argument against transfer as "rest[ing] on a fallacious assumption: that this court must honor connections to a preferred forum made in anticipation of litigation and for the likely purpose of making that forum appear convenient"); *Zimmer*, 609 F.3d at 1381 ("This is a classic case where the plaintiff is attempting to game the system by artificially seeking to establish venue by sharing office space with another of the trial counsel's clients.").

439. *In re* Vistaprint, Ltd., 628 F.3d 1342, 1346-47 (Fed. Cir. 2010).

facts on the ground, or better account for the realities of patent litigation, the Federal Circuit can better identify the cases that warrant the extraordinary remedy of mandamus. The end result of this inquiry may be that the Federal Circuit issues mandamus in fewer venue cases from the Eastern District, where aggressive supervision might be unnecessary, but is more alert to jurisdictional tricks employed by litigants in venues that are vying to replace the Eastern District as the hotbed for patent litigation, such as the Western District of Wisconsin.[440] The court might also use broader and more aggressive language to make the standards for mandamus and for transfer of venue as clear as possible, in an effort to reduce the need for case-by-case supervision of the Eastern District.

In sum, the Federal Circuit's singular nature suggests that the mandamus standards that work for the regional circuits will not necessarily work for the Federal Circuit. A common criticism of the Federal Circuit is that it refuses to engage broader policy concerns in its decisions, and instead develops a formalistic, context-insensitive jurisprudence that inhibits the development of "optimal rules."[441] If the Federal Circuit were to confront *Innotron* and the reasoning behind it, rather than distinguishing, downplaying, or ignoring the case, the court could develop a more refined mandamus framework that accounts for its choice-of-law constraints, its *sui generis* jurisdictional structure, and its superior understanding of the realities of patent litigation.

CONCLUSION

Federal Circuit mandamus is at a critical juncture. It has been over twenty years since the court, in *Innotron*, last examined the role of Federal Circuit mandamus in the federal scheme for resolving patent disputes. Because the court has not engaged in any introspection, it has drifted toward a standard under which it will consider any issue of regional circuit law on mandamus, so long as the underlying case would ultimately be appealed to the Federal Circuit. That standard might work for the regional circuits, which are almost always applying their own circuit's law and reviewing a narrow group of district judges with whom they frequently interact. The Federal Circuit, however, with its uniquely broad geographic jurisdiction and uniquely narrow subject-matter jurisdiction, might require a more refined standard.

The repeated issuance of mandamus to the Eastern District of Texas does not reflect any effort to account for the Federal Circuit's uniqueness. Instead, it resembles interlocutory error correction under Federal Circuit law, a model of

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440. *Cf. In re* Affymetrix, Inc., Misc. No. 913, 2010 WL 1525010, at *1-2 (Fed. Cir. Apr. 13, 2010) (denying mandamus petition that sought transfer from the Western District of Wisconsin to the Northern District of California, even though the defendant's employee-witnesses, all six third-party witnesses, the development and marketing documents, and the accused product itself, were located in California).

441. *E.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit as an Institution: What Ought We to Expect?*, 43 LOY. L.A. L. REV. 827, 833-34 (2010).

mandamus that this Article has termed "supervisory plus" mandamus. The court could certainly fix the shortcomings of its mandamus doctrine and practice. It should begin from the premise that Federal Circuit mandamus on non-patent issues is, in general, useful and efficient. The court should be fully aware of the need to use the writ judiciously, and could preserve its didactic function by reserving the writ for situations where, as judged from the Federal Circuit's unique position as appellate forum for nearly all patent cases, serious change is needed in a district court's practice. This approach would recognize that the Federal Circuit is a federal appellate court like no other, while also ensuring that mandamus remains an option in those extraordinary situations in which the benefits of immediate review outweigh its substantial costs.

COMBATING MORAL HAZARD: THE CASE FOR RATIONALIZING PUBLIC EMPLOYEE BENEFITS

MARIA O'BRIEN HYLTON*

ABSTRACT

The current crisis in public employee benefits is a fairly conventional moral hazard story about overly generous promises made by both private sector employers and politicians spending public dollars. The private sector, forced by the Financial Accounting Standards Board (FASB) in 1993 to confront the true cost of promises made to future retirees, dealt with the newly discovered debt in a number of ways, including the termination of defined benefit plans which were quickly replaced by defined contribution plans. The public sector was also forced to confront its own largesse with the implementation of GASB 45, which focused careful attention on the present value of the level of benefits promised. This period of scrutiny coincided with skyrocketing health care costs and a deep recession that saw enormous private sector job loss and, unsurprisingly, growing resentment by private sector employees of the relatively lavish benefits still enjoyed by unionized public workers. This Paper describes the astonishing scope of public sector benefits-driven indebtedness and provides an account which contrasts the prudent self-correction process in the private sector with the ongoing struggle of many states to address the issue. In addition, this paper proposes specific reforms—the movement of all employees into defined contribution (DC) plans; mandated use of realistic rates of return; the explicit promotion of the cultural norms of thrift and frugality; and, in extreme cases where the political landscape appears incapable of responding effectively to the crisis, the modification of legal regimes to prohibit collective bargaining over benefits—for policymakers to consider.

INTRODUCTION

In the middle of the twentieth century, both private and public employers committed themselves to employee benefits for current employees and retirees that would ultimately prove unaffordable as the population aged and the cost of health care soared. Many private enterprises, pushed by FAS 106,[1] took a series

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1. FIN. ACCOUNTING STANDARDS BD. (FASB), FIN. ACCOUNTING FOUND., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 106: EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS (1990) [hereinafter FASB]. *See About FAF: Overview*, FIN. ACCT. FOUND., http://www.accountingfoundation.org/cs/ContentServer?site=Foundation&c=Page&pagename=Foundation%2FPage%2FFAFSectionPage&cid=1176158231339 (last visited Sept. 27, 2011).

> Organized in 1972, the Financial Accounting Foundation (FAF) is the independent, private-sector organization with responsibility for:
>
> • Establishing and improving financial accounting and reporting standards;

of steps designed to correct and rationalize these benefits beginning in the mid-1990s. The public sector, plagued as always by the presence of political factors, and allowed more time by GASB 45,[2] moved much more slowly to address the problem of unaffordable benefits for retirees and current workers. New Jersey, for example, is estimated to carry a pension obligation that equals 44% of its total GDP.[3] A little further to the west, Illinois is described this way:

> After 30 years of the state's procrastination, the pension burden has grown backbreaking. Illinois' five pension funds are $35 billion in the red, a serious shortfall for a state with a general operating budget of $43

> - Educating constituents about those standards;
> - The oversight, administration, and finances of its standard-setting Boards, the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB), and their Advisory Councils;
> - Selecting the members of the standard-setting Boards and Advisory Councils; and
> - Protecting the independence and integrity of the standard-setting process. . . .
>
> Financial Accounting Standards Board (FASB)
>
> Established by the FAF in 1973, the FASB has been delegated the authority to establish standards of financial accounting and reporting for private-sector entities, including business and not-for-profit organizations. FASB standards are recognized as generally accepted and authoritative.

Id.

2. *See* GOVERNMENTAL ACCOUNTING STANDARDS BD. (GASB), OTHER POSTEMPLOYMENT BENEFITS: A PLAIN-LANGUAGE SUMMARY OF GASB STATEMENTS NO. 43 AND NO. 45 (2004) [hereinafter GASB STATEMENTS], *available at* http://www.gasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820457538&blobheader=application%2Fpdf.

3. Eileen Norcross & Andrew Biggs, *The Crisis in Public Sector Pension Plans: A Blueprint for Reform in New Jersey* 2 (Mercatus Ctr. at George Mason Univ., Working Paper No. 10-31, 2010), *available at* http://mercatus.org/sites/default/files/publication/WP1031-%20NJ%20Pensions.pdf.

> [New Jersey] reports that its pension systems are underfunded by $44.7 billion, when liabilities are discounted at the 8.25 percent annual return that New Jersey predicts it can achieve on funds' investment portfolios.
>
> However, when plan liabilities are calculated in a manner consistent with private sector accounting requirements, methods that economists almost universally agree are more appropriate, New Jersey's unfunded benefit obligation rises to $173.9 billion. This amount is equivalent to 44 percent of the state's current GDP and 328 percent of its current explicit government debt. This calculation applies a discount rate of 3.5 percent (the yield on Treasury bonds with a maturity of 15 years) to reflect the nearly risk-free nature of accrued benefits for workers. It is estimated if state pension assets average a return on 8 percent, New Jersey will run out of funds to meet its pension obligations in 2019. If asset returns are lower than 8 percent, they will run out of funds sooner. State actuaries estimate that under certain assumptions, New Jersey's pension plans will run out of assets to make benefit payments beginning in 2013.

Id. (citations omitted).

> billion this year. Illinois owes $2.6 billion this year, and within five years that will reach $4 billion annually. By comparison the state will spend $5.9 billion total on kindergarten through 12th-grade education next year. "If we were a business we wouldn't be in Chapter 11, we'd be in Chapter 13," [sic] says Ralph M. Martire, executive director of the Center for Tax & Budget Accountability, a Chicago-based nonprofit think tank. "We'd have to liquidate." Illinois is not a fast-growing state that can hope that future population and tax growth will bail it out. D'Arcy of the University of Illinois calculates that Illinois should be 97%-funded based on its rate of income growth. Instead retirement funds are 62%-funded.[4]

And, even further west, the picture is just as grim. California is estimated to become insolvent by the early 2030s.[5] Smaller government bodies in the state are already leading the way. Vallejo[6] filed for Chapter 9 in 2008 "after property-tax revenue collapsed in the housing bust and a major employer -- the U.S. government's Mare Island Ship-yard -- closed. With the tax base hammered, rich public employee contracts granted in better times were devouring more than 90% of the city's budget."[7]

This Paper analyzes the core moral hazard problem[8] that has plagued public pensions and other benefits for those who work for the state—i.e. the apparently irresistible tendency of state legislators and executive branch officials to spend taxpayer dollars to enhance benefits and decrease contributions during flush economic times in exchange for voter support at the polls. By moral hazard I

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4. Nanette Byrnes & Christopher Palmeri, *Sinkhole! How Public Pension Promises Are Draining State and City Budgets*, BLOOMBERG BUSINESSWEEK, June 13, 2005, http://www.businessweek.com/magazine/content/05_24/b3937081.htm. Of course, Mr. Martire meant Chapter 7 and not Chapter 13.

5. *See* AUSTIN APPLEGATE ET AL., BARCLAYS CAPITAL, STATES' PENSIONS: A MANAGEABLE LONGER-TERM CHALLENGE 15 (2011), *available at* http://www.nasra.org/resources/barclays1105.pdf (providing estimates from 2026 to 2044, with 2037 considered most accurate); *see also* Joshua Rauh, *The Day of Reckoning for State Pension Plans*, KELLOGG FIN. DEP'T (Mar. 22, 2010), http://kelloggfinance.wordpress.com/2010/03/22/the-day-of-reckoning-for-state-pension-plans/ (predicting when certain states' pension funds will run dry).

6. *In re* City of Vallejo, 432 B.R. 262, 265 (E.D. Cal. 2010); *see* Jonathan Weber, *For Vallejo, Bankruptcy Isn't Exactly a Fresh Start*, N.Y. TIMES, Jan. 23, 2011, at A29A, *available at* http://www.nytimes.com/2011/01/23/us/23bcweber.html?_r=4 (stating Vallejo should be set to emerge in the summer of 2011 with reduced health care payments and increased employee contributions, but pensions remain the same); *see also* Bobby White, *Long Road Out of Bankruptcy*, WALL ST. J., May 4, 2011, at A4, *available at* www.online.wsj.com/article/SB10001424052748704706045763014135212040 74.html.

7. Jonathan R. Laing, *The $2 Trillion Hole*, BARRON'S, Mar. 15, 2010, at A40.

8. *See* Definition of Moral Hazard, PRINCETON UNIV. WORDNET, http://wordnetweb.princeton.edu/perl/webwn?s=moral%20hazard (last visited Oct. 3, 2011) (defining moral hazard as "([E]conomics) the lack of any incentive to guard against a risk when you are protected against it (as by insurance)").

mean, essentially, the subsidization by taxpayers of unaffordable commitments entered into by their political representatives during the course of bargaining with public unions. (In general, moral hazard problems arise in the context of information asymmetry: one party (politicians) has more information and less concern about the consequences of their behavior than the party that must pay (taxpayers).) The argument here is that politicians have essentially spent and committed future taxpayer dollars with far less care than if they would have spent their own, private funds. This behavior is explained by a desire to gain the support of public sector unions and their members and encouraged by a generally ignorant and unsuspecting public.[9] Paul Krugman has described moral hazard as "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly."[10]

Part I retraces the history pre-dating the current crisis and the role that FAS 106 and GASB 45 played in finally forcing both public and private employers to disclose the true cost of their promised future commitments. Part II focuses on three states that have managed to rein in costs by adopting private sector-style reforms and three that have struggled, and thus far failed, to rationalize their public benefits cost structure. Part III draws on the experiences of the most successful states and the private sector and proposes a menu of specific reforms designed to combat the worst tendencies of state politicians to spend without regard to future cost to the taxpayer. Only reforms like those forced upon the private sector by FAS 106 can bring down future benefits costs in the public sector. And, to avoid a repeat of the current fiscal crisis, states must eliminate, as much as possible, incentives that encourage decision makers in the public sector to spend public dollars with much less care than comparable private dollars; in extreme cases, it may be necessary to prohibit bargaining over health insurance and retirement income for current and future employees.

I. HOW WE GOT HERE: MEASURING OPEB AND PENSION LIABILITIES

The story of the current projected $3.9 trillion shortfall[11] in promised state and local government retiree benefits is a classic public choice tale, consisting of the usual self-interested and vaguely disorganized politicians, an unsophisticated and ignorant electorate, and well-organized interests (in this case public employee unions) in search of maximum private benefit via access to public dollars.[12] The dominant theme is political self-interest, short horizons, and

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9. *See, e.g.*, Steven Greenhouse, *A Watershed Moment for Public-Sector Unions*, N.Y. TIMES, Feb. 19, 2011, at A14, *available at* http://www.nytimes.com/2011/02/19/us/19union.html.

10. PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008, at 63 (2009).

11. *See A Gold-Plated Burden: Hard-Pressed American States Face a Crushing Pensions Bill*, ECONOMIST (Oct. 14, 2010) [hereinafter *A Gold-Plated Burden*], http://www.economist.com/node/17248984 ("Joshua Rauh, of the Kellogg School of Management at Northwestern University, and Robert Novy-Marx, of the University of Rochester, estimate that the states' pension shortfall may be as much as $3.4 trillion and that municipalities have a hole of $574 billion.").

12. *See generally* JOHN CULLIS & PHILIP JONES, PUBLIC FINANCE & PUBLIC CHOICE:

a persistent disconnect between easy-to-make promises and their real, future cost.[13] In the 1960s many large private enterprises began offering retiree health care and other post-employment benefits (OPEBs).[14] Private pensions, at this point in U.S. history, were almost invariably offered in the form of defined benefit (DB) plans—much like the pensions that still dominate the public sector today.[15] DB plans typically guaranteed workers a specific monthly retirement benefit based primarily on pay and length of service.[16] Employers were not required to account on their balance sheets for the present value of OPEB promises; instead, they used a pay-as-you-go system and reported only expenditures incurred in a given year for current retirees.[17] Shorter life expectancies for an overwhelmingly male workforce (which were in turn a function of both less sophisticated health care for end-of-life conditions and popular (albeit unhealthy) habits such as tobacco consumption) meant these OPEB debts were modest and of little concern.[18]

ANALYTICAL PERSPECTIVES (3d ed. 2009); *see also* SARA CONNOLLY & ALISTAIR MUNRO, ECONOMICS OF THE PUBLIC SECTOR (1999); MURRAY J. HORN, THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR (1995); PETER SELF, GOVERNMENT BY THE MARKET?: THE POLITICS OF PUBLIC CHOICE (1993).

13. *See* sources cited *supra* note 12.

14. *See* Martin Feldman & Roscoe Haynes, *Effect of New GASB 45 Accounting Rules: What We Can Learn From FAS 106*, BENEFITS & COMPENSATION DIG., Mar. 2007, at 18, 19-20.

15. *See* Norcross & Biggs, *supra* note 3, at 4.

> Under a defined benefit (DB) plan, the employer promises employees a regular pension payment (i.e., an annuity) over the worker's retirement years. The amount of the benefit payment depends on the worker's age, years on the job, and a measure of their final salary. More specifically, benefit formulas generally pay a given percentage of the employee's final salary multiplied by the number of years of employment. In a defined benefit plan, investment risk is borne by the employer since the employer's payment is independent of the investment return earned by the pension's fund.

Id. (citations omitted).

16. *See id.*

17. *See* Feldman & Haynes, *supra* note 14, at 19.

18. *See* Barbara A. Lingg, *Women Beneficiaries Aged 62 or Older, 1960-88*, 53 SOC. SECURITY BULL. 2, 3-4 (1990), *available at* http://www.ssa.gov/policy/docs/ssb/v53n7/v53n7p2.pdf.

> During the past six decades, women have represented an increasing percentage of the Nation's workforce. In 1930, 10 million women workers accounted for 22 percent of the total workforce. Thirty years later, 23 million women workers accounted for one-third of the labor force. In 1988, the 55 million women in the labor force comprised 45 percent of the total workforce. . . .

Id. at 3. For statistics on smoking rates, see CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL SIGNS: CURRENT CIGARETTE SMOKING AMONG ADULTS AGED ≥ 18 YEARS—UNITED STATES, 2009 (Sept. 7, 2010), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm59e0907.pdf; Marc Kaufman, *Decades-Long U.S. Decrease in Smoking Rates Levels Off*, WASH. POST (Nov. 9, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/08/AR2007110801094.html;

The 1980s and 1990s witnessed an unprecedented bull run in the stock market as well as rising health care costs.[19] In some years, medical costs increased by more than 20% per year.[20] Public pension funds began shifting assets into risky equities instead of the low risk, fixed income investments that had been long time favorites.[21] The stock market's astonishing performance caused many public and private pension funds to appear overfunded, and politicians were receptive to union requests for more pay and improved benefits at lower contribution levels (in exchange, presumably for promises of ongoing support at the polls).[22] Many fund managers began to expect annual returns of 8% or better.[23]

A. The Private Sector Owns Up to Its Debt

In 1990, when the Financial Accounting Standards Board (FASB)[24] issued

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Smoking Prevalence Among U.S. Adults, 1955-2007, INFOPLEASE, http://www.infoplease.com/ipa/A0762370.html (last visited Oct. 3, 2011) (showing that over 42% of the population smoked regularly in 1965, while only 20.8% of the population were smokers in 2007).

19. *See* Feldman & Haynes, *supra* note 14, at 19.

20. *Id.* at 19-20.

21. *See* Andrew G. Biggs, *Public Pensions Roll the Dice*, AMERICAN (June 23, 2011), www.american.com/archive/2011/june/public-pensions-roll-the-dice/.

22. *See* JOSH BARRO & STUART BUCK, MANHATTAN INST. FOR POLICY RESEARCH, UNDERFUNDED TEACHER PENSION PLANS: IT'S WORSE THAN YOU THINK 4 (2010).

> Instead of setting aside investment gains for future pension payments, state governments started "shortening vesting periods, increasing the multipliers used in determining benefit amounts, decreasing the age at which employees could receive full retirement benefits and shortening the years of service needed to qualify. New York, New Jersey, Illinois, Pennsylvania, Kentucky, California, Colorado and other states increased benefits."

Id. (internal citation omitted).

23. *Id.* at 5-6.

24. FASB, FACTS ABOUT FASB (2007), *available at* http://www.fasb.org/facts/facts_about_fasb.pdf.

> Since 1973, the Financial Accounting Standards Board (FASB) has been the designated organization in the private sector for establishing standards of financial accounting and reporting. Those standards govern the preparation of financial reports. They are officially recognized as authoritative by the Securities and Exchange Commission (Financial Reporting Release No. 1, Section 101 and reaffirmed in its April 2003 Policy Statement) and the American Institute of Certified Public Accountants (Rule 203, Rules of Professional Conduct, as amended May 1973 and May 1979). Such standards are essential to the efficient functioning of the economy because investors, creditors, auditors, and others rely on credible, transparent, and comparable financial information.
>
> The Securities and Exchange Commission (SEC) has statutory authority to establish financial accounting and reporting standards for publicly held companies under the Securities Exchange Act of 1934. Throughout its history, however, the Commission's policy has been to rely on the private sector for this function to the extent that the

FAS 106, private employers were required for the first time to account for the present value of OPEBs.[25] Actuaries were to apply a discount rate of 6% to determine the present value of all promised benefits.[26] Six percent reflected a blended average of the historic rate of interest on U.S. Treasury and high-grade corporate bonds.[27] FAS 106 meant that shareholders and others could see how much debt a company was carrying in the form of future promised benefits to employees. (This change, long overdue, should be contrasted with the longstanding requirement that employers account for future pension costs and set aside cash each year to satisfy those costs.)[28]

As employers began reporting their OPEB debt, FAS 106 generated unusual amounts of attention outside of accounting circles. The Big Three U.S. automakers alone reported a total OPEB liability of $35.7 billion.[29] Private

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private sector demonstrates ability to fulfill the responsibility in the public interest.

Id. at 1; *see also* U.S. SEC. & EXCH. COMM'N, REAFFIRMING THE STATUS OF THE FASB AS A DESIGNATED PRIVATE-SECTOR STANDARD SETTER (2003), *available at* http://www.sec.gov/rules/policy/33-8221.htm.

25. *See* FASB, *supra* note 1, at 19-22.

26. BARRO & BUCK, *supra* note 22, at 7 ("Private plans generally choose a discount rate based on a blended average of corporate bonds in the Moody's Aa rating range, pegged by Mercer Consulting as of February 2010 at 6.06 percent over a fifteen-year plan horizon, the typical period used by public-sector plans.").

27. *Id.*

28. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (2006 & Supp. 2010); *see also FRBSF Economic Letter Underfunding of Private Pension Plans*, FED. RES. BANK S.F. (FRBSF) (June 13, 2003), http://www.frbsf.org/publications/economics/letter/2003/el2003-16.pdf.

> ERISA, which mandates the funding requirements for DB plans, requires companies to make a normal contribution to their pension plan that is equal to the normal pension cost, called the Net Periodic Pension Cost (NPPC). The NPPC is expensed in a sponsoring firm's income statement, and it includes changes in a firm's pension obligations as a result of services rendered by employees. But in calculating the NPPC, those costs are netted against the firm's expected return on plan assets. Note that the expected rate of return is determined by the sponsoring firm and could depart significantly from the plan assets' realized return.
>
> ERISA also requires additional contributions based on a plan's funding status. In computing the funding status, ERISA compares the market value of plan assets to the ABO, which generally is less than the PBO. For a plan that is less than 90% funded, ERISA requires the sponsoring firm to make an additional contribution to the plan to reduce the funding deficiency within three to five years. There are exceptions, however. If a plan is over 80% funded today and was more than 90% funded for the past two years, the additional contribution requirement is waived. Furthermore, companies may request a hardship waiver or an extension period to meet the normal and additional contribution requirements.

Id. at 2.

29. Elizabeth K. Keating & Eric S. Berman, *Unfunded Public Employee Health Care Benefits*

sector enterprises generally employed one or both of the following techniques in order to right size their OPEB liability: First, they took enormous write-downs. For example, General Motors wrote down $23.5 billion in 1990,[30] AT&T took a $7.5 billion charge,[31] and IBM took a "$2.7 billion charge against $37 billion in shareholder equity."[32] Second, many employers threatened bankruptcy or actually restructured themselves through bankruptcy, terminating defined benefit plans and moving employees into defined contribution plans en masse.[33] The new DC plans often required higher levels of employee contribution and, of course, dramatically reduced performance risk for the sponsoring employer.[34]

Not all employers were able to reduce or eliminate their OPEB liability. Indeed a 2005 Standard and Poor's study pegged the total underfunded OPEB liability of all S&P 500 companies at $292 billion—almost twice the size of their

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and GASB No. 45, 21 ACCT. HORIZONS 245, 253 (2007).

30. *Id.*

31. Kevin Anderson, *Health-care Bill: $335B, Retiree Liability Expected to Rise*, USA TODAY, Dec. 5, 1991, at 2B ("AT&T's Tuesday announcement that it will charge up to $7.5 billion against assets to comply with an accounting-rule change known as Financial Accounting Standard 106 adds to a fast-growing list of companies that have made the painful jump.").

32. Scott Burns, *Book Value to Get Socked by FAS 106*, DALL. MORNING NEWS, Jan. 3, 1993, at 1H (IBM took a $2.7 billion charge).

33. *See* Jim Freer, *Bankers Up in the Air Over FAS 106 Funds*, 103 U.S. BANKER 44, 45 (1993).

> Allan Martin, Bankers Trust New York Corp.'s managing director for retirement services, says most corporations have been focusing on their health care liabilities rather than on the accounting for them, in anticipation of FAS 106. He says many have been cutting benefits, capping them or switching them to defined-contribution plans.

Id.; *see also* Fred Williams, *Companies Face Up to Retiree Health Liability*, PENSIONS & INVESTMENTS, Sept. 30, 1991, at 3 ("Chrysler was the first to disclose its potential liability of $4 billion to $6 billion and has implemented a defined contribution approach to controlling retiree medical costs.").

34. *See* Mark A. Hofmann, *Firms Continue to Cut Retiree Health Plans*, BUS. INS., Dec. 6, 1993, at 1.

> Some 47% of surveyed employers reported having modified their retiree health benefits in the previous two years. Another 22% said changes were planned this year. Larger employers were more likely to make changes than smaller ones: 51% of those with 1,000 or more employees said they had made changes, compared with only 37% of smaller employers. Some 30% of all surveyed employers said they had raised retiree premium contributions, and 21% shifted costs by raising deductibles, coinsurance or out-of-pocket maximums. Eleven percent reported having tightened eligibility standards. "Some changes were aimed at making retiree benefit cost more predictable, probably with (Financial Accounting Standard) 106 in mind: 9% of employers installed (or decreased) the lifetime maximum benefit, and 5% changed from a defined benefit to a defined contribution or fixed-dollar approach," Foster Higgins [& Co., Inc.] said.

Id.

total pension liabilities.[35] Johnson & Johnson, General Electric, and Boeing remain examples of large companies with substantial OPEB liabilities that have yet to be completely addressed.[36]

Between 2000 and 2006, a housing bubble formed in the United States that would make the earlier tech bubble[37] seem contained by comparison. One consequence of the rapid climb in housing prices during this time was a dramatic increase in property tax revenues.[38] State and local governments, flush with cash, responded to union demands in the same way they did when the stock market was rising inexorably. Numerous states granted public employees increased benefits

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35. Press Release, Standard & Poor's, S&P 500 Companies Significantly Under Funded for Other Post Emp't Benefits (OPEB) (Dec. 19, 2005), *available at* www.thefreelibrary.com/S%26P+500+Companies+Significantly+Under+Funded+for+Other+Post...-a0139908769.

36. *See* Howard Silverblatt & Dave Guarino, *S&P 500 2010: Pensions and Other Post-Employment Benefits (OPEBs)*, S&P INDICES, May 26, 2011, at 1, 8, app., *available at* http://www.standardandpoors.com/servlet/BlobServer?blobheadername3=MDT-Type&blobcol=urldata&blobtable=MungoBlobs&blobheadervalue2=inline%3B+filename% 3DSP_500_OPEB-Pensions-May26-2011.pdf&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobkey=id&blobheadername1=content-type&blobwhere=1243908577565&blobheadervalue3=UTF-8.

37. *See* Chris Gaither & Dawn C. Chmielewski, *Fears of Dot-Com Crash, Version 2.0*, L.A. TIMES, July 16, 2006, http://articles.latimes.com/2006/jul/16/business/fi-overheat16 ("The market value of Nasdaq companies peaked at $6.7 trillion in March 2000 and bottomed out at $1.6 trillion in October 2002."). Total losses from the peak of the U.S. property bubble are estimated at $4.3 trillion. Roger C. Altman, *The Great Crash, 2008: A Geopolitical Setback for the West*, FOREIGN AFF. 2 (Jan./Feb. 2009), http://www.jmhinternational.com/news/news/selectednews/files/2009/01/20090201_20090101_Foreign%20Affairs_TheGreatCrash2008.pdf. ("Total home equity in the United States, which was valued at $13 trillion at its peak in 2006, had dropped to $8.8 trillion by mid-2008 and was still falling in late 2008."). While this is a smaller number than the $5.1 trillion lost in the NASDAQ, it affected a much broader base of the population. And, the dot-com bubble was fueled by paper gains, while the real-estate bubble led to real debts.

38. *See generally* NATALIA SINIAVSKAIA, NAT'L ASS'N OF HOME BUILDERS, PROPERTY TAX RATES AFTER THE HOUSING DOWNTURN (2011), *available at* http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=155396&channelID=311; Charles Hugh Smith, *Property Taxes Keep Rising as Home Values Keep Falling*, DAILY FIN. (Dec. 18, 2010), http://www.dailyfinance.com/2010/12/18/property-taxes-keep-rising-as-home-values-keep-falling/; Nin-Hai Tseng, *The Tax Man Doesn't Want Housing to Recover*, FORTUNE (June 27, 2011), http://finance.fortune.cnn.com/tag/property-tax/.

Florida experienced rapid property tax growth. *See* Tim Padgett, *Florida's Property Taxes Go Wacky in Housing Slump*, TIME (June 29, 2009), http://www.time.com/time/business/article/0,8599,1907198,00.html. Virginia, which did not see nearly as much development as Florida, still enjoyed substantially increased revenues. *See* GERALD PRANTE, TAX FOUND., PROPERTY TAX COLLECTIONS SURGED WITH HOUSING BOOM 2 tbl.1 (2006), *available at* http://www.taxfoundation.org/files/sr146.pdf; John L. Knapp, *How the Housing Boom Affects Virginia's Real Estate Tax*, 81 VA. NEWS LETTER (Weldon Cooper Ctr. for Pub. Serv., Charlottesville, VA), Oct. 2005, at 1, 6, *available at* http://www.coopercenter.org/sites/default/files/ publications/vanl1005.pdf.

at decreased contribution levels.[39] In some states, contribution levels dropped below 3% and employees could retire in their forties and fifties—many years before reaching the Medicare eligibility threshold age of sixty-five.[40]

Some states encouraged employees to use up saved vacation and over-time during their last year of employment in order to inflate their income; the state would then pay 90% of this "final salary"—an amount often greater than the retiree's true base pay.[41] For the first time large numbers of public employees began receiving six figure pensions. And, by some accounts, public sector unions were so successful at securing salary and benefits increases that average public sector pay and benefits surpassed private sector averages.[42]

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39. *See* PEW CTR. ON THE STATES, PROMISES WITH A PRICE: PUBLIC SECTOR RETIREMENT BENEFITS 8 (2007), *available at* http://www.pewcenteronthestates.org/uploadedfiles/Promises%20with%20a%20Price.pdf.

40. *Id.* ("Legislatures responded . . . by shortening vesting periods, increasing the multipliers used in determining benefit amounts, decreasing the age at which employees could receive full retirement benefits and shortening the years of service needed to qualify. New York, New Jersey, Illinois, Pennsylvania, Kentucky, California, Colorado and other states increased benefits."); *see also A Gold-Plated Burden*, *supra* note 11 (In New Jersey, "[e]mployees' contributions were cut from 5% of payroll to 3%. New Jersey also increased benefits, giving pension rights to surviving spouses in 1999 and a boost of 9.1%, in effect, to scheme members in 2001, just as the dotcom bubble was bursting and the fund's assets were falling in value").

41. *See* PEW CTR. ON THE STATES, *supra* note 39, at 29; *see also* Steven Brull, *The Big Public Pension Squeeze*, INSTITUTIONAL INVESTOR (June 10, 2009), http://www.institutionalinvestor.com/Article/2230301/The-Big-Public-Pension_Squeeze.html.

42. *See* Press Release, Bureau of Labor Statistics, Emp'r Costs for Emp. Comp. (June 8, 2011), *available at* http://www.bls.gov/news.release/archives/ecec_06082011.pdf ("Total employer compensation costs for private industry workers averaged $28.10 per hour worked in March 2011. Total employer compensation costs for [s]tate and local government workers averaged $40.54 per hour worked in March 2011." (emphasis omitted)); *see also* A. Gary Shilling, *How to Tackle Government Labor Costs*, WALL ST. J., Apr. 29, 2010, at A19.

> Years ago, there was an informal "social contract"—public employees generally received lower wages than private-sector workers, and in return they got earlier retirement and generous pensions, allowing them to catch up. That arrangement has long since gone by the boards. The result is a remarkable trend. State and local government employees for years have received pay increases in excess of inflation, and BLS figures show they now have wages that are 34% higher on average than in the private sector. . . .
>
> Partly responsible for these trends is unionization, which the Department of Labor reports has jumped to 37.4% of the public sector in 2009 from 24.1% in 1973 (unionization in the private sector declined to 7.2% from 25.4% in the same time period). The result is often pay levels higher than needed to attract qualified employees. The average quit rate among state and local employees is a third of that in the private sector. . . .
>
> Public employees also have a 70% advantage in benefits. Health insurance, retirement benefits, life insurance and paid sick leave are not only much more available

B. The Public Sector's Turn: GASB 45 and Discount Rates

Finally, in 2004, the Governmental Accounting Standards Board (GASB)[43] effectively imported FAS 106 from the private sector. GASB 45 required the same kind of disclosure procedures for state and local government accounting. Various government entities had to determine the present value of their pension and OPEB obligations.[44] States and municipalities with annual revenues of $100 million or more had until 2007 to begin reporting; smaller governments had until 2010.[45]

GASB advised governments to make an annual contribution that covered both current benefits and contributed to the cost of future benefits.[46] Governments could either make a large down payment and set up a fund to cover OPEBs, or they could continue to use a pay-as-you-go system using a higher annual contribution rate (ACR).[47] If there was no money set aside, then the difference between the ACR and what was actually paid would show up as a liability on the balance sheet.[48] The actual present value of the total unfunded

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> to them, but much richer. In 2009, BLS figures indicate that the costs of health insurance were 2.18 times as much for state and local employees as for private-sector workers.

Id.; Mortimer B. Zuckerman, *Public Sector Workers Are the New Privileged Elite Class*, U.S. NEWS & WORLD REP. (Sept. 10, 2010), *available at* http://www.usnews.com/opinion/mzuckerman/articles/2010/09/10/public-sector-workers-are-the-new-privileged-elite-class; *see also* Dan Bobkoff, *Public v. Private Sector: Who's Compensated More?*, NPR (Feb. 25, 2011), http://www.npr.org/2011/02/25/134065799/Truth-Squading-Public-Private-Pay-And-Benefits; George Stephanopoulos, *Working in America: Public vs. Private Sector*, ABC NEWS (Feb. 18, 2011, 6:51 PM), http://abcnews.go.com/blogs/politics/2011/02/working-in-america-public-vs-private-sector/; Adam Summers, *Comparing Private Sector and Government Worker Salaries*, REASON FOUND. (May 10, 2010), http://reason.org/news/show/public-sector-private-sector-salary.

43. GOVERNMENTAL ACCOUNTING STANDARDS BD., FACTS ABOUT GASB (2010-2011).

> The Governmental Accounting Standards Board (GASB) is the independent organization that establishes and improves standards of accounting and financial reporting for U.S. state and local governments. Established in 1984 by agreement of the Financial Accounting Foundation (FAF) and 10 national associations of state and local government officials, the GASB is recognized by governments, the accounting industry, and the capital markets as the official source of generally accepted accounting principles (GAAP) for state and local governments.

Id. at 1.

44. GASB STATEMENTS, *supra* note 2, at 2.

45. *See id.* at 11; *see also* Harvey M. Katz, *Who Will Pay the Cost of Government Employer Retiree Health Benefits*, 59 LABOR L.J. 40, 41 (2008).

46. GASB STATEMENTS, *supra* note 2, at 4-5.

47. *Id.*

48. *See* DEP'T OF REVENUE, OTHER POST-EMPLOYMENT BENEFITS (OPEB) 2, *available at* http://www. mass.gov/dor/docs/dls/mdmstuf/technical-assistance/best-practices/opeb.pdf.

debt was relegated to a footnote.[49]

Reaction to GASB 45 was swift and furious—politicians worried about political backlash from astonished taxpayers; unions feared public outrage (which, as we shall see, turned out to be a reasonable fear); and governments feared a drop in their credit ratings which were critical to raising substantial sums in the municipal bond market at low rates.[50] "If governments do nothing, their credit ratings could be damaged and their cost of borrowing could rise."[51] As Joseph Mason of Fitch, a rating agency noted: "With health-care costs spiralling and workforces ageing, . . . standing still isn't a viable option."[52] Texas went so far as to pass a statute ignoring GASB 45.[53]

The events of 2007-2011 did nothing to improve the balance sheets of most states. The recession increased the demand for Medicaid and other state-funded health services as large numbers of newly unemployed struggled to secure of health insurance coverage.[54] The costs associated with health care continued to

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49. *Id.* ("While the new standards require state and local governments to include a footnote in their financial statements indicating the actuarial accrued liabilities, the standard does not include a funding requirement, which would have to be implemented through Legislative action. However, once the total liability, including the amount that is unfunded, is known, taxpayers, government employees, and municipal credit rating agencies will begin to take notice.").

50. Maria O'Brien Hylton, *The Other Situation* in New Jersey: The State of Public Pension and Retiree Health Plans and Prospects for Reform*, EMP. BENEFITS COMM. NEWSLETTER (Am. Bar Ass'n, Section of Labor & Emp't Law, Chicago, IL), Winter 2011, *available at* http://www.americanbar.org/content/newsletter/groups/labor_law_ebc_newsletter/winter_2011_ebc_newsletter/11_winter_aball_ebc_hylton.html.

51. *Clearly Unhealthy: Public Sector Employers Count the Cost of Their Health-Care Promises*, ECONOMIST, July 2, 2005, at 75-76 (noting that employees worried that employers would cut health-care benefits as the private sector did when FAS 106 took effect).

52. *Id.*

53. H.B. 2365, 80th Leg., 80(R) Sess. (TX 2007), *available at* http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB02365F.pdf (codified in scattered parts of TEX. GOV'T CODE § 2266).

54. *See* KATHRYN LINEHAM, NAT'L HEALTH POLICY FORUM, THE BASICS: MEDICAID FINANCING 1-2 (Feb. 4, 2011), *available at* http://www.nhpf.org/library/the-basics/Basics_MedicaidFinancing_02-04-11.pdf.

> The Medicaid program, which provides health coverage to poor or disabled individuals, is jointly funded by the federal and state governments. Each state administers its Medicaid program within broad federal guidelines. In 2009, Medicaid provided coverage to an estimated 50.1 million people. Combined state and federal spending was $380.6 billion, of which the federal government paid about 66 percent and states paid about 34 percent.
>
> Medicaid is a sizeable portion of total state spending. Although the share varies by state, it is the first or second largest budget item for states next to elementary and secondary education. On average, state and federal Medicaid spending accounted for 21.1 percent of total state budgets in 2009. . . .
>
> The federal and state governments jointly fund the Medicaid program. Because

rise, and life expectancy was longer than ever.[55] Of course, revenue from

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> Medicaid is an entitlement program, there is no limit on the amount the federal government pays as long as the state pays its share. The federal portion of Medicaid spending in each state is called the Federal Medical Assistance Percentage and is commonly referred to as the FMAP.
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> . . . .
>
> The federal formula is:
>
> *FMAP = 1 – 0.45 x (State Per Capita Income^2/ U.S. Per Capita Income^2)*
>
> And the state formula is:
>
> *STATE SHARE = 0.45 x (State Per Capita Income^2/U.S. Per Capita Income^2)*
>
> The multiplier of 0.45 in the FMAP formula ensures that states with average per capita income receive a federal share of 55 percent. The statute also establishes a minimum FMAP of 50 percent for states, stipulating that no state shall bear more than 50 percent of total costs, regardless of the result of applying the formula. The statute also contains an upper limit on the regular FMAP of 83 percent.

Id. (emphasis added) (citations omitted). For current trends, see CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL SUMMARY OF MEDICAID MANAGED CARE PROGRAMS AND ENROLLMENT AS OF JULY 1, 2010, at 1 (2011), *available at* https://www.cms.gov/MedicaidDataSourcesGenInfo/downloads/2010Trends.pdf; *see also* KAISER COMM'N ON MEDICAID & THE UNINSURED, KAISER FAMILY FOUND., STATE FISCAL CONDITIONS & MEDICAID (2010), *available at* http://www.kff.org/medicaid/upload/7580-06.pdf.

> During an economic downturn, unemployment rises and puts upward pressure on Medicaid. As individuals lose employer sponsored insurance and incomes decline, Medicaid enrollment and therefore spending increase. At the same time, revenue losses make it more difficult for states to pay their share of Medicaid spending increases. Specifically, a 1 percentage point increase in the national unemployment rate is estimated to result in 1 million more Medicaid and CHIP enrollees and an additional 1.1 million uninsured at the same time as state revenues are projected to fall by 3 to 4%.
>
> Since the start of the recession in December 2007, unemployment has increased 4.8 percentage points which could result in an estimated 4.8 million more Medicaid and CHIP enrollees and over 5.2 million more uninsured. . . .

Id. at 1.

55. In United States, average life expectancy increased from 70.2 years in 1965 to 78.1 years in 2009. *Life Expectancy at Birth, Total (Years)*, WORLD BANK, http://data.worldbank.org/indicator/SP.DYN.LE00.IN?cid=GPD_10 (last visited Sept. 24, 2011); *see also* LAURA B. SHRESTHA, CONG. RESEARCH SERV., RL32792, LIFE EXPECTANCY IN THE UNITED STATES 26-27 tbl.A1 (2006), *available at* http://aging.senate.gov/crs/aging1.pdf (noting that life expectancy for women rose from about seventy years in 1945 to over eighty years in 2003, while life expectancy for men rose from approximately sixty-five to seventy-five over the same time period). For information on rising health care costs, see BEN FURNAS, CTR. FOR AM. PROGRESS, AMERICAN HEALTH CARE SINCE 1994: THE UNACCEPTABLE STATUS QUO 2 (2009), *available at* http://www.americanprogress.org/issues/2009/01/pdf/1994_health_memo.pdf ("Per-person health care expenditures in the United States have risen 6.5 percent per year since 2000, and 5.5 percent per year on average since 1994. In contrast, consumer inflation has averaged just 2.6 percent per year." (citations omitted)); see also EXEC. OFFICE OF THE PRESIDENT, THE BURDEN OF HEALTH INSURANCE

property and sales taxes plunged,[56] as record numbers of Americans were

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PREMIUM INCREASES ON AMERICAN FAMILIES 2-3 (2009), *available at* http://www.whitehouse.gov/assets/documents/Health_Insurance_Premium_Report.pdf; KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2011 ANNUAL SURVEY 19-32 (2011), *available at* http://ehbs.kff.org /pdf/2011/8225.pdf. Some states went to drastic measures to reign in healthcare costs. *See, e.g.*, *Arizona Father Needs Liver but Medicaid Cancels Expensive Operation*, TIMES-PICAYUNE, Dec. 18, 2010, www.nola.com/politics/index.ssf/2010/12/arizona_father_needs_liver_but.html ("In Illinois, a pharmacist closes his business because of late Medicaid payments. In Arizona, a young father's liver transplant is canceled because Medicaid suddenly won't pay for it. In California, dentists pull teeth that could be saved because Medicaid doesn't pay for root canals."). *But see State's Deadly Delay Unnecessary*, ARIZ. REPUBLIC, Apr. 6, 2011, http://www.azcentral.com/arizonarepublic/opinions/articles/2011/04/06/20110406wed1-06.html#ixzz1SCvCWxLD ("After six dark months, Arizona is finally restoring transplant funding. The state will again pay for life-saving procedures that were dropped from AHCCCS coverage last Oct. 1.").

56. *See* Kelly Nolan, *Fall in Property-Tax Revenue Squeezes Cities*, WALL ST. J., July 16, 2011, http://online.wsj.com/article/SB10001424052702304521304576447940532071536.html.

> But total revenue from property taxes across the United States fell 3% in the fourth quarter of 2010 and 1.7% in the first quarter of 2011, compared with a year earlier. Consecutive declines hadn't happened before in census data stretching back to 1963. That has put a squeeze on already-strapped cities, counties and school districts.
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> . . .
>
> One reason is the sharp decline in property values, on which the taxes are based. Another factor: Statutory property tax caps in some states and taxpayer resistance to higher property-tax rates in others have prevented local officials from trying to raise rates enough to compensate for falling assessed values of homes, Mr. Ciccarone said.
>
> Property taxes had shown resilience until now because municipalities charge tax rates on assessed real-estate values that often lag market values by at least few years [sic]. So the sharp decline seen in property values during the recession is just starting to be reflected in some valuations.

Id.; *accord* BYRON LUTZ ET AL., FED. RESERVE BD., THE HOUSING CRISIS AND STATE AND LOCAL GOVERNMENT TAX REVENUE: FIVE CHANNELS (2010), *available at* http://www.federalreserve.gov/pubs/feds/2010/201049/201049pap.pdf; *see* Michael Cooper, *Recession Tightens Grip on State Tax Revenues*, N.Y. TIMES, Feb. 22, 2010, http://www.nytimes.com/2010/02/23/us/23states.html.

> Over all, state tax collections fell to $134.5 billion in the last quarter of 2009, a 4.1 percent drop from the $140.2 billion collected during the same period a year earlier, according to the report, which will be released Tuesday by the Nelson A. Rockefeller Institute of Government.
>
> While the drop in tax collections was less severe than earlier in the year—the record for the steepest drop was set last spring when tax collections fell by 16.6 percent compared with the same period in 2008—the continuing declines are putting even more stress on states.

Id.; Erik Schelzig & Shannon McCaffrey, *AP Analysis: States Face Long Slog After Recession*, ABC NEWS, June 13, 2011, http://abcnews.go.com/US/wireStory?id= 13828801; *see also* LUCY DADAYAN & DONALD J. BOYD, NELSON A. ROCKEFELLER INST. OF GOV'T, RECESSION OR NO

foreclosed and stopped spending.[57] Pension funds—heavily invested in equities—were battered by several years of poor stock market performance.[58]

Combined, these forces put incredible stress on all levels of government,

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RECESSION, STATE TAX REVENUES REMAIN NEGATIVE (2010), *available at* http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-01-07-SRR_78.pdf.

57. *See Foreclosure Activity Hits Record High in Third Quarter*, FORECLOSURE CLEANUP NETWORK (Oct. 15, 2009), http://www.foreclosurecleanupnetwork.com/page/foreclosure-activity-hits.

> [F]oreclosure filings—default notices, scheduled auctions and bank repossessions—were reported on 937,840 properties in the third quarter, a 5 percent increase from the previous quarter and an increase of nearly 23 percent from Q3 2008. One in every 136 U.S. housing units received a foreclosure filing during the quarter—the highest quarterly foreclosure rate since RealtyTrac began issuing its report in the first quarter of 2005.

Id. (citing data from Reality Trac); JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING (2009), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2009.pdf. Regarding consumer spending, see Carla Fried, *Fed: Consumer Spending Down $7,300 Per Person Since Great Recession Began*, CBS MONEY WATCH (July 12, 2011), http://moneywatch.bnet.com/economic-news/blog/daily-money/fed-consumer-spending-down-7300-per-person-since-great-recession-began/3140/#ixzz1SJARddzh.

> Kevin Lansing, an economist at the Federal Reserve Bank of San Francisco, took a look at how our current personal spending compares to what we would have spent if we had continued at the hectic, bubble-induced pace that ensued from 2000 until the Great Recession began in December 2007. According to Lansing, average per-person spending was $7,356 less (in inflation-adjusted dollars) than if our pre-recession spending spree had continued apace.

Id.; *see also* Shobhana Chandra, *U.S. Economy: Recession Eases, Consumer-Spending Slump Deepens*, BLOOMBERG (Aug. 1, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aRV7ZR6CGNQY.

> Consumer spending, which accounts for about 70 percent of the economy, fell at a 1.2 percent pace following a 0.6 percent increase in the prior quarter. It was forecast to drop 0.5 percent, according to the survey median. Purchases slid 2 percent since the peak at the end of 2007--the most since a 2.4 percent decline in the 1980 recession.
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> . . .
>
> The economy has lost 6.5 million jobs since the recession began in December 2007, and economists surveyed by Bloomberg last month forecast the jobless rate will exceed 10 percent by early 2010.

Id.

58. *See* Kathy Chu, *States Try to Stem Losses in Public Pension Funds*, USA TODAY, Nov. 7, 2008, http://www.usatoday.com/money/perfi/retirement/2008-11-06-state-pensions-cutbacks_N.htm ("In the 12-month period ended Sept. 30, public pension plans lost 14.9%, according to Wilshire Associates, a consulting firm."); *see also* Deborah Brewster, *US Public Pension Funds Face Big Losses*, FIN. TIMES, Oct. 27, 2008, at 1 ("California's Calpers, the [United States'] biggest pension fund, last week reported a loss of 20 per cent [sic] of its assets, or more than $40bn, between July 1 and October 20 this year.").

most of which responded by slashing budgets and avoiding pension contributions where possible. The one major counterweight to this widespread misery was the much-debated federal stimulus, which, with the benefit of hindsight, is now widely viewed as a failure.[59]

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59. *See* Michael D. Shear & Alexi Mostrous, *Biden Fires Back at Stimulus Critics: Administration Says Act Is Working*, WASH. POST, July 17, 2009, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071604155.html.

> Without naming Cantor, the vice president, [whom President Obama has] dubbed the "sheriff" of the stimulus plan, . . . trained his rhetoric squarely at the Richmond lawmaker, who has helped hone one of the GOP's most effective lines of attack on the president: that Obama's $787 billion stimulus package has not produced jobs.
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> . . .
>
> "The point of these programs on the jobs front is to cushion the blow," said Jared Bernstein, Biden's chief economic adviser. "I feel very confident that the American people understand that it will take a very, very long time to fill what the president described as a very, very deep hole."
>
> Bernstein presented a series of charts indicating that $226 billion has been put to work already, the leading edge of a wave of money flowing through the economy that he said would reduce the number of job losses that would have otherwise occurred.

Id. For taxpayer reactions, see Kristen Schorsch & Julie Wernau, *Complaints Rain Down on Stimulus Program*, CHI. TRIB., May 1, 2011, at 1, *available at* http://www.chicagotribune.com/news/ct-met-stimulus-contractors-20110430,0,5859319.story.

> In early 2009, President Barack Obama called for infusing $5 billion into the federal government's decades-old weatherization program to put people to work and lower energy costs. Illinois split a three-year, $242 million grant among 35 agencies, CEDA being the largest.
>
> . . .
>
> Critics say Illinois is one of a string of states that wasted taxpayer money through weatherization programs.
>
> "Weatherization is so vulnerable to fraud at every level," said Leslie Paige, spokeswoman for Citizens Against Government Waste, a nonpartisan group in Washington, D.C. "There's a lot of opportunity for sweetheart deals, self-dealing, all kinds of inappropriate uses of the money."

Id.; *see also* Kim Murphy, *Voters Say All that Pork Is Starting to Smell: Sen. Patty Murray Has Brought Billions of Dollars to Washington State. Now Her GOP Rival and Critics Are Using It Against Her*, L.A. TIMES, Oct. 27, 2010, at A10.

> Sen. Patty Murray has been one of the nation's biggest advocates of federal spending to boost the foundering economy. Here at the Hanford Nuclear Reservation, the country's worst atomic weapons contamination site, Murray scored $1.9 billion in stimulus funds to speed cleanup and add 1,500 high-paying jobs in central Washington.
>
> But voters here have been ambivalent at best about all the money flowing in. During the primary, Murray trailed the local "tea party" candidate, who lost the GOP nomination to real estate investor and former legislator Dino Rossi. The Democratic incumbent now is waging the fight of her 18-year career against Rossi, fueled by conservative fears—even in the Hanford boom belt—that all the federal bacon comes

Most crises, however painful, provide a perverse kind of education, and this one was no exception. A fundamental flaw in GASB 45 was exposed, and the folly of permitting governments to select their own discount rate in order to determine the present value of their OPEB liability quickly became obvious. The idea had been that because governments do not go bankrupt like private sector companies, public sector retiree promises were somehow more secure. This security was in turn justification for investment by public sector funds in riskier assets.[60] Typically, public sector funds chose 8% as their discount rate; private

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with too much fat.

Id. For reports on job-creation effects of the legislation, see Jim McTague, *Overly Stimulating*, BARRON'S, Nov. 16, 2009, at 36.

> Economists generally feel that the data are inaccurate. Ethan Harris, a senior economist at Banc of America Securities-Merrill Lynch Global Research, says that collectively the stimulus, low federal-funds rates, TARP spending and the decision to keep systemically important companies from failing has saved millions of jobs. "Can I add it up and give credit to one particular policy? It's impossible," he says.
>
> Michael Balsam, chief solutions officer at Onvia, which runs the private Recovery.org Website, says many recipients lack the resources to accurately report data. Onvia measures actual government contracts, culling the information daily from 88,000 federal, state and local government [w]ebsites. No job is created until a contract is signed, he asserts. So far, about $30 billion in contracts have been awarded, translating at best into 330,000 jobs versus 640,329 claimed by Obama.

Id.; *see also* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, 47 U.S.C.); *Breakdown of Funding*, RECOVERY.GOV, http://www.recovery.gov/transparency/fundingoverview/pages/fundingbreakdown.aspx (last visited Sept. 24, 2011); Timothy Conley & Bill Dupor, *The American Recovery and Reinvestment Act: Public Sector Jobs Saved, Private Sector Jobs Forestalled*, OHIO STATE UNIV., May 17, 2011, http://web.econ.ohio-state.edu/dupor/arra10_may11.pdf (arguing that the stimulus plan destroyed more private sector jobs than the public sector jobs it created, resulting in a net loss in jobs). *But see* EXEC. OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISERS, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, Exec. Summary (2011), *available at* http://www.whitehouse.gov/sites/default/files/cea_7th_arra_report.pdf ("CEA estimates that as of the first quarter of 2011, the ARRA has raised employment relative to what it otherwise would have been by between 2.4 and 3.6 million," but at a cost of nearly $666 billion, that comes out to a cost to taxpayers of $185,000 to $278,000 per job.).

60. *See A Gold-Plated Burden*, *supra* note 11.

> The more risk the pension fund takes (for example, by buying high-yielding bonds of companies with poor credit ratings), the lower its liabilities appear to be.
>
> . . .
>
> Suppose . . . that a state had to pay a bondholder $30,000 a year for 25 years and to pay a pensioner the same sum for the same period. The bond obligation would have a present value of $425,000 in its accounts but the pension liability, with the same cashflows, would be valued at just $320,000.

Id.; *see also* DOUGLAS J. ELLIOTT, THE BROOKINGS INST., THE FINANCIAL CRISIS' EFFECTS ON THE ALTERNATIVES FOR PUBLIC PENSIONS 9 (2010) ("My own view is that an 8% return target is

sector pension of OPEB debt opted for the more conservative 6% rate based on high-grade corporate bonds and other fixed income securities.[61] From the beginning, this discrepancy effectively subsidized public sector pensions and OPEBs, allowing governments to set aside far less capital than private sector employers for equivalent obligations.[62]

Many analysts believe that the discount rate should optimally reflect the riskiness of the payout, and, because the payout in a DB plan is guaranteed, the discount rate should be at most 4%, which is considered by most actuaries to be a risk-free rate.[63] The official estimate of the unfunded liability for public sector pensions stands now at about $1 trillion; that number rises to $3.5 trillion when a 4% rate is employed.[64]

When GASB 45 went into effect, numerous Wall Street banks began pitching OPEB bonds. The sales pitch went something like this: issue billions of dollars in municipal bonds at 5% interest and invest the proceeds in equities in anticipation of an 8% return. The banks earned handsome fees on both sides of this arrangement, and the governments took advantage of a "legal arbitrage opportunity" and could make a large down payment on OPEB debt. When instead the stock market lost over 20% of its value, and governments fell deeper in debt, the riskiness of this approach became apparent. Recently convicted governor Rod Blagojevich left office in disgrace after the Illinois version of this

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unreasonably high in today's environment. Maintaining such a target level serves to mask the true extent of the pension deficits. Bad as those deficits look now, they would be significantly worse if the expected returns average 7% or 6%.").

61. *See* ELLIOTT, *supra* note 60, at 2.

62. For anyone who is in doubt about the significance of a few percentage points, it is critical to note that a small spread in the discount rate unquestionably makes an enormous difference. At a rate of 6%, the present value of unfunded government pension debt more than doubles the official figures which use a rate of 8%. *See* Gina Chon, *Gurus Urge Bigger Pension Cushion*, WALL ST. J., Mar. 29, 2010, at A2.

> The drop of one percentage point in the discount rate means a 10% to 20% increase in the total pension obligation, according to James Rizzo, senior consultant and actuary at Gabriel, Roeder, Smith & Co., a consulting firm for the public sector. For example, a pension system with a total liability of $100 billion would have an obligation of as much as $120 billion after a decline of one percentage point in the discount rate.

Id.

63. *See* BARRO & BUCK, *supra* note 22, at 6 ("[D]iscount rates should be derived from securities that have as little risk as the liabilities themselves." (internal citation omitted)). The market value of liability theory, a complete discussion of which is well beyond the scope of this paper, would treat the "risk" of the liabilities here as the likelihood that a plan would be able to escape its obligations to beneficiaries—i.e. the chance that the state would default or that it would somehow be found not liable for the contractually enforceable promises of future benefits made to its employees.

64. *See generally* Norcross & Biggs, *supra* note 3 (addressing reform in New Jersey); *see also* Veronique de Rugy, *Pension-Crisis Deniers Never Sleep*, NAT'L REV. ONLINE (Mar. 29, 2011), www.nationalreview. com/corner/263303/pension-crisis-deniers-never-sleep-veronique-de-rugy.

scheme backfired and left the state $60 billion in debt.[65]

C. GASB 45 and Amortization

Another feature of public pension plan reporting merits mention here. The choice of amortization period makes a huge difference in the size of OPEB debt.

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65. BARRO & BUCK, *supra* note 22, at 5.

> In 2003, Illinois governor Rod Blagojevich, who left office in 2009 in disgrace, embraced a plan to "issue debt at a cost of 5.1 percent and then earn 8.5 percent or so investing the proceedings [sic]." This turned into "a disaster" when the market dropped last year, leaving Illinois about $60 billion short.

Id. (alteration in original) (internal citations omitted); *see also* Amy Merrick, *Big State, Big Cuts, Little Room: Illinois Agency Has to Pare Hundreds of Millions, but Mandates Restrict Fall of the Ax*, WALL ST. J., June 14, 2010, at A3, *available at* http://online.wsj.com/article/SB10001424052748704312104575298632860515858.html.

> The state's debt exploded in 2003, when Democratic then-Gov. Rod Blagojevich pushed through a plan to borrow $10 billion. From fiscal 2002 to fiscal 2003, Illinois's debt more than doubled, from $9.54 billion to nearly $21 billion. After Mr. Blagojevich was removed from office last year amid corruption allegations, which he denies, Mr. Quinn became governor.

Id.; Stephen Moore, *State Spending Spree*, WALL ST. J., Mar. 22, 2007, at A16.

> Last year states cashed in on the boom times by hiking expenditures by almost 9%, according to the National Association of State Budget Officers, or three times the rate of overall inflation. This year at least a dozen states are contemplating double-digit rates of spending growth. If that happens, aggregate state budgets will be up nearly 20% in just two years.
>
> One politician tossing aside the "new Democrat" playbook of fiscal restraint is the just-re-elected Governor of Illinois, Rod Blagojevich. Mr. Blagojevich just recently announced a $60.1 billion budget loaded with $7 billion in new taxes and $16 billion in new debt—what the Chicago Sun Times calls "the largest tax increase and biggest borrowing spree in state history." Mr. Blagojevich intends to reward nearly every Democratic special interest group that helped elect him: the teachers unions (the school budget would rise by a whopping 23% in one year), public transit employees, health-care providers and the poverty industry. He calls his fiscal time bomb of debt and taxes "a moral imperative." Almost all the new costs of the social welfare pyramids he wants to fund would fall on businesses, which are likely to feel their own "moral imperative" to flee if the legislature in Springfield is foolhardy enough to pass this plan.

Id.; Christopher Wills, *Illinois Deep in Debt, Doesn't Pay Bills*, MSNBC, May 13, 2010, http://www.msnbc.msn.com/id/37136518/ns/us_news-life/t/illinois-deep-debt-doesnt-pay-bills/ ("The practice of simply putting off payments became commonplace under ex-Gov. Rod Blagojevich, who liked to spend but adamantly opposed a tax increase to help cover costs. Before he was arrested and kicked out of office, Blagojevich's toxic relationship with legislators essentially paralyzed government, so bills just piled up."). For more background on this governor, see David Bernstein, *Mr. Un-Popularity*, CHI. MAG., Feb. 2008, *available at* http://www.chicagomag.com/Chicago-Magazine/February-2008/Mr-Un-Popularity/index.php?cp=1&cparticle=1&si=0&siarticle=0#an-anc.

Private pension plans typically amortize over fifteen years; governments use a thirty-year period, which permits the debt and losses to be obscured to a degree. Shorter amortization periods mean much larger present values;[66] longer periods mean much smaller present values. Public plans, with older workforces, cannot justify the use of a thirty-year period because the number of years until retirement is not that long in most cases. With respect to health care, most public plans assume that health care costs will drop to levels that are consistent with inflation. The experience of the last few decades suggests that such an assumption is overly optimistic and unjustified. Health care costs have consistently outstripped inflation since 1978[67] and show no sign of abating.[68] Future OPEB obligations are underestimated when based on such obviously fatuous assumptions.

II. STATE EXPERIENCE: TRANSFORMING AN ENTRENCHED CULTURE OF DEBT

In many states, public employees—teachers, firefighters, police, and civil servants—routinely retire in their early forties with pensions close to the salary

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66. For example, assuming a 7% discount rate, the present value of a $1 million obligation is $362,446.02 when amortized over fifteen years. That is 275% higher than the $131,367.12 present value when amortized over thirty years.

67. *See* KAISER FAMILY FOUND., TRENDS IN HEALTH CARE COSTS AND SPENDING (2009), *available at* http://www.kff.org/insurance/upload/7692_02.pdf ("Spending on health care, which is a projected to be 17.6% of the U.S. gross domestic product (GDP) in 2009, has consistently grown faster than the economy overall since the 1960s."); *see also Health Costs Race Past Inflation*, CNN MONEY, Sept. 11, 2007, http://money.cnn.com/2007/09/11/pf/health_costs_kaiser/index.htm ("Since 2001, however, premiums for family coverage have increased 78 percent, while wages have gone up 19 percent and inflation has gone up 17 percent.").

68. Health-care costs are projected to continue to outpace inflation. *See* THE SEGAL CO., 2011 SEGAL HEALTH PLAN COST TREND SURVEY (2010), *available at* http://www.segalco.com/publications/surveysandstudies/2011trendsurvey.pdf. Some states have taken matters into their own hands. *See* Robert Weisman, *Health Care Hikes Rejected*, BOS. GLOBE, Apr. 2, 2010, http://www.boston.com/business/healthcare/articles/2010/04/02/state_rejects_health_insurance_rate_hikes/ ("Making good on Governor Deval Patrick's promise to reject health insurance rate increases deemed excessive, the state Division of Insurance yesterday denied 235 of 274 increases proposed by insurers for plans covering individuals and small businesses."); *see also* Press Release, Governor Deval Patrick, Patrick-Murray Administration Proposes Comprehensive Health Care Cost-Containment Legislation (Feb. 17, 2011), *available at* http://www.mass.gov/governor/pressoffice/pressreleases/2011/administration-proposes-comprehensive-health.html.

> "Massachusetts led the nation on health care reform and is poised to lead again on health care cost containment," said Governor Patrick. "With 98 percent of the Commonwealth's residents insured, we have shown how government, consumers, insurers and providers can work together to realize the goals of health care reform. Our next major achievement in this arena will be controlling costs while ensuring that the people of Massachusetts continue to receive world-class care."

Id.

earned in the last few years of employment.[69] In some cases, retired public

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69. *See, e.g.*, Sam Allen, *Public Hospital President's Retirement Pay Spotlights Issue of 'Supplemental' Pensions*, L.A. TIMES, Apr. 28, 2011, http://articles.latimes.com/2011/apr/28/local/la-me-pensions-20110428.

> When he turned 65 two years ago, Samuel Downing received a $3-million retirement payment from a public hospital district in Salinas, [California], where he serves as president and chief executive.
>
> But Downing continued working at his $668,000-a-year job for another two years, and after he retires this week, he will receive another payment of nearly $900,000. That comes on top of his regular pension of $150,000 a year.

Id.; Adam Elmahrek, *Retired Santa Ana City Manager Cashed Out $230,366 in Unused Time Off*, VOICE OF OC (Mar. 30, 2011), http://www.voiceofoc.org/countywide/this_just_in/article_3821dcce-5afa-11e0-bbce-001cc4c03286.html; Jason Grotto, *$20 Billion Pension Problem*, CHI. TRIB., Nov. 17, 2010, at 6, *available at* http://articles.chicagotribune.com/2010-11-16/news/ct-met-pensions-deals-20101116-51_1_pension-funds-pension-crisis-pension-problem ("In the name of labor peace, city officials and union leaders signed collective bargaining agreements that resulted in average salary increases of about 4 percent annually from 2000 to 2009, even though increases in Chicago's cost of living averaged just 2.2 percent during that time."); Ray Long & Todd Wilson, *Illinois Might Shift Health Care Costs: Ex-State Workers May Be Asked to Contribute More*, CHI. TRIB., Jan. 24, 2011, at 6.

> The idea is to start charging the retirees who can afford to pay for their health care. And new state research shows some of the 84,100 retirees and survivors appear to possess the ability to pay—the average annual household income for a retired state worker younger than 65 was nearly $78,000.
>
> The sizable rocking-chair income is the result of waves of state workers taking advantage of sweet early retirement plans that allowed them to walk out of government jobs in their 50s, start collecting pension benefits and still have time to start a second career.

Id.; Michael B. Marois & James Nash, *Brown Measures Take Aim at California Pension 'Spiking' and Other Abuses*, BLOOMBERG (Apr. 1, 2011), http://www.bloomberg.com/news/2011-04-01/brown-measures-take-aim-at-california-pension-spiking-and-other-abuses.html ("Brown, a Democrat, offered seven measures yesterday that among other things would prohibit employees from pension 'spiking' by manipulating overtime, unused vacation and special compensation to create an inflated benchmark for future benefits. Other bills would ban retroactive benefits and forbid workers from purchasing additional service credits."); Nannette Miranda, *Calif. Lawmakers Approve Proposal to End Pension Abuse*, ABC LOCAL, May 4, 2011, http://abclocal.go.com/kabc/story?section=news/state&id=8112710.

> Inside the Capitol, an Assembly committee helped the group's cause by approving a proposal to end pension abuses, especially spiking where public employees pad their last check with unused vacation and sick time and even car allowances.
>
> The proposal was a result of the city of Bell scandal, where former City Manager Robert Rizzo stood to make $600,000 a year in retirement.

Id.; Mary Williams Walsh & Amy Schoenfeld, *Padded Pensions Add to New York Fiscal Woes*, N.Y. TIMES, May 21, 2010, at A1, *available at* http://www.nytimes.com/2010/05/21/business/economy/21pension.html. For a list of those with six-figure pensions in California, see *Calpers*

employees can expect a pension that provides *more than 100%* salary replacement.[70] Add to that a promise of fully paid health insurance after age sixty-five (the eligibility threshold for Medicare benefits),[71] and it quickly becomes apparent that employee benefits typical to the public sector are substantially more lavish than those generally available to private sector workers.[72]

The financial health of several states—California, Illinois and Colorado, for example—is so precarious that bankruptcy or the complete cessation of all state functions save paying benefits to retirees is not unthinkable. In the face of a credible bankruptcy threat by one or more of the populous states, it is not unreasonable to expect that the federal government would feel compelled to step in and assume most (or all) of the crippling future pension liabilities. We have seen a mini version of this recently with the so-called "bail outs" of the automobile[73] and financial services industries.[74] In each of these cases, the

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Database, FIX PENSIONS FIRST, www.fixpensionsfirst.com/calpers-database/ (last visited Jan. 15, 2012); *see also* Brad Branan, *Six-Figure Pensions Surge for Sacramento County*, SACRAMENTO BEE, July 18, 2011, at 1A, *available at* http://www.sacbee.com/2011/07/18/3776044/ six-figure-pensions-surge-for.html#ixzz1SlLhRf1W ("Take George Anderson. He was 51 when he retired as undersheriff four years ago, because then-Attorney General Jerry Brown had named him head of the Justice Department's division of law enforcement. He earned a $143,000 annual salary in the new job, on top of his $173,559-a-year pension. . . ."); Richard G. Jones, *Multiple Jobs by Public Workers Strain Pension Plan in New Jersey*, N.Y. TIMES, Sept. 1, 2006, http://www.nytimes.com/2006/09/01/nyregion/ 01pension.html.

> New Jersey officials on Thursday released the salary records of the highest-paid public employees who have multiple public jobs. State lawmakers, who are struggling to curb soaring property taxes and cut state expenditures, say that the practice of holding multiple positions—and earning more pension credits as a result—has added a huge burden to the state's troubled pension system.

Id.; Ron Lieber, *Battle Looms Over Huge Costs of Public Pensions*, N.Y. TIMES, Aug. 6, 2010, http://www.nytimes.com/2010/08/07/your-money/07money.html ("Taxpayers, whose payments are also helping to restock Colorado's pension fund, may not be as sympathetic, though. The average retiree in the fund stopped working at the sprightly age of 58 and deposits a check for $2,883 each month. Many of them also got a 3.5 percent annual raise, no matter what inflation was, until the rules changed this year.").

70. *See, e.g.*, Walsh & Schoenfeld, *supra* note 69 ("In Yonkers, more than 100 retired police officers and firefighters are collecting pensions greater than their pay when they were working. One of the youngest, Hugo Tassone, retired at 44 with a base pay of about $74,000 a year. His pension is now $101,333 a year.").

71. 42 U.S.C. § 426 (2006); Basis of Eligibility and Entitlement, 42 C.F.R. § 406.5 (2011).

72. *See* Laing, *supra* note 7; EMPLOYEE BENEFIT RESEARCH INSTITUTE, http://www.ebri.org/ (last visited Feb. 17, 2012); *see also supra* note 39 and accompanying text.

73. *See* Taylor A. Wall, Saving America's Automobile Industry: The Bailouts of 1979 and 2009, An Overview of the Economic Conditions, Factors for Failure, Government Interventions and Public Relations (Nov. 29, 2010) (unpublished Senior Thesis, Claremont McKenna College), *available at* http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1045&context=cmc_

federal government provided taxpayer dollars to industries that essentially privatized their growing wealth in good times and then anxiously spread the risk of default to all taxpayers in the midst of crisis.[75]

It is not clear how well this peculiar phenomenon is understood by the taxpaying public.[76] To the extent taxpayers understand what was done with their money and perceive little direct, personal benefit, one might expect many to oppose the more ambitious bailout of financially strapped states that would be required. On the other hand, taxpayers who approve of the bailout of, for example, General Motors,[77] might also favor a repeat intervention to "save" their

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theses; *see also Automotive Industry Crisis*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/index.html (last updated May 25, 2011); Nick Bunkley & Bill Vlasic, *Automakers to Seek More Money for Retooling Vehicle Plants*, N.Y. TIMES, Aug. 22, 2008, http://www.nytimes.com/2008/08/23/business/ 23auto.html?dbk.

74. *See* Mike McIntire, *Bailout Is a Windfall to Banks, if Not to Borrowers*, N.Y. TIMES, Jan. 17, 2009, http://www.nytimes.com/2009/01/18/busiess/18bank.html; *Officials: Tracking Bailout Money Is Difficult*, MPR NEWS (Dec. 31, 2008), http://minnesota.publicradio.org/display/web/2008/12/31/bailout_report; *see also* Deborah Solomon et al., *U.S. to Buy Stakes in Nation's Largest Banks*, WALL ST. J., Oct. 14, 2008, http://online.wsj.com/article/SB122390023840728367. html.

75. *See* Yalman Onaran & Alexis Leondis, *Bank Bailout Returns 8.2% Beating Treasury Yields*, BLOOMBERG (Oct. 20, 2010), http://www.bloomberg.com/news/2010-10-20/bailout-of-wall-street-returns-8-2-profit-to-taxpayers-beating-treasuries.html; *see also Bailout Recipients*, PRO PUBLICA (Dec. 12, 2011), http://projects.propublica.org/bailout/list/index; Comm. for a Responsible Fed. Budget, *Federal Reserve Balance Sheet*, STIMULUS.ORG, http://stimulus.org/financialresponse/federal-reserve-balance-sheet (last visited Jan. 15, 2012).

76. *See* Dennis Jacobe, *Six in 10 Oppose Wall Street Bailouts*, GALLUP (Apr. 3, 2008), http://www.gallup.com/poll/106114/six-oppose-wall-street-bailouts.aspx; *see also* Robert Reich, *Obama's Wall Street Bailout Failure*, SALON (Mar. 20, 2009), http://www.salon.com/2009/03/20/reich_3/.

77. *See* Dave Boyer, *Watchdog Questions GM Bailout Repayment*, WASH. TIMES, June 2, 2011, http://www.washingtontimes.com/news/2011/jun/2/watchdog-questions-gm-bailout-repayment/ ("The Obama administration released a report Wednesday showing that taxpayers probably will lose $14 billion of the $80 billion that the government loaned to General Motors, Chrysler, auto lenders and suppliers."); *GM Has Its Price*, CHI. TRIB., Nov. 19, 2010, http://articles.chicagotribune.com/2010-11-19/news/ct-edit-gm-20101118_1_gm-bondholders-gm-profits-toyota-and-other-rivals.

> The bill for taxpayers stands to keep growing. Because of special tax treatment connected to its bailout, GM can deduct its accumulated losses against future profits—avoiding at least some obligations it otherwise would have owed had it emerged from a typical bankruptcy. That tax break reportedly could be worth as much as $45 billion over time.

Id.; Josh Mitchell & Sharon Terlep, *U.S. Unlikely to Recoup GM Bailout, Panel Says*, WALL ST. J., Jan. 13, 2011, http://online.wsj.com/article/SB10001424052748704803604576078501503246420.html ("The U.S. government is unlikely to recover its entire $50 billion investment in General Motors Co., in part because the Obama administration unloaded a big block of shares in the company's initial public offering at $33 a share rather than wait for a higher price, a federal

own state or one thousands of miles away. It is hard to know what the political response to history-making interventions will be. What is certain, though, is that the alternative—independent state efforts to right-size their budgets and constrain the growth in benefits costs—will require significant changes in the way states function as employers.

A. Benefits Reductions for Future Employees

Some states have limited their reform efforts to constraining growth in *future* costs only.[78] These efforts have focused on higher employee contributions,[79] closing existing DB plans,[80] and pushing new hires into DC-like vehicles[81] on the pension side. With health care, the creation of Health Savings Accounts,[82] and

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panel said Wednesday.").

78. *See* Steven Greenhouse, *States Want More in Pension Contributions*, N.Y. TIMES, June 15, 2011, http://www.nytimes.com/2011/06/16/business/16pension.html?pagewanted=all.

> So far this year, eight states, including Wisconsin and Florida, have decided to require government employees to contribute more, sometimes far more, to their pensions. Governors and legislators in 10 other states, including California and Illinois, are proposing their own pension changes as they grapple with budget deficits and underfunded pension plans.

Id.; *State of War: Taxpayers Versus Public-Sector Workers*, ECONOMIST (Apr. 7, 2011), http://www.economist.com/node/18433186.

79. *See* Greenhouse, *supra* note 78.

80. *See, e.g.*, S.B. 524, 117th Leg., 1st Reg. Sess. (Ind. 2011); CTR. FOR STATE & LOCAL GOV'T EXCELLENCE, ISSUE BRIEF: A ROLE FOR DEFINED CONTRIBUTION PLANS IN THE PUBLIC SECTOR 3 (2011), *available at* http://www.slge.org/wp-content/uploads/2011/12/A-Role-for-DC-plans.pdf; U.S. BUREAU OF LABOR STATISTICS, ON DEFINED-BENEFIT PLANS: "FROZEN" DEFINED—BENEFIT PLANS, 2 PROGRAM PERSP., Apr. 2010, at 1, *available at* http://www.bls.gov/opub/perspectives/ program_ perspectives_vol2_issue3.pdf; Randall Jensen, *San Diego Ahead in Pension Reform*, BOND BUYER, Jan. 7, 2011, http://www.bondbuyer.com/issues/120_5/san_diego_pension-1021855-1.html ("On a state level, Michigan and Alaska have adopted mandatory defined contribution plans, while Oregon and Indiana have implemented a mandatory hybrid plan, according to the Center for State and Local Government Excellence. Eight other states offer the option of a defined contribution plan."). *But see* Stephen C. Fehr, *States Overhaul Pensions but Pass on 401(k)-Style Plans*, STATELINE (June 21, 2011), http://stateline.org/live/details/story?contentId=582585 ("No state this year replaced its traditional fixed-benefit pension with a new plan in which employees set aside a portion of their pay and assume the risk in making investment decisions. Only one state, Indiana, implemented such a plan for new employees, but made it optional.").

81. *See* RONALD SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES, STATE DEFINED CONTRIBUTION HYBRID PENSION PLANS (2010), *available at* http://www.nasra.org/resources/NCSL_DC_Hybrid.pdf; *see also* JOHN E. NIXON, PEW CTR. ON THE STATES, BENDING THE CURVE: LONG-TERM PENSION COSTS (2011), *available at* http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/States_Fiscal_Health_Project/Closing_the_Gap_Nixon.pdf.

82. *See* CTR. FOR POLICY AND RESEARCH, JANUARY 2007 CENSUS SHOWS 4.5 MILLION PEOPLE

higher co-payments and deductibles,[83] seem to dominate state efforts focused on new hires.

None of these changes are easy to implement, especially where, as almost always, public union approval must be obtained. The added interference of elected officials also makes cost cutting hard. The Federal Reserve Bank of Chicago characterized the chief financial officer of the Chicago Public Schools system's efforts to contain OPEB liability as "always fighting a defensive battle to prevent plan expansions that are granted by the state legislature."[84] Additionally, the prospect of reduced benefits has resulted in many workers taking early retirement and other unanticipated side-effects.[85]

COVERED BY HSA/HIGH-DEDUCTIBLE HEALTH PLANS (2007), *available at* http://www.ahipresearch.org/PDFs/FINAL%20AHIP_HSAReport.pdf; DEP'T OF THE TREASURY, IRS PUBLICATION 969: HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS (2011), *available at* http://www.irs.gov/pub/irs-pdf/p969.pdf; KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2007 ANNUAL SURVEY (2007), *available at* http://www.kff.org/insurance/7672/upload/76723.pdf. Several states have begun experimenting with HSAs for their public employees, including: Indiana, *see* Mitch Daniels, Editorial, *Hoosiers and Health Savings Accounts*, WALL ST. J., Mar. 1, 2010, http://online.wsj.com/article/SB10001424052748704231304575091600470293066.html; and Washington, *see* WASH. STATE HEALTH CARE AUTH., WASHINGTON STATE PEBB AND HEALTH SAVINGS ACCOUNTS (2006), *available at* http://www.pebb.hca.wa.gov/documents/board/ 011706HSAstudy.pdf.

83. For a discussion of the legality of private employers insisting on coordination with Medicare, see *AARP v. EEOC*, 390 F. Supp. 2d 437 (E.D. Pa. 2005), *aff'd on other grounds*, 489 F.3d 558 (3d Cir. 2007); Diane M. Juffras, *Coordinating Retiree Health Benefits with Medicare: The EEOC Issues Its Long-Delayed Final Rule*, 34 PUB. EMP'T LAW BULL. 1, 1-3 (2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/pelb34.pdf.

84. Richard A. Mattoon, *Facing the Challenge of Retiree Health Care: Liabilities and Responses of State and Local Governments—A Conference Summary*, 250a CHI. FED. LETTER 1, 4 (2008).

85. Changes in benefits and compensation for public employees are producing unanticipated results. In California, the *L.A. Times* reports a rise in felonious activity by sheriff's deputies, including insurance fraud, as a result of cutbacks in available overtime. *See* Robert Faturechi, *L.A. County Is Seeing a Spike in Deputy-Fraud Allegations*, L.A. TIMES, July 19, 2011, http://articles.latimes.com/2011/jul/19/local/la-me-lasd-fraud-20110719. In Ohio a recent and unexpected consequence of legislative changes to public employee bargaining rights appears to be a record number of retirement applications. The Ohio Public Employees Retirement System reports a 34% increase in applications to retire in 2011 over 2010. *See* Bebe Raupe, *More Ohio State Workers Seek to Retire in Wake of Passage of Controversial Law*, 38 BNA PENSION & BENEFITS REP. 1249 (2011).

> [Ohio Senate Bill 5] . . . eliminates binding arbitration as the means to resolve police officer and firefighter contract disputes, prohibits all public employees from striking, eliminates automatic pay increases, removes seniority as the sole determinant for the order of layoffs, prohibits [local] governments from picking up any portion of their workers' share of pension contributions, and requires workers to pay at least 15 percent of their health care costs.

Nonetheless, it appears some states have enjoyed success at controlling benefits costs for future hires.[86] The problem of benefits for current employees and retirees is, of course, more difficult to solve. As the tables below illustrate, Indiana, Washington and South Dakota have each managed to make changes that reduce future liabilities.

. . .

> [H]ealth care, sick leave, and pension benefits would not be subject to bargaining and, in cases of fiscal emergency, the law allows management to throw out standing labor agreements.

Id.

86. *See* Jeannette Neumann, *State Workers, Long Resistant, Accept Cuts in Pension Benefits*, WALL ST. J., June 29, 2010, at A9 ("This year, nine state legislatures have voted to reduce benefits, increase monthly contributions or both for current workers and sometimes retirees, according to Keith Brainard, research director for the National Association of State Retirement Administrators. Unions and workers' associations in at least two-thirds of those states have supported the rollbacks."); Jon Ortiz, *California Pension Proposal Seeks to Hike Employee Contributions*, SACRAMENTO BEE, July 12, 2011, at 1A, *available at* http://www.sacbee.com/2011/07/12/3763140/california-pension-proposal-seeks.html.

> Nationally, 15 states have either bargained or legislated higher pension contributions from public employees, according to the National Conference of State Legislatures. Of those, eight states—including California—are offsetting the employee contribution increases with lower government contributions. CalPERS figures that those higher state worker payments will save government nearly $407 million on its 2011-12 pension bill. New Mexico workers started contributing another 1.75 percent of their salaries into their pension programs on July 1. Their employers—state government, school districts and colleges—will save a combined $50 million this year by reducing their pension payments by the same amount. Lawmakers in New Jersey, traditionally a union-friendly state, recently passed a landmark measure that increases employee pension payments. Unions there are suing to block the increases.
>
> Unions also are fighting a new Florida law that required 560,000 employees to begin paying 3 percent of their salaries to the state retirement system on July 1. The contributions will save state and local governments $806 million in the first year. . . . CalPERS says about 175 cities and counties have either raised employee contributions, reduced pensions for new hires or both.

Id.

B. The Challenge Presented by Current Employees and Retirees

Pew Center on the States—The Widening Gap[87]	% Funded Pensions	% ARC Contributed in 2009
New York	101%	100%
Wisconsin	100%	100%
Washington State	99%	73%
North Carolina	97%	100%
Delaware	94%	97%
South Dakota	92%	100%
Tennessee	90%	100%
Wyoming	89%	63%
Nebraska	88%	100%
Georgia	87%	100%
Kansas	64%	68%
Connecticut	62%	96%
Alaska	61%	110%
Louisiana	60%	97%
Rhode Island	59%	100%
New Hampshire	58%	75%
Kentucky	58%	58%
Oklahoma	57%	77%
West Virginia	56%	96%
Illinois	51%	71%

Washington is one of only four states in the union that enjoys a fully-funded pension system.[88] As far back as 1977, Washington took action to reduce pension debt, "raising the retirement age, requiring more cost-sharing between members and employers, and limiting opportunities to inflate pensions with late career salary increases."[89] Further, Washington closed down older plans and

87. *The Trillion Dollar Gap Grows Wider*, PEW CTR. ON THE STATES (Apr. 25, 2011) [hereinafter *Trillion Dollar Gap*], http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=85899358839.

88. Geoff Mulvihill & Susan Haigh, *States Cutting Benefits for Public-Sector Retirees*, WASH. TIMES, Sept. 15, 2010, http://www.washingtontimes.com/news/2010/sep/15/states-cutting-benefits-public-sector-retirees/.

89. BUILDING A 21ST CENTURY GOVERNMENT: REFORMING PENSIONS 1 (2011), *available at* http://www.drs.wa.gov/news-announcements/2011-Pension-Proposals.pdf.

opened new, less generous benefit plans.[90] In this recent pension crisis, Washington politicians have proposed a constitutional amendment that would require the state to make its full ACR towards their pension fund and have repealed automatic annual benefit increases for those who make above the minimum benefit amount.[91]

South Dakota has also taken a proactive stance towards pension costs and enjoys a 97% funded status as a result. "South Dakota . . . replaced its automatic annual COLA of 3.1% with a formula that determines the annual adjustment based on the funded status of the state's pension plans."[92] Like Minnesota and Colorado, this action resulted in a lawsuit.[93] While courts in Minnesota and Colorado have already thrown out similar suits, the case of *Tice v. South Dakota* is still pending.[94]

Indiana's funded percentage is estimated at 72%,[95] below the 80% funded ratio that experts consider to be the bottom of the healthy range for pension plans.[96] However, the overall debt amount is by no means insurmountable. In fact, according to a study that determined the necessary annual tax hike needed to achieve solvency of the state's public pension system, Indiana comes in last at $329.[97]

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90. *See* GOVERNOR CHRIS GREGOIRE, REFORMING PENSIONS TO HOLD DOWN COSTS (2010), *available at* http://www.governor.wa.gov/priorities/budget/pension_reform.pdf; JAMES L. MCINTIRE, WASH. STATE TREASURER, PENSION FUNDING REFORM FOR WASHINGTON STATE (2010), *available at* http://www.tre.wa.gov/documents/pensionFundingReform.pdf.

91. *See* Stephen C. Fehr, *Judges Uphold Cost-of-Living Cuts to Pensions*, STATELINE (July 1, 2011), http://www.stateline.org/live/printable/story?contentId=585060; *see also* Fehr, *supra* note 80.

92. Timothy Inklebarger, *COLA Reduction Laws Under Fire in 3 States*, 38 PENSIONS & INVS. (2010).

93. *Id.*

94. *See* Marianne Goodland, *PERA Lawsuit Moves Forward; Court Date Set*, COLO. STATESMAN, June 3, 2011, http://www.coloradostatesman.com/content/992838-pera-lawsuit-moves-forward-court-date-set; Andrew Harris & William Selway, *Colorado, Minnesota Courts Throw Out Suits Disputing Retiree Benefit Cuts*, BLOOMBERG (June 30, 2011), http://www.bloomberg.com/news/2011-06-30/colorado-minnesota-state-courts-toss-retiree-pension-benefit-cut-lawsuits.html.

95. *See* PEW CTR. ON THE STATES, ROADS TO REFORM: CHANGES TO PUBLIC SECTOR RETIREMENT BENEFITS ACROSS STATES 5 (2010), *available at* http://pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/States_Fiscal_Health_Project/Pensions_Web%20Update_121710.pdf.

96. *Id.*

97. Robert Novy-Marx & Joshua D. Rauh, *The Revenue Demands of Public Employee Pension Promises* 40 (Simon Graduate Sch. of Bus., Working Paper No. FR 11-21, 2011), *available at* http://kellogg.northwestern.edu/faculty/rauh/research/RDPEPP.pdf.

Northwestern Univ. Study: Needed Tax Increases for Full Pension Funding[98]	**$ per taxpayer**
Indiana	$ 329
Arkansas	$ 534
Utah	$ 538
West Virginia	$ 600
Arizona	$ 608
Idaho	$ 737
Maine	$ 761
South Dakota	$ 776
North Carolina	$ 784
Georgia	$ 803
Colorado	$ 1,739
New Mexico	$ 1,756
Illinois	$ 1,907
Minnesota	$ 1,928
California	$ 1,994
Ohio	$ 2,051
Wyoming	$ 2,080
Oregon	$ 2,140
New York	$ 2,250
New Jersey	$ 2,475

Governor Mitch Daniels has pushed hard for getting the state budget under control.[99] Indiana combined its various pension plans under one roof to cut operating expenses,[100] and is considering increasing its annual pension contributions.[101] Indiana has a long-standing hybrid plan that combines elements of DB and DC plans, reducing the state's investment risk.[102] Further, Indiana

98. *Id.* (illustrating the ten states with the highest needed tax increase and the ten with the lowest needed tax increase).

99. *See USA: Gov. Daniels Signs Sen. Walker's New Public Employee Pension Bill into Law*, RIGHT VISION NEWS, Apr. 15, 2011, at 1.

100. *See* Janice Fioravante, *How Indiana and California Use Hybrid Pension Plans to Solve Their Funding Problems*, INSTITUTIONAL INVESTOR (Mar. 31, 2011), www.institutionalinvestor.com/Article/2799174/How-Indiana-and-California-Use-Hybrid-Pension-Plans-to-Solve-Their-Funding-Problems.html?ArtcileId=2799174.

101. Caitlin Devitt, *Indiana Mulls Hike in Levels of Contribution to Pension Plans*, INVESTMENT MGMT. WKLY., Apr. 11, 2011, at 1.

102. *See* Fioravante, *supra* note 100.

does not face the same legal roadblocks to changing benefits. "States such as Indiana and Texas still statutorily consider pension benefit payments as 'mere gratuities that do not vest and can be amended or modified at any time by the state.'"[103]

One approach, apparently first considered in Maine,[104] seeks to coordinate retiree pension costs with Social Security.[105] The situation in Maine is particularly interesting because "[Maine] avoided the common mistake of sweetening benefits when markets were strong[;]"[106] the shortfall Maine faces is simply the direct result of investment losses.[107] The proposed law would, following a phase-in period, cover current pension promises with social security benefits and the state pension.[108] In the long run, this would take pressure off of the Maine plan without any need to repudiate earlier promises to retirees.

C. Desperate Measures in Desperate Places

In some states, the combination of generous benefits promises and the financial collapse of 2008 combined to produce a crisis atmosphere which, in turn, triggered the first serious debates about the appropriateness of collective bargaining in the public sector since the Depression.[109] The

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103. Inklebarger, *supra* note 92, at 1.

104. *See* Mary Williams Walsh, *Maine Giving Social Security Another Look*, N.Y. TIMES, July 21, 2010, at A1 [hereinafter Walsh, *Maine Social Security*], *available at* http://www.nytimes.com/2010/07/21/business/economy/21states.html.

> Even if it fully embraces the proposal, Maine will have to come up with a considerable sum to sustain its existing pension plan, presumably through some combination of taxes and service cuts. After a phase-in period, Social Security would cover part of state retirees' benefits, with the state pension as the remainder. Many pension plans in corporate America coordinate their benefits in this way. The proposal has the advantage of not reducing promised benefits, guaranteed by the constitution in many states. The change would not be cheap, but it would reduce the role of Maine's pension fund and thus the risk of having to suddenly cover giant losses down the road.

Id.. Maine created a task force to generate a report in 2009. ME. UNIFIED RET. PLAN TASK FORCE, TASK FORCE STUDY AND REPORT: MAINE STATE EMPLOYEE AND TEACHER UNIFIED RETIREMENT PLAN (2010), *available at* http://www.mainepers.org/PDFs/other%20publications/MainePERS%20Final%20URP%20Task%20Force%20Report%203-9-2010.pdf.

105. *See* Social Security Act, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch.7 (2006)).

106. Walsh, *Maine Social Security*, *supra* note 104.

107. *Id.*

108. *Id.*

109. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS SUMMARY (2011), *available at* http://www.bls.gov/news.release/union2.nr0.htm; Barry Bluestone, Op-Ed, *A Future for Public Unions?*, BOS. GLOBE, July 18, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/18/a_future_for_public_unions/.

> [B]etween 2000 and 2008, the price of state and local public services has increased by 41 percent nationally compared with 27 percent in private services. Even in the face of

> the worst fiscal crisis in decades, many state and local union leaders refuse to consider a wage freeze that could help preserve more of their members' jobs.

Id.; Daniel Henninger, *The Fall of the House of Kennedy*, WALL ST. J., Jan. 21, 2010, http://online.wsj.com/article/SB10001424052748704320104575015010515688120.html ("In 1962, President John F. Kennedy. . . . signed executive order 10988 allowing the unionization of the federal work force."); *Wisconsin's Blow to Union Power*, N.Y. TIMES, Feb. 18, 2011, http://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees; *see also* Steven Greenhouse, *Most U.S. Union Members Are Working for the Government, New Data Shows*, N.Y. TIMES, Jan. 22, 2010, http://www.nytimes.com/2010/01/23/business/23labor.html.

> For the first time in American history, a majority of union members are government workers rather than private-sector employees, the Bureau of Labor Statistics announced on Friday.
>
> In its annual report on union membership, the bureau undercut the longstanding notion that union members are overwhelmingly blue-collar factory workers. It found that membership fell so fast in the private sector in 2009 that the 7.9 million unionized public-sector workers easily outnumbered those in the private sector, where labor's ranks shrank to 7.4 million, from 8.2 million in 2008.
>
> . . .
>
> According to the labor bureau, 7.2 percent of private-sector workers were union members last year, down from 7.6 percent the previous year. That, labor historians said, was the lowest percentage of private-sector workers in unions since 1900.
>
> Among government workers, union membership grew to 37.4 percent last year, from 36.8 percent in 2008.

Id.; Joseph A. McCartin, *What's Really Going on in Wisconsin?*, NEW REPUBLIC, Feb. 19, 2011, *available at* http://www.tnr.com/article/politics/83829/wisconsin-public-employees-walker-negotiate.

> Following the example of cities like New York and Philadelphia, in 1959, Wisconsin became the first state to enact legislation recognizing the rights of government workers to bargain collectively. Similar laws spread in subsequent years, encouraged by Wisconsin's law and inspired by Executive Order 10988, signed by President John F. Kennedy in 1962, which allowed federal workers to bargain over some aspects of their work (but not their pay or benefits). Critically, this growth enjoyed bipartisan support: Governor Ronald Reagan signed the Meyers-Milias-Brown Act in 1968, which brought public sector bargaining to California. Through his own executive order in 1969, President Richard Nixon strengthened the bargaining rights Kennedy had first offered federal workers. As a result of this support on both sides of the aisle, between the mid-'50s and the mid-'70s, there was a tenfold increase in the membership of government workers' unions.

Id.; *Public Sector Labor Unions Evolve Over a Century*, NPR (Feb. 24, 2011), http://www.npr.org/2011/02/24/134017794/Public-Workers-History. *But see* Elizabeth G. Olson, *Are Public Unions Our Convenient Economic Scapegoats?*, CNN MONEY (Feb. 28, 2011), http://management.fortune.cnn.com/2011/02/28/are-public-unions-our-convenient-economic-scapegoats/ ("'Unionized workers didn't sow the seeds of the economic downturn, deregulation of the financial industry did,' says Robert Bruno, a University of Illinois professor of labor and employment relations. 'We've suffered billions in losses because of greed, gross mismanagement and illegal activity in the

situation in Wisconsin is perhaps best known.[110] The magnitude of the problem in California, Illinois and Colorado is staggering and has left commentators wondering about the possibility of bankruptcy as a viable solution.[111]

While the 81% present funded ratio on California's pensions are not among the worst offenders, the total size of California's unfunded liability, due it its large population and economy, is without peer.[112] Estimates on the total unfunded liability range from $93 billion according to the official reports that use a 7.75% discount rate[113] to over $500 billion based on a risk-free discount rate.[114] The primary culprit for these extraordinary debts are California's retiree benefit

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financial industry.'").

110. *See* Dawn Rhodes et al., *Wisconsin Senators Living Day-to-Day South of Border*, CHI. TRIB., Feb. 21, 2011, http://articles.chicagotribune.com/2011-02-21/news/ct-met-wisconsin-democrats-illinois-20110221_1_senators-wisconsin-constitutions-julie-lassa; Abby Sewell & Michael Muskal, *Indiana Democrats Flee to Illinois in Protest of Union Legislation*, L.A. TIMES, Feb. 23, 2011, http://articles.latimes.com/2011/feb/23/news/la-pn-0223-indiana-democrats-flee-20110224; Amanda Terkel, *The Wisconsin Collective Bargaining Fight: Behind The Scenes*, HUFFINGTON POST, June 21, 2011, http://www.huffingtonpost.com/2011/06/21/wisconsin-collective-bargaining-protests-behind-scenes_n_880625.html. For the current status, see Monica Davey, *Wisconsin Court Reinstates Law on Union Rights*, N.Y. TIMES, June 14, 2011, http://www.nytimes.com/2011/06/15/us/politics/15wisconsin.htm ("The Wisconsin Supreme Court cleared the way on Tuesday for significant cuts to collective bargaining rights for public workers in the state, undoing a lower court's decision that Wisconsin's controversial law had been passed improperly."); Amy Merrick, *Wisconsin Union Law to Take Effect*, WALL ST. J., June 15, 2011, http://online.wsj.com/article/SB10001424052702303848104576386122936205978.html.; see also State of Wis. *ex rel.* Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011), *available at* http://www.wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=66078.

111. *See, e.g.*, William Alden, *Cash-Strapped States Seeking a Way to Declare Bankruptcy*, HUFFINGTON POST, Jan. 21, 2011, http://www.huffingtonpost.com/2011/01/21/states-seek-path-to-bankruptcy_n_812006.html; Mary Williams Walsh, *A Path Is Sought for States to Escape Their Debt Burdens*, N.Y. TIMES, Jan. 20, 2011, http://www.nytimes.com/2011/01/21/business/ economy/21bankruptcy.html.

112. *See Trillion Dollar Gap*, *supra* note 87.

113. Daniel Borenstein, *Public-Pension Accounting Hides the Size of the Problem*, OAKLAND TRIB., May 28, 2010, http://www.insidebayarea.com/columnsci_18155641

> CalPERS assumes a 7.75 percent rate, similar to other public systems. The system says that's reasonable because it has earned an average 7.9 percent over the past 20 years. Yet, CalPERS actuaries recently recommended reducing the rate to 7.5 percent, a move the board of directors rejected. Critics say even that would not have been nearly enough. They note that the rate for the entire 20th century averaged about 6.2 percent, and that CalPERS' rate for the last 10 years averaged 4.3 percent. Investment guru Warren Buffett calls the rates used by public-pension systems "nuts" and "crazy," and suggests 6 percent would be more reasonable.

Id.

114. David Crane, *California's $500-Billion Pension Time Bomb*, L.A. TIMES, Apr. 6, 2010, http://articles.latimes.com/2010/apr/06/opinion/la-oe-crane6-2010apr06.

plans, which were regularly increased during economic boom cycles and never reduced during the inevitable bust cycles.[115] Reform measures have included increased contributions and higher retirement ages for current workers and decreased benefits for new hires.[116] Further proposals entail moving away from a DB plan towards a hybrid plan and instituting benefit caps.[117]

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115. *See* Byrnes & Palmeri, *supra* note 4.

> California's pension benefits are extreme. In 1999 and again in 2001, a time when the pension plans were flush with strong investment gains and state contributions were low, the state legislature upped the benefits to levels far beyond even the most generous public plans. A recent analysis by the LAO notes that for longer-term and some local employees, it's quite possible to receive more annual income in retirement than when a worker was employed.
>
> This tendency to dole out goodies in fat times is the core moral hazard of public-pension plans. Politicians like to reward voters when they can, and public workers vote.

Id.

116. *See* NAT'L ASS'N OF STATE RET. ADM'RS, SELECTED APPROVED CHANGES TO STATE PUBLIC PENSIONS TO RESTORE OR PRESERVE PLAN SUSTAINABILITY (2011), *available at* http://www.nasra.org/resources/SustainabilityChanges.pdf.

117. *See id.*; Byrnes & Palmeri, *supra* note 4.

Forbes: Overall Ranking of All State Debt[118]
1. Utah
2. New Hampshire
3. Nebraska
4. Texas
5. Virginia
6. North Dakota
7. Nevada
8. Iowa
9. Montana
10. Colorado
41. Wisconsin
42. Massachusetts
43. Ohio
44. Mississippi
45. Louisiana
46. New Jersey
47. California
48. Connecticut
49. New York
50. Illinois

The pension situation in Illinois is by far the most absurd in the nation. Illinois appears on the bottom rung on every analysis of state debt.[119] The present funded ratio is a mere 51%, creating a $62 billion shortfall, even when using highly optimistic official discount rates.[120] The situation is so dire that some economists have estimated that Illinois will run out of money to fund its pensions within seven years.[121]

118. *Global Debt Crisis*, FORBES (Jan. 20, 2010), http://forbes.com/lists/2010/44/deb-10_Global-Debt-Crisis_Rank.html.

119. *See, e.g.*, *id.*

120. *See Trillion Dollar Gap*, *supra* note 87.

121. *See* Joshua Rauh, *The Day of Reckoning for State Pension Plans*, KELLOGG SCH. OF MGMT. (Mar. 22, 2010), http://kelloggfinance.wordpress.com/2010/03/22/the-day-of-reckoning-for-state-pension-plans/.

Northwestern Univ. Study: Year that Pension Funds Are Expected to Run Out[122]	**Year**
North Carolina	N/A
Utah	2042
Delaware	2040
South Dakota	2035
New York	2034
North Dakota	2033
Florida	2033
Tennessee	2032
Iowa	2032
Georgia	2032
Indiana	2020
Hawaii	2020
Kentucky	2020
West Virginia	2019
Arkansas	2019
Connecticut	2018
New Jersey	2018
Illinois	2018
Louisiana	2017
Oklahoma	2017

Illinois has a long and sorry history of shirking its ARC,[123] even in the midst

122. *Id.* (illustrating the ten states whose funds are expected to run dry the soonest and the ten expected to run dry the latest).

123. *See* Byrnes & Palmeri, *supra* note 4.

> According to an analysis by the Civic Federation, a Chicago research group sponsored by the business community, since 1970 Illinois has not once paid its annual pension bill in full. . . .
>
> . . .
>
> Over the years, even as the state failed to pay for existing pension promises, the Springfield politicians have added more. In the past 10 years benefit sweeteners have added $5.8 billion in new benefits, largely through early retirement inducements. And there has been a general creep up in the level of promises made. Today, one-third of Illinois state employees get hazard rates of pension payments originally intended only for state police, according to the governor.
>
> . . .
>
> Illinois State Representative Robert S. Molaro, a member of a commission

of adding pension sweeteners and charges of political corruption. Home to strong and influential unions, Wisconsin democrats received safe harbor in Illinois in their recent attempt to prevent Gov. Walker's efforts to enact pension reform.[124] Reform measures, while rather late, have finally broken through in Illinois. The state "raised its retirement age to 67, the highest of any state, and capped public pensions at $106,800 a year."[125] Other reform measures have included a new formula for determining COLA's, an optional 401(k) style plan, and closing loopholes that allowed for double-dipping and spiking.[126] In one more desperate measure, "the Illinois Legislature recently gave the city of Chicago permission to operate a casino in order to raise money to help alleviate the pension funding crisis there."[127]

> convened by the governor to make recommendations for fixing the pension system [said,] "It will be hard for us to go to the taxpayers and ask them to pay for our pensions with benefits you in the private sector couldn't even dream of."

Id.

124. *See* Mark Niquette & Stephanie Armour, *Democrats From Wisconsin, Indiana Take Haven in Illinois to Block Bills*, BLOOMBERG (Feb. 23, 2011), http://www.bloomberg.com/news/2011-02-23/wisconsin-indiana-democrats-flee-to-illinois-to-block-union-rights-votes.html ("Illinois has become a haven for Midwestern Democratic lawmakers fleeing their states to stall votes on Republican-backed bills restricting union rights.").

125. Mary Williams Walsh, *With Severe Budget Troubles, States Are Taking Aim at Pensions*, BOS. GLOBE, June 20, 2010, at A16, *available at* http://www.boston.com/news/nation/articles/2010/06/20/with_severe_budget_troubles_states_are_taking_aim_at_pensions/.

126. *See* NAT'L ASS'N OF STATE RET. ADM'RS, *supra* note 116.

127. Rachel Steingard, *No Fix in Sight for Ill. Public Pension Woes*, SOC'Y AM. BUS. EDITORS & WRITERS (June 2, 2011), http://sabew.org/2011/06/no-fix-in-sight-to-ill-public-pension-woes/.

Forbes: Unfunded Pension Debt Per Capita[128]	**$**	**USD**
Nebraska	$	4,878
Tennessee	$	5,229
North Dakota	$	6,080
North Carolina	$	6,300
Florida	$	6,389
Delaware	$	6,872
West Virginia	$	7,054
Vermont	$	7,082
Utah	$	7,272
Indiana	$	7,418
New Mexico	$	14,614
Hawaii	$	15,526
Colorado	$	15,548
Wisconsin	$	16,418
New Jersey	$	16,838
Illinois	$	17,230
Connecticut	$	17,622
Alaska	$	18,797
Ohio	$	19,110
Rhode Island	$	20,271

Colorado is interesting for reasons other than its unremarkable 70% funding ratio for public pensions. Unlike many states whose shortfalls are due primarily to overly generous benefits, lack of funding and pension abuses, Colorado's underfunded liability appears to issue mainly from its attempt to reach overly optimistic projected rates of return by overweighting in risky equities and hedge funds.[129] However, it is the topic of pension reform where Colorado requires mention. Colorado was among the first set of states to reduce costly COLAs, which provides an immediate and substantial cost savings. This change resulted

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128. *Global Debt Crisis*, *supra* note 118 (showing the ten states with the most and least amount of unfunded pension debt per capita).

129. *See* Byrnes & Palmeri, *supra* note 4.

> Meredith Williams, executive director of Colorado's public employee retirement system, says that by 2000, his funds were 90%-invested in equities and real estate investment trusts. The bear market took Colorado's plan from 105%-funded to only 76%. That prompted Williams to cut stocks to something closer to 60% of total holdings. "You live by that sword, you die by that sword," he says.

Id.; *see also* Steve Eder et al., *Pensions Leap Back to Hedge Funds*, WALL ST. J., May 27, 2011, http://online.wsj.com/article/SB10001424052702303654804576347762838825864.html?mod=googlenews_wsj ("The number of public pension plans investing in hedge funds has leapt 50% since 2007 to about 300. . . .").

in a lawsuit, *Justus v. Colorado*,[130] which captured the eyes of pension reformers and unions across the nation. The judge in this case recently ruled that removing COLA is constitutional,[131] *which may open the doors to similar reforms and judicial decisions across the nation*.

Sadly, in spite of these often contentious efforts at reform of both the public collective bargaining process and the specific terms of benefits plans, each of these jurisdictions remains in precarious financial condition.[132]

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130. Order on Defendant's Motion for Summary Judgment, Justus v. Colorado, No. 2010-CV-1589 (Colo. Dist. Ct., Denver Cnty. June 29, 2011).

131. *See* Andrew Harris & William Selway, *Colorado, Minnesota Courts Throw Out Suits Disputing Retiree Benefit Cuts*, BLOOMBERG (June 30, 2011), http://www.bloomberg.com/news/2011-06-30/colorado-minnesota-state-courts-toss-retiree-pension-benefit-cut-lawsuits.html.

> Judge Robert S. Hyatt in Denver . . . rejected claims by the former workers that they had a right to specific cost of living adjustments.
>
> Hyatt said that while the plaintiffs had a contractual right to their pensions, they didn't have a right to "the specific COLA formula in place at their respective retirement, for life without change." Johnson said Minnesota retirees didn't have a constitutionally protected property interest in COLA increases.

Id.

132. *See* MOODY'S INVESTORS SERVS., COMBINING DEBT AND PENSION LIABILITIES OF U.S. STATES ENHANCES COMPARABILITY 7-8 fig.3 (2011), *available at* http://www.nasra.org/resources/Moodys1101.pdf.

Moody's: Total Debt as % of Personal Income[133]	**%**
Nebraska	0.1%
Indiana	2.5%
Tennessee	2.9%
North Carolina	3.3%
Iowa	3.4%
South Dakota	3.5%
Missouri	4.0%
Ohio	4.1%
Texas	4.5%
Pennsylvania	5.6%
Rhode island	19.7%
Illinois	20.5%
Massachusetts	20.6%
West Virginia	20.9%
Kentucky	21.2%
Alaska	21.6%
New Mexico	21.9%
Connecticut	22.3%
Mississippi	22.8%
Hawaii	27.7%

If these states were private firms, there is little doubt that bankruptcy would be their only viable option.[134]

133. *Id.* (showing the ten states with the most and least total debt as a percentage of personal income).

134. *See id.* at 11-12 fig.5.

Moody's: Unfunded Pension as % of GDP[135]	
New York	-0.91%
Nebraska	0.06%
Wisconsin	0.11%
North Carolina	0.13%
Indiana	0.49%
Washington	0.59%
Ohio	0.62%
Delaware	0.69%
Missouri	0.80%
Tennessee	1.08%
South Carolina	7.71%
Maine	8.03%
Hawaii	8.09%
New Mexico	8.66%
Oklahoma	8.99%
Rhode Island	9.19%
Kentucky	9.54%
Illinois	9.85%
Mississippi	11.18%
West Virginia	11.31%

Additionally, the legality of changes to benefits for workers whose benefits have "vested"—i.e. current retirees and long-term employees—remains in doubt.[136]

All of the recent turmoil has raised doubts about the appropriateness of collective bargaining in the public sector. Some states, most notably Texas,[137]

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135. *Id.* (showing the ten states with the highest and lowest unfunded pension liability as a percentage of GDP).

136. My colleague, Jack Beermann, is presently working on a paper which addresses the constitutionality of state efforts to change public employees' benefits.

137. Texas has private sector unions, but they are heavily restricted and not allowed to use collective bargaining. *See* Mark Hemingway, *California Unions Stand in Way of Texas-Size Success*, S.F. EXAMINER, Feb. 10, 2011, http://www.sfexaminer.com/opinion/op-eds/2011/02/california-unions-stand-way-texas-size-success#ixzz1SxgV4uXN.

> Texas has right-to-work laws, meaning the state forbids compulsory union dues as a condition of employment. California does not, and forced unionization means a much more expensive labor force. . . . While Texas has public-sector unions, the state has

have never permitted their public employees to engage in collective bargaining. This alone did not shield Texas from the same morally hazardous behavior of other states;[138] it did however, make change easier to effect when it became apparent that the state could not afford the promises it had made.[139] The argument in favor of limiting public collective bargaining to wages and working conditions (thereby excluding bargaining over benefits) grows out of the public choice theory and moral hazard analysis which provides the only coherent explanation for the persistent overpromising described in this paper.

At the heart of public choice theory is the simple insight that politicians are rational, self-interested actors like everyone else.[140] The astonishing debt figures that GASB 45 finally forced states to report are the logical result of years of rent-seeking by legislators and public sector unions. Well organized unions push hard for improved benefits. Politicians, who are legally obligated to negotiate with these unions on behalf of the taxpayers,[141] understand that strong union support

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> instituted tight controls. Under Texas law, state employees cannot receive benefit increases unless the pension funds can meet their long-term obligations, and state employees are required to contribute 6 percent of their paycheck to their pensions.

Id. But see David Madland, *Public Sector Unions Should Have the Right to Collective Bargaining*, U.S. NEWS & WORLD REP., Feb. 25, 2011, http://www.usnews.com/opinion/articles/2011/02/25/public-sector-unions-should-have-the-right-to-collective-bargaining ("Texas, which does not allow collective bargaining and has a very weak union movement, faces a $27 billion budget deficit over the next two fiscal years, a budget deficit similar in size to California's, but with a much smaller economy.").

138. *See* Kate Alexander, *Texas Public Pensions Under Scrutiny in Spite of Protections*, AUSTIN AM.-STATESMAN, Dec. 11, 2010, http://www.statesman.com/news/texas-politics/texas-public-pensions-under-scrutiny-in-spite-of-1114511.html; *Trillion Dollar Gap*, *supra* note 87 (reporting Texas has an estimated $24.9 billion unfunded liability, but makes full ARC each year); *see also Global Debt Crisis*, *supra* note 118 (reporting Texas pension debt comes out to $7,744 per person).

139. *See* Susan Combs et al., *House Bill 2365 Protects Texans from Far-Reaching Consequences of Government Accounting Rule*, WINDOW ON ST. GOV'T (June 11, 2007), http://www.window.state.tx.us/newsinfo/columns/070611gasb.html.

> Retirement health benefits for the state of Texas and most Texas governmental entities are not constitutionally mandated or contracted programs. Instead, the programs are reviewed and renewed during the regular budgeting process.
>
> . . .
>
> Texas budgets within available revenue; however, what we can afford as a state changes each biennium. For example, in 2003 the Legislature faced a $10 billion shortfall. Consequently, benefits were reduced.

Id.

140. *See* Jane S. Shaw, *Public Choice Theory*, LIBR. ECON. & LIBERTY, http://www.econlib.org/Library/Enc1/PublicChoiceTheory.html (last visited Feb. 21, 2012).

141. *See* James Sherk, *Wisconsin's Blow to Union Power: F.D.R. Warned Us*, N.Y. TIMES, http://nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees/fdr-warned-us-about-public-sector-unions (last updated Sept. 16, 2011) ("Government collective bargaining

in the form of votes and dollars can be secured by increasing compensation to the union's membership. Why benefits but not wages? Both the union and the politician understand that large wage increases mean large increased expenses in the very short term—voter ire in response to the tax increases needed to fund the wage increases is likely and, no doubt, undesirable. Benefits are attractive precisely because they usually involve *future* promises. Mixed with long amortization periods, high discount rates and a few other optimistic assumptions, and the budget appears balanced. The politician secures desired support, unions report victory at the bargaining table to their membership and the taxpayer is happy that the budget is balanced without any appreciable increase in taxes.

The only problem with this, indeed with all stories about moral hazard, is that eventually the future arrives and the careless behavior in question must be addressed. As we have seen, there are only a few options—evisceration of the remainder of a state's budget in order to honor benefit promises; (relatively) easy changes in benefits promised to future hires; and, most difficult, a re-working of earlier promises. This latter option is being explored to one degree or another in every state examined for this paper. Some jurisdictions, most noticeably Massachusetts,[142] have managed to extract concessions without affecting the permissible scope of collective bargaining; others are gambling on judicial support for legislative changes;[143] still others are pursuing a combination of

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means voters do not have the final say on public policy. Instead their elected representatives must negotiate spending and policy decisions with unions.").

142. For background on this debate, see Michael Levenson, *House Votes to Restrict Unions*, BOS. GLOBE, Apr. 27, 2011, http://articles.boston.com/2011-04-27/news/29479557_1_unions-object-labor-unions-health-care. For an update on this debate, see Noah Bierman, *Patrick, Leaders Strike Deal on Unions*, BOS. GLOBE, July 9, 2011, http://www.boston.com/news/politics/articles/2011/07/09/patrick_leaders_strike_deal_on_union_bargaining_curbs/?s_campaign=8315.

> The agreement, reached behind closed doors and slated for approval Monday, allows Patrick to argue that he is cutting health costs for cities and towns by $100 million without gutting workers' rights. Patrick has been pitching himself nationally as a governor who can work with organized labor under tough budgetary circumstances, contrasting his approach with Republican governors who have fought divisive battles with unions this year.

Id.

143. The case in Colorado is *Justus v. Colorado*, No. 10-CV-01589 (Colo. Dist. Ct., Denver Cnty. June 29, 2011), *available at* http://www.copera.org/pdf/Misc/06-29-11Order.pdf; the case in Minnesota is *Swanson v. Minnesota*, No. 62-CV-10-05285 (Minn. Dist. Ct., Ramsey Cnty. June 29, 2011), *available at* http://graphics8.nytimes.com/packages/pdf/business/20110701pension/swansonPera.PDF; and the case in South Dakota is *Tice v. South Dakota*, Civ No. 10-225 (6th Cir., S.D. June 15, 2010). *See* Marianne Goodland, *PERA Lawsuit Moves Forward; Court Date Set*, COLO. STATESMAN, June 3, 2011, http://coloradostatesmen.com/content/992838-pera-lawsuit-moves-forward-court-date-set; *see also* Mary Williams Walsh, *Two Rulings Find Cuts in Public Pensions Permissible*, N.Y. TIMES, July 1, 2011, at B1 [hereinafter Walsh, *Two Rulings*], *available at* http://www.nytimes.com/ 2011/07/01/business/01pension.html.

> The two court decisions, issued Wednesday, suggest that the legal tide may be changing

changes in benefit levels combined with the fundamental reform of limiting or eliminating collective bargaining.[144]

It is impossible to predict which states will fully rationalize their promises. Maybe the long, painful period of reckoning, in which most states now find

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> for public pensioners. The political tide has already turned in some places—in addition to Colorado and Minnesota, South Dakota and New Jersey have also cut cost-of-living benefits for current retirees, and other states have been awaiting legal guidance before doing the same.
>
> In their court filings, retirees in Colorado and Minnesota had argued that their benefits were contractual in nature, and therefore protected by state and federal constitutional language barring the impairment of contracts.
>
> However, in his ruling dismissing the Minnesota case, Judge Gregg E. Johnson of the state's Second Judicial District Court wrote that the retirees in that state "have not met their burden to show unconstitutionality beyond a reasonable doubt."
>
> Judge Robert S. Hyatt, a district judge in Denver, offered a different line of thinking, noting that the 2010 state law that cut the benefits did not actually allow the state to remove money from the pension fund and use it to balance the budget.
>
> Rather, he wrote, the law required the state to send even more money to the pension fund at the same time that it required retirees to give up part of their benefit, "in order to create a larger pool of investable funds and thus provide for sustainable pension benefits in the future."

Id.

144. *See, e.g.*, Richard Pérez-Peña, *New Jersey Lawmakers Approve Benefits Rollback for Work Force*, N.Y. TIMES, June 24, 2011, at A1, *available at* http://www.nytimes.com/2011/06/24/nyregion/nj-legislature-moves-to-cut-benefits-for-public-workers.html?pagewanted=all ("New Jersey lawmakers on Thursday approved a broad rollback of benefits for 750,000 government workers and retirees, the deepest cut in state and local costs in memory, in a major victory for Gov. Chris Christie and a once-unthinkable setback for the state's powerful public employee unions."); Mary Williams Walsh, *The Burden of Pensions on States*, N.Y. TIMES, Mar. 11, 2011, at B1, *available at* http://www.nytimes.com/2011/03/11/business/11pension.html?pagewanted=all (reporting that similar step has occurred in Wisconsin); *Wis. Supreme Court Allows Walker's Union Restrictions*, NEWSMAX (June 15, 2011), http://www.newsmax.com/Newsfront/US-Wisconsin-Budget-Unions/2011/06/14/id/400078 ("The Wisconsin Supreme Court handed Republican Gov. Scott Walker a major victory on Tuesday, ruling that a polarizing union law could take effect that strips most public employees of their collective-bargaining rights."); *see also Indiana Gov. Mitch Daniels Is Tough on Budgets*, NPR (Feb. 28, 2011), http://www.npr.org/2011/02/28/134111630/indiana-gov-mitch-daniels-tough-on-budgets (reporting Indiana reforms).

Until it became more beneficial for politicians to fight union demands rather than agree to them, actual reform was, of course, hard to come by. The economic costs to individual taxpayers were mostly obscured and so the diffuse benefits of waging a campaign to counteract well-organized unions did not outweigh the costs. In truth, many of the people expected to bear the costs of these benefits were not old enough to vote. As the table showing per capita debt load demonstrates, the more densely populated, industrialized states tended to have strong public unions and democratic majorities that support unions. In these states, the pressure to grant union benefits was especially powerful and per capita debt load increased as one would predict.

themselves, will serve as an effective push back against the next round of tempting over-promising when the economy rebounds.

III. MORAL HAZARD PUSHBACK AND REFORM: TOWARD A CULTURE OF THRIFT AND TRANSPARENCY

The task facing the many states that have overpromised benefits is essentially two-fold: first, implementing cost cutting strategies in order to avoid bankruptcy or the equally distasteful specter of a budget with one line-item—benefits payments. As the case studies make clear, without cost cutting or dramatic increases in revenue, it is not inconceivable that a state could, after honoring its health care and pension obligations, have little or no ability to pay for education, police and fire, social services (including its share of Medicaid) and so on.[145] Such a state of affairs would radically alter the states' traditional role in the areas of education, law enforcement, and social services. Experience to date suggests that cost cutting must be a significant part of any solution.[146]

Second, policymakers must recognize and reject the rent-seeking behavior that created the current unsustainable state of affairs.[147] It is hard to say which

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145. *See* Chu, *supra* note 58 ("'When revenue is down and pensions are suffering investment losses, the budgets of governments are squeezed . . . .'"); *see also* Marois & Nash, *supra* note 69 (reporting that California trying to pass a bill "to end pension abuses" because they "'bankrupt the State of California' . . . said Senator Tony Strickland.").

146. In better economic times and with a lower unemployment rate, increased revenue from property, income and sales taxes are also viable options.

147. *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); *see generally* Paul M. Johnson, *Rent-Seeking Behavior*, A GLOSSARY OF POLITICAL ECONOMY TERMS, AUBURN UNIV., http://www.auburn.edu/~johnspm/gloss/rent-seeking_behavior (last visited Jan. 16, 2012).

> [Rent-seeking is t]he expenditure of resources in order to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a "favorable" decision on some public policy. The term seems to have been coined (or at least popularized in contemporary political economy) by the economist Gordon Tullock. Examples of rent-seeking behavior would include all of the various ways by which individuals or groups lobby government for taxing, spending and regulatory policies that confer financial benefits or other special advantages upon them at the expense of the taxpayers or of consumers or of other groups or individuals with which the beneficiaries may be in economic competition.

Id.; Kelley L. Ross, *Rent-Seeking, Public Choice, and the Prisoner's Dilemma*, FRIESIAN.COM, http://www.friesian.com/rent.htm (last visited Jan. 16, 2012).

> Public Choice theory is about the different incentives and processes that operate when goods are sought through political means rather than through purely economic means. The essential point is about the distribution of costs and benefits. The political appropriation and distribution of goods is attractive because it concentrates its benefits and disperses its costs. Many people can be taxed only a small amount and then a small number of people can be given large sums. This means that the many hardly notice the

of these the states will find more difficult, as morally hazardous behavior is notoriously difficult to constrain permanently.[148] The collective efforts of the "good" and "bad" states described above suggests several avenues for reform; the list below is also informed by the experience of private employers who resorted to bankruptcy or took advantage of the flexibility of the ERISA plan amendment process following the scrutiny triggered by FAS 106.[149]

> wealth that they have lost, while the few become active partisans of their own benefits. Politicians hear nothing from the many and a lot from the few, who also have some money to contribute to the politicians, money that may actually be, or be freed up by, the benefits they receive--like the money teachers' unions get from compulsory union dues, from the money paid by the government to teachers. Thus, constituencies and interest groups are created for each particular political benefit program, and it becomes nearly impossible to get rid of them. The rent-seeking aspect of this is that the beneficiaries receive rents on the basis of their participation in the interest group.
>
> . . .
>
> Such things are hard for politicians to resist, since it holds the promise of a group of dedicated voters beholden for their own program.

Id.

148. *See* Jonathan Morduch, *Microinsurance: The Next Revolution?*, *in* UNDERSTANDING POVERTY 337, 339 (Abrijit Vinayak Banerjee et al. eds., 2006). For example,

> Why do farmers have difficulty finding effective insurance? The problems are several, and a handful of Nobel Prizes in economics have been given to those who generated the key insights. First, "moral hazard" is omnipresent; once insured, farmers are less likely to apply the extra fertilizer, labor, and other inputs needed to maximize chances of success: the very fact of being insured raises the probability of losses.

Id.; Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996); Everett U. Crosby, *Fire Prevention*, 26 ANNALS AM. ACAD. POL. & SOC. SCI. 224 (1905); *see also* Jay Bhattacharya et al., *Does Health Insurance Make You Fat?*, *in* ECONOMIC ASPECTS OF OBESITY 35 (Michael Grossman & Naci Mocan eds., 2011), *available at* http://www.nber.org/ papers/w15163; CHING-TO ALBERT MA & MICHAEL H. RIORDAN, HEALTH INSURANCE, MORAL HAZARD, AND MANAGED CARE (2001), *available at* http://www.columbia.edu/~mhr21/ma.pdf; LIRAN EINAV ET AL., SELECTION ON MORAL HAZARD IN HEALTH INSURANCE (2011), *available at* http://www.nber.org/programs/ag/rrc/NB11-70%20Einav,%20Finkelstein%209.2011.pdf; Richard Zeckhauser, *Insurance*, LIBR. ECON. & LIBERTY, http://www.econlib.org/library/Enc1/Insurance.html (last visited Jan. 16, 2012).

> Once insured, an individual has less incentive to avoid risky behavior. With automobile collision insurance, for example, one is more likely to venture forth on an icy night. Federal deposit insurance made S&Ls more willing to take on risky loans. Federally subsidized flood insurance encourages citizens to build homes on flood plains.

Id.

149. Employers have almost complete freedom to amend health care plans, and less freedom to amend pension plans. Nonetheless, employers managed to terminate many DB plans and push employees into DC plans. *See* Procedures for PBGC Approval of Plan Amendments, 29 C.F.R. pt. 4220 (2011); *see also* Ellen E. Schultz, *Companies Sue Union Retirees to Cut Promised Health Benefits*, WALL ST. J., Nov. 10, 2004, at A1, *available at* http://online.wsj.com/public/resources/

A. Bankruptcy Option

Thus far no state in the union has declared bankruptcy, although the frightening condition of many states' budgets has generated considerable discussion about the desirability of this option.[150] Short of bankruptcy, which

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documents/SB11000371112946924 6.htm.

150. *See* Kate Linthicum, *Wall Street Warms to L.A. at Last*, L.A. TIMES, July 2, 2011, at AA1, *available at* http://articles.latimes.com/2011/jul/02/local/la-me-city-finances-20110702.

> Another critic of the city's fiscal outlook, former Mayor Richard Riordan, weighed in on the news of the city's favorable loan rates.
>
> In an interview with the Bond Buyer last month, Riordan said that he thinks that Los Angeles, like many cities and states, may go bankrupt soon because of dramatic increases in employee pension and healthcare benefit costs.

Id.; *see also* Randall Jensen, *Ex-L.A. Mayor Warns of Insolvency*, BOND BUYER, June 17, 2011, http://www.bondbuyer.com/issues/120_116/richard-riordan-profile-1027933-1.html; Mary Williams Walsh & Abby Goodnough, *Edging Toward Default: A Small City's Depleted Pension Fund Rattles Rhode Island*, N.Y. TIMES, July 12, 2011, at B1, *available at* http://www.nytimes.com/2011/07/12/business/central-falls-ri-faces-bankruptcy-over-pension-promises.html?pagewanted=all.

> The small city of Central Falls, R.I., appears to be headed for a rare municipal bankruptcy filing, and state officials are rushing to keep its woes from overwhelming the struggling state.
>
> The impoverished city, operating under a receiver for a year, has promised $80 million worth of retirement benefits to 214 police officers and firefighters, far more than it can afford. Those workers' pension fund will probably run out of money in October, giving Central Falls the distinction of becoming the second municipality in the United States to exhaust its pension fund, after Prichard, Ala.
>
> . . .
>
> Some analysts fear that a Central Falls bankruptcy, and a whiff of other problems out there, could scare nervous investors away from bonds issued by Rhode Island's other municipalities, perhaps setting off a chain reaction that could push the state itself to the brink. There is a precedent: the last American state to default on its bonds, Arkansas in 1933, got in over its head by trying to help struggling municipalities.

Id. But see Michael Corkery, *Illinois Treasurer Rejects State Bankruptcy*, WALL ST. J., Mar. 25, 2011, at C6.

> "Someone has to go out and have the testosterone and deal with the problems, particularly with the public employee unions," the state's Republican treasurer said in a forum this week at Cardozo Law School of Yeshiva University in New York.
>
> Testosterone, said Mr. Rutherford, is better than allowing states to seek bankruptcy protection so a judge can sort out fiscal problem such as pensions.

Id.; Roger Lowenstein, *Broke Town, U.S.A.*, N.Y. TIMES, Mar. 6, 2011, at MM26, *available at* http://www.nytimes.com/ 2011/03/06/magazine/06Muni-t.html?pagewanted=all.

> Even in Illinois, pensions will be paid. Failure to do so would embroil the government in court for years. That may be the hope of ideologues, who envision that the courts—or possibly even a bankruptcy filing—could be used to alter employee

would presumably permit a state to reject and renegotiate its labor agreements, there is the possibility of renegotiation *for the purpose of avoiding bankruptcy*. Even in bankruptcy, the legal standing for a state or local government to discharge pension and health benefits is unclear. As the experience in Colorado demonstrates, for example, it is simply unclear whether the state supreme court will permit a catastrophe exception to the generally accepted principle that the state cannot unilaterally breach a contractual obligation.[151]

Although there is no state experience to provide guidance, bankruptcy by cities and counties may be instructive. Orange County's bankruptcy in 1994 remained the largest municipal bankruptcy in history until 2011[152] and New York City narrowly averted bankruptcy in 1975.[153] As a result of unfunded pension responsibilities, Vallejo, California, received bankruptcy protection;[154] Central

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> contracts. In the 1930s, progressives persuaded Congress to let cities declare bankruptcy to escape the clutches of creditors. Now, conservatives want Congress to authorize states to file for bankruptcy. "Some people on the right see it as a chance to whack the public unions," says David Skeel, a law professor at the University of Pennsylvania who has written in favor of state bankruptcy. It's not hard to fathom why Gingrich, who as speaker of the House in the 1990s briefly shut down the U.S. government, would favor default by the states.

Id.; David Skeel, *A Bankruptcy Law—Not Bailouts—for the States*, WALL ST. J., Jan. 18, 2011, http://online.wsj.com/article/SB10001424052748703779704576073522930513118.html; Walsh, *Two Rulings*, *supra* note 143 ("Public pensions are considered so bulletproof that when the city of Vallejo, Calif., recently restructured its finances in bankruptcy, it cut other costs but left worker pensions intact."); *but see also* Jeb Bush & Newt Gingrich, Op-Ed, *Better Off Bankrupt*, L.A. TIMES, Jan. 27, 2011, http://articles.latimes.com/2011/jan/27/opinion/la-oe-gingrich-bankruptcy-20110127; Alison Vekshin, *State Bankruptcy Weighed by Republicans Blocking Aid*, BLOOMBERG (Jan. 21, 2011), http://www.bloomberg.com/news/2011-01-21/u-s-state-bankruptcy-weighed-by-house-republicans-blocking-aid.html. For current status, see Corey Boles & Siobhan Hughes, *No State Bailouts, Lawmaker Says*, WALL ST. J., Jan. 25, 2011, at A4; Mary Williams Walsh, *A Path Is Sought for States to Escape Their Debt Burdens*, N.Y. TIMES, Jan. 20, 2011, http://www.nytimes.com/2011/01/ 21/business/economy/21bankruptcy.html?_r=1&pagewanted=all. To view the hearing, see *State and Municipal Debt: The Coming Crisis?*, COMMITTEE OVERSIGHT & GOV'T REFORM (Feb. 9, 2011), http://oversight.house.gov/index.php?option=com_content& view=article& id=1101%3A2-9-11-qstate-and-municipal-debt-the-coming-crisisq&catid=34&Itemid=39.

151. *See* Order on Defendant's Motion for Summary Judgment, *supra* note 130; *see also* Harris & Selway, *supra* note 131.

> Judge Robert S. Hyatt . . . rejected claims by the former workers that they had a right to specific cost of living adjustments. Hyatt said that while the plaintiffs had a contractual right to their pensions, they didn't have a right to "the specific COLA formula in place at their respective retirement, for life without change."

Id.

152. *See Orange County Goes Bust*, TIME, Dec. 19, 1994, at 26.

153. *See* Sam Roberts, *When the City's Bankruptcy Was Just a Few Words Away*, N.Y. TIMES, Dec. 31, 2006, http://www.nytimes.com/2006/12/31/nyregion/31default.html.

154. *See supra* note 6.

Falls, Rhode Island, has recently entered bankruptcy;[155] Hamtramck, Michigan, is teetering on the edge of bankruptcy;[156] Jefferson County, Alabama, has recently filed the largest municipal bankruptcy ever;[157] and, Prichard, Alabama, simply stopped paying pension bills once they were denied bankruptcy protection.[158]

Bankruptcy is probably most attractive to states that cannot persuade their unions to voluntarily agree to benefit cost reductions. Just a credible threat of bankruptcy may be sufficient in some cases to force labor to agree to increase employees' share of health costs and pension contributions; to extend retirement eligibility dates; and to reevaluate all promises made to current retirees. As some private employers found in the 1990s and still do today,[159] bankruptcy may prove

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155. *See* Michael McDonald & David McLaughlin, *'Dire' Finances Force R.I. City Into Bankruptcy*, BLOOMBERG (Aug. 1, 2011), http://www.bloomberg.com/news/2011-08-01/-dire-situation-forces-rhode-island-city-of-central-falls-into-bankruptcy.html.

156. *See* Monica Davey, *Michigan Town Is Left Pleading for Bankruptcy*, N.Y. TIMES, Dec. 27, 2010, http://www.nytimes.com/2010/12/28/us/28city.html.

157. *See* Melinda Dickinson, *Alabama County Files Biggest Municipal Bankruptcy*, REUTERS (Nov. 10, 2011), http://www.reuters.com/article/2011/11/10/us-usa-alabama-jeffersoncounty-id USTRE7A87WW20111110; Phillip Inman, *Bankruptcy Threat to Jefferson County, Alabama*, GUARDIAN, July 24, 2011, at 22, *available at* http://www.guardian.co.uk/business/2011/jul/24/jefferson-county-alabama-bankruptcy.

158. *See* Michael Cooper & Mary Williams Walsh, *Alabama Town's Failed Pension Is a Warning*, N.Y. TIMES, Dec. 22, 2010, http://www.nytimes.com/2010/12/23/business/23/prichard.html?pagewanted=all.

159. *See, e.g.*, *In re* General Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009); *see also* WHITE HOUSE, DETERMINATION OF VIABILITY SUMMARY: GENERAL MOTORS CORPORATION (Mar. 30, 2009), *available at* http://www.whitehouse.gov/assets/documents/GM_Viability_Assessment.pdf; official filings are available at http://www.motorsliquidationdocket.com/; *'Bankruptcy Likely' for General Motors*, INDEP., May 27, 2009, http://www.independent.co.uk/news/business/news/bankruptcy-likely-for-general-motors-1691469.html.

> The UAW yesterday disclosed it agreed to take a much smaller 17.5 per cent [sic] stake in GM, plus a warrant for an added 2.5 percent stake to partially fund the $20 billion that GM must put into a trust that will start paying retiree health care costs next year.
>
> In exchange for agreeing to a lower equity ownership stake, GM promised the union $6.5 billion of preferred shares that pay 9 percent interest, plus a $2.5 billion note. The union, facing the possibility that it may not be able to quickly sell GM shares to fund its trust, preferred the certainty of the $585 million annual dividend that accompanies the preferred shares.
>
> The remaining $10 billion will come from health care trust funds that GM already has set up. The trust will get a seat on GM's board as well, although it will have to vote at the direction of GM's other independent directors. The concession deal, on which roughly 61,000 workers will vote by tomorrow, also froze wages and cut retiree health care benefits, performance bonuses and cost-of-living raises.

Id.; Chris Isidore, *GM Bankruptcy: End of an Era*, CNN MONEY (June 1, 2009), http://money.cnn.com/2009/06/01/news/companies/gm_bankruptcy/.

to be the cleanest way to restructure employee benefit debt.

B. Lessons from the Private Sector Post-FAS 106

Besides bankruptcy, private employers, stunned by the results of calculations mandated by FAS 106, undertook to force employees to engage in more cost sharing with respect to both health care and retirement benefits. The flexibility afforded by ERISA via the procedures for plan amendment[160] resulted in health

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> In the end, even $19.4 billion in federal help wasn't enough to keep the nation's largest automaker out of bankruptcy. The government will pour another $30 billion into GM to fund operations during its reorganization.
>
> . . .
>
> More than 650,000 retirees and their family members who depend on the company for health insurance will experience cutbacks in their coverage, although their pension benefits are unaffected for now.

Id.; Neil King Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J., June 2, 2009, http://online.wsj.com/article/SB124385428627671889.html ("General Motors Corp. became the second-largest industrial bankruptcy in history Monday as it filed its landmark case, with President Barack Obama predicting the humbled corporate titan will emerge from Chapter 11 'a stronger and more competitive' company within months."); Peter Whoriskey, *GM Emerges From Bankruptcy After Landmark Government Bailout*, WASH. POST, July 10, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/10/AR2009071001473.html.

> Formed by the sale of most of the old company's assets out of bankruptcy, the new GM will be an anomaly among American businesses because most of it will be owned by the U.S. and Canadian governments. The U.S. Treasury owns 60.8 percent of the new company's common stock, the UAW retiree health trust has 17.5 percent and the governments of Canada and Ontario 11.7 percent.
>
> . . .
>
> In a statement issued yesterday, Rep. Jeb Hensarling (R-Tex.) dismissed the company's boasts that it had completed the bankruptcy sale in far less time than many experts had predicted.
>
> It is "amazing how fast a company can emerge from Chapter 11 when you inject $40 billion of involuntary taxpayer capital into the process and trample over the rights of creditors in an unprecedented fashion," Hensarling said.
>
> But U.S. Bankruptcy Judge Robert E. Gerber, who approved the sale, wrote in a July 7 ruling that a liquidation would be "staggering" to the public.
>
> The company has 225,000 employees, 500,000 retirees, 6,000 dealers and 11,500 suppliers.

Id.

160. Even in somewhat extreme cases, courts have enforced employer's rights under ERISA to change existing plans. *See* McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991).

> McGann, an employee of H & H Music, discovered that he was afflicted with AIDS in December 1987. Soon thereafter, McGann submitted his first claims for reimbursement under H & H Music's group medical plan, provided through Brook Mays, the plan administrator, and issued by General American, the plan insurer, and informed his employer that he had AIDS. McGann met with officials of H & H Music

> in March 1988, at which time they discussed McGann's illness. Before the change in the terms of the plan, it provided for lifetime medical benefits of up to $1,000,000 to all employees.
>
> In July 1988, H & H Music informed its employees that, effective August 1, 1988, changes would be made in their medical coverage. These changes included, but were not limited to, limitation of benefits payable for AIDS-related claims to a lifetime maximum of $5,000. No limitation was placed on any other catastrophic illness. H & H Music became self-insured under the new plan and General American became the plan's administrator. By January 1990, McGann had exhausted the $5,000 limit on coverage for his illness.
>
> . . .
>
> McGann's claim cannot be reconciled with the well-settled principle that Congress did not intend that ERISA circumscribe employers' control over the content of benefits plans they offered to their employees. McGann interprets section 510 to prevent an employer from reducing or eliminating coverage for a particular illness in response to the escalating costs of covering an employee suffering from that illness. Such an interpretation would, in effect, change the terms of H & H Music's plan. Instead of making the $1,000,000 limit available for medical expenses on an as-incurred basis only as long as the limit remained in effect, the policy would make the limit *permanently* available for all medical expenses as they might thereafter be incurred because of a single event, such as the contracting of AIDS. Under McGann's theory, defendants would be effectively proscribed from reducing coverage for AIDS once McGann had contracted that illness and filed claims for AIDS-related expenses. If a federal court could prevent an employer from reducing an employee's coverage limits for AIDS treatment once that employee contracted AIDS, the boundaries of judicial involvement in the creation, alteration or termination of ERISA plans would be sorely tested.
>
> . . .
>
> ERISA does not broadly prevent an employer from "discriminating" in the creation, alteration or termination of employee benefits plans; thus, evidence of such intentional discrimination cannot alone sustain a claim under section 510. That section does not prohibit welfare plan discrimination between or among categories of diseases. Section 510 does not mandate that if some, or most, or virtually all catastrophic illnesses are covered, AIDS (or any other particular catastrophic illness) must be among them. It does not prohibit an employer from electing not to cover or continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some "prejudice" against AIDS or its victims generally. The same, of course, is true of any other disease and its victims. That sort of "discrimination" is simply not addressed by section 510. Under section 510, the asserted discrimination is illegal only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing right to which he may become entitled.

Id. at 403, 407-08 (footnotes omitted); *see also* Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 512 (1997); Hines v. Mass. Mut. Life Ins. Co., 43 F.3d 207, 209 (5th Cir. 1995); Messmer v. Xerox Corp., 139 F. Supp. 2d 398, 405 (W.D.N.Y. 2001).

Plainly, then, neither Xerox nor Preferred Care obligated itself by contract to continue

care plans that required increased co-pays and co-insurance,[161] tightening of preexisting condition rules,[162] and myriad other changes designed to shift more

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paying benefits once those benefits had begun to be paid. Rather, defendants reserved the right and authority to change plans, or the terms of the plans, from one year to the next. As the case authority cited above makes clear, ERISA permits them to do precisely that.

Id.

161. *See* Judy Ward, *Total Benefits: Rethinking Retiree Health*, PLAN SPONSOR (Dec. 2001), http://www.plansponsor.com/MagazineArticle.aspx?id=6442460246&magazine.

> 52% of companies offering retiree health care in 2000 said they would likely increase retirees' premium share in the next two years.
>
> Companies are regularly reconfiguring their retiree health benefits offerings these days, says Lou Mazawey, a Washington-based principal at Groom Law Group. "I do not see any stampede [to eliminate the benefits]," he says. "But, what more companies are doing-and this may accelerate even more with the economic downturn-is cutting back on retiree health benefits." Changes include capping annual or lifetime maximum benefits per participant, switching from indemnity plans to HMOs, substituting a defined contribution approach, and increasing retiree premium contributions, deductibles, and copays, he says.
>
> . . .
>
> The squeeze prompts a couple of explanations. In the early 1990s, Financial Accounting Statement 106 required companies to begin recording unfunded retiree health benefit liabilities on their financial statements. Thus, many companies faced a big jump in their liabilities. "Instead of paying as they go, now employers actually had to accrue-much like employers had to do for retirement benefits," [Steve] Coppock[, a Hewitt principal in Connecticut,] says. Very few companies actually fund their FAS 106 obligations in the sense of putting actual money into accounts and then gaining tax advantages as a result, he adds. Paul Fronstin, senior research associate at EBRI says "The main reason is the cost." In the mid- to late 1990s, "there was a little bit of a lull" in health-care costs, Coppock agrees. "That has certainly come back with a vengeance."

Id.; *see also Private Supplemental Coverage Summary*, NAT'L BIPARTISAN COMMISSION ON FUTURE MEDICARE, http://thomas.loc.gov/medicare/K-P-1499.html (last visited Jan. 17, 2012).

> In a recent survey of employers (Hay Group, 1998), 5 percent of employers had dropped retiree coverage since FAS 106 took effect and another 3 percent were considering dropping coverage. A more common response among employers was to require higher contributions from their retirees, 25 percent, as a means of offsetting FAS106 liabilities.
>
> Some employers have turned to Medicare risk HMOs as an efficient alternative. One survey, Mercer/Foster Higgins, found that the percentage of medium and large employers offering coordinated risk HMO plans rose from 7 percent in 1993 to 39 percent in 1997. Among employers offering this type of coverage, about one third provided some kind of incentive for retirees to join risk plans, resulting in about 39 percent of beneficiaries choosing this option.

Id.

162. Efforts to place limits on coverage of preexisting conditions are now illegal under the recently passed Patient Protection and Affordable Care Act, Sec. 2704. *See* Immediate Access to

of the cost of health care onto employees and their dependents.[163]

C. Defined Benefit to Defined Contribution Plans

The elimination of the DB vehicle as an option for government employers is primarily attractive because it combats the moral hazard problem directly. That is, because DB plans involve *guaranteed future* payments as opposed to a DC plan's limited promise to contribute toward a generalized savings goal, it is impossible for politicians and legislators to make promises without regard to cost. DC contributions are typically made on a real time basis; in contrast, DB contributions, as we have seen in this paper, are often manipulated or ignored in a manner consistent with the short term horizon of elected officials who figure that someone else will have to worry about how to pay tomorrow for promises made today. A switch to DC plans forces legislators to budget *now* for contributions that will be made in the very near future. The "kicking the can down the road" mentality that has dominated thinking about public sector benefits disappears with DC plans, and this is good for everyone concerned.

With DC plans, employees and governments understand exactly what they are promised and promising, respectively, and no one (least of all the taxpayer) needs to worry about overly optimistic discount and amortization rates. The contribute-as-you-go feature of DC arrangements also imposes precisely the kind of fiscal discipline that has been missing in the public sector for decades. To be blunt, politicians cannot promise any more than can actually be paid immediately in exchange for campaign contributions, votes and other support.

The ERISA rules governing the amendment of pension plans do not permit the same degree of flexibility as for welfare plans, like healthcare.[164] However,

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Insurance for Uninsured Individuals with a Preexisting Condition, 42 U.S.C.A. § 18001 (West 2010); Peter Grier, *Health Care Reform Bill 101: Rules for Preexisting Conditions*, CHRISTIAN SCI. MONITOR, Mar. 24, 2010, http://www.csmonitor.com/USA/Politics/2010/0324/Health-care-reform-bill-101-rules-for-preexisting-conditions.

163. *See* Roberts, *supra* note 153; *see also* PAUL FRONSTIN, EMP. BENEFIT RESEARCH INST., RETIREE HEALTH BENEFITS: TRENDS AND OUTLOOK 1 (2001), *available at* http://www.ebri.org/pdf/briefsdpf/0801ib.pdf.

> As a result of FAS 106, some employers placed caps on what they were willing to spend on retiree health benefits. Some added age and service requirements, while others moved to some type of "defined contribution" health benefit. Some completely dropped retiree health benefits for future retirees, while others dropped benefits for current retirees, although this has happened less frequently than the other changes.

Id.

164. Public pension plans are governed by a different set of rules than welfare plans, which include healthcare. ERISA allows for employers to terminate a DB pension plan and substitute a hybrid or DC plan in its place. *See* Ward, *supra* note 161; *see also supra* note 149. For a further discussion on the legal parameters of welfare plans, see EMP. BENEFITS SUBCOMM., ABA SECTION OF LABOR & EMP'T LAW, LIABILITY ISSUES UNIQUE TO WELFARE PLANS (2011), *available at* http://www2.americanbar.org/calendar/ll0216-2011-midwinter-meeting/Documents/Chapter_14.pdf; see also, for example, Sprague v. Gen. Motors Corp., 133 F.3d 388 (6th Cir. 1998)

thousands of employers managed to terminate their DB plans in favor of contributory DC arrangements or hybrid plans.[165] The merits of this sea change have been debated in many corners.[166] In general the merits of DC arrangements

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(en banc); Chiles v. Ceridian Corp., 95 F.3d 1505 (10th Cir. 1996); Mein v. Pool Co. Disabled Int'l Emp. Long Term Disability Benefit Plan, 989 F. Supp. 1337 (D. Colo. 1998).

165. *See* EMP. BENEFIT RESEARCH INST., FACTS FROM EBRI: RETIREMENT TRENDS IN THE UNITED STATES OVER THE PAST QUARTER-CENTURY 1 (2007), *available at* http://www.ebri.org/pdf/publications/facts/0607fact. pdf; DAVID RAJNES, EMPLOYEE BENEFIT RESEARCH INSTITUTE ISSUE BRIEF: AN EVOLVING PENSION SYSTEM: TRENDS IN DEFINED BENEFIT AND DEFINED CONTRIBUTION PLANS (2002), *available at* http://www.ebri.org/pdf/briefspdf/0902ib.pdf; Jim Jaffe, *The Decline of Private-Sector Defined Benefit Promises and Annuity Payments: What Will It Mean?*, NOTES (Emp. Benefit Research Inst., Washington, D.C.), July 2004, at 2, *available at* http://www.ebri.org/pdf/notespdf/0704notes.pdf; *Over to You: Workers Need to Fend for Themselves*, ECONOMIST, Apr. 7, 2011, http://www.economist.com/node/18502061 ("Between 1979 and 2009 the share of employees in DB pension plans in America fell from 62% to 7% of the total . . . , according to the Employee Benefit Research Institute (EBRI), whereas those in DC plans rose from 16% to 67% (the rest had a bit of both).").

166. *See* Maria O'Brien Hylton, *Together We Can: Imagining the Future of Employee Pension Plans*, 12 EMP. RTS. & EMP. POL'Y J. 383, 385-88 (2008) (reviewing EMPLOYEE PENSIONS: POLICIES, PROBLEMS & POSSIBILITIES (Teresa Ghilarducci & Christian E. Weller eds., 2007)).

> Simply put, a defined benefit plan is not an absolute guarantee to an employee of a stream of pension income that will see the employee and his spouse through to the end of their retirement. Defined benefit plans can and do fail as the faithful reader of any newspaper can attest: think about United Airlines, Polaroid, and Bethlehem Steel. Of course, the authors' objections to defined contribution plans are not without merit. It is just that organized labor's consistent advocacy on behalf of defined benefit arrangements is not supported by the economic experience of the past few decades.

Id. at 387 (footnotes omitted); *see also* Zvi Bodie et al., *Defined Benefit Versus Defined Contribution Pension Plans: What Are the Real Trade-offs?*, *in* NAT'L BUREAU OF ECON. RESEARCH: PENSIONS IN THE U.S. ECONOMY 139, 139-59 (Zvi Bodie et al. eds., 1988), *available at* http://www.nber.org/chapters/c6047.pdf; James Poterba et al., *Defined Contribution Plans, Defined Benefit Plans, and the Accumulation of Retirement Wealth*, 91 J. PUB. ECON. 2062 (2007); João F. Cocco & Paula Lopes, *Defined Benefit or Defined Contribution?: An Empirical Study of Pension Choices* (Fin. Markets Grp., London Sch. of Econ. and Political Sci., UBS Pensions Series 026, 505, 2004), *available at* http://eprints.lse.ac.uk/24751/. One serious cause for concern over 401(k) plans is the ability of an unsophisticated workforce to manage their own assets for retirement. *See* U.S. GEN. ACCOUNTING OFFICE, PRIVATE PENSIONS: KEY ISSUES TO CONSIDER FOLLOWING THE ENRON COLLAPSE (Feb. 27, 2002) (statement of David M. Walker, Comptroller Gen. of the U.S.), *available at* http://www.gao.gov/new.items/d02480t.pdf.

> Even with opportunities to diversify, studies indicate that employees will need education to improve their ability to manage their retirement savings. Numerous studies have looked at how well individuals who are currently investing understand investments and the markets. On the basis of those studies, it is clear that among those who save through their company's retirement programs or on their own, large percentages of the investing population are unsophisticated and do not fully understand the risks associated with

are that they encourage employees to take an active role in planning for their retirement and allow them to enjoy all of the upside risk during periods when plan assets are performing well.[167] There is, however, an alarming body of data which suggests that many employees have been unable or are unwilling to educate themselves about long term investing and, as a result, appear to be making very poor choices about retirement savings.[168] The argument over the relative merits of DB over DC plans is, at bottom, a fight about paternalism. DB supporters generally believe that the average employee either cannot, will not or should not have to make investment decisions designed to prepare for retirement; retirement planning is viewed as the responsibility of the employer (ideally with

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> their investment choices. For example, one study found that 47 percent of 401(k) plan participants believe that stocks are components of a money market fund, and 55 percent of those surveyed thought that they could not lose money in government bond funds. Another study on the financial literacy of mutual fund investors found that less than half of all investors correctly understood the purpose of diversification. These studies and others indicate the need for enhanced investment education about such topics as investing, the relationship between risk and return, and the potential benefits of diversification.

Id. at 8-9 (footnotes omitted). As a result, most unions strongly prefer DB plans. *See Union Workers Have a 'Union Advantage' in Pensions*, AFL-CIO, http://www.aflcio.org/issues/retirement security/definedbenefit pensions/#2 (last visited Jan. 17, 2012).

167. John Broadbent et al., *The Shift from Defined Benefit to Defined Contribution Pension Plans—Implications for Asset Allocation and Risk Management*, at ii (Comm. on the Global Fin. Sys., 2006), *available at* http://www.bis.org/publ/ wgpapers/cgfs27broadbent3.pdf ("The transition from DB to DC plans in private sector pensions is shifting investment risk from the corporate sector to households. Households are therefore becoming increasingly exposed to financial markets, and retirement income may be subject to greater variability than before."); *see Comparison of Traditional Defined Benefit with Traditional Defined Contribution Plans*, COUNCIL UC FAC. ASS'NS, http://www.cucfa.org/news/pension_table.html (last visited Jan. 17, 2012); *Defined Benefit vs. 401(k) Plans: Investment Returns for 2003-2006*, TOWERS WATSON (June 2008), www.watsonwyatt.com/us/pubs/insider/shawarticle.asp?ArticleID=19148.

> Achieving consistently high investment returns in volatile financial markets is challenging. The shift from defined benefit plans to 401(k) plans has raised concerns about whether today's workers will have sufficient resources for a secure retirement. In a defined benefit plan, the sponsor assumes the investment risk and, generally, the responsibility for providing lifetime retirement income. With 401(k) plans, however, it's up to employees to invest wisely and build up enough savings to last a lifetime.

Id.; *see also* KELLY OLSEN & JACK VANDERHEI, EMPLOYEE BENEFIT RESEARCH INSTITUTE SPECIAL REPORT: DEFINED CONTRIBUTION PLAN DOMINANCE GROWS ACROSS SECTORS AND EMPLOYER SIZES, WHILE MEGA DEFINED BENEFIT PLANS REMAIN STRONG: WHERE WE ARE AND WHERE WE ARE GOING 9 (1997), *available at* http://www.ebri.org/pdf/briefspdf/1097ib.pdf; Ashby H.B. Monk & Steven A. Sass, *Risk Pooling and the Market Crash: Lessons from Canada's Pension Plan*, CENTER RETIREMENT RES. B.C., June 2009, at 1, *available at* http://crr.bc.edu/images/stories/ Briefs/ib_9-12.pdf.

168. *See* sources cited in *supra* note 167.

input and oversight from employee representatives) whose sophistication and experience makes it ideally suited to this function. The widespread lack of retirement savings in the United States[169] by employees left to create and monitor their own § 401(k) plans[170] suggests that there are valid concerns about retirement readiness.

However, DB plans, primarily because the sponsoring employer bears the risk of ensuring asset performance, are expensive.[171] Any firm in a market in which most competitors have switched to DC plans will find it hard to compete and keep labor costs in line if it clings to a DB plan.[172] Recently, Georgia, Michigan, Alaska, Colorado and Utah have moved to shift new public employees out of traditional DB plans and into §401(k)-style vehicles.[173]

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169. *See* Jack VanDerhei, *Retirement Savings Shortfalls for Today's Workers*, NOTES (Emp. Benefit Research Inst., Washington, D.C.), Oct. 2010, at 2, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-Oct10.RetShrtfl-Cobra.pdf.

> The aggregate [retirement savings shortfall] for these age cohorts expressed in 2010 dollars is $4.55 trillion, for an overall average of $47,732 per individual. The average RSS varies by age cohort as well as gender and marital status. The RSS per individual is always lowest for households, somewhat higher for single males, and more than twice as large for single females. The estimated retirement shortfall for any gender/marital status combination increases for younger cohorts, largely due to the impact of health care-related costs rising faster than the general inflation rate.

Id. at 1.

170. I.R.C. § 401(k) (2006 & Supp. 2010).

171. *See* Geoffrey Colvin, *The End of a Dream*, CNN MONEY (June 22, 2006), http://money.cnn.com/2006/06/12/magazines/fortune/pension_retirementguide_fortune/index.htm ("Today's low long-term interest rates, combined with a stock market that's no higher than it was six years ago, have made traditional defined-benefit plans a crushing financial burden to many firms—just as they're feeling the heat from foreign businesses that don't have plans."); *Traditional Pension Plans*, UNION PLUS RETIREMENT PLANNING CENTER, http://retirement.unionplus.org/money-for-retirement/pension-plans.html (last visited Jan. 17, 2012) ("The number of companies willing to sponsor traditional pension plans is steadily shrinking. Employers continue to freeze or terminate their defined-benefit pension plans as they look for less expensive options.").

172. *See, e.g.*, OLSEN & VANDERHEI, *supra* note 167, at 33 (citing stability of DC plans); Colvin, *supra* note 171 (providing IBM as "one of the few companies in the whole infotech industry offering a defined-benefit plan" and adding that IBM just froze its DB plan).

173. *See* Steven Greenhouse, *Pension Funds Strained, States Look at 401(k) Plans*, N.Y. TIMES, Mar. 1, 2011, http://www.cnbc.com/id/41844284/Pension_Funds_Strained_States_Look_at_401_k_Plans.

> Lawmakers and governors in many states, faced with huge shortfalls in employee pension funds, are turning to a strategy that a lot of private companies adopted years ago: moving workers away from guaranteed pension plans and toward 401(k)-type retirement savings plans. . . . Utah lawmakers voted last year to make a partial changeover to a 401(k)-type plan, following in the footsteps of Alaska, Colorado, Georgia, Michigan, Ohio and several other states, which offer at least some version of it. In February, Kentucky's Senate approved a full switch to a 401(k)-type plan,

The experience of private sector employees with §401(k) plans, of course, has not been uniformly positive.[174] However, with its low fees, automatic enrollment, matching contributions, and straightforward investment options, the Federal Thrift Savings plan does provide a possible model for other public workers.[175] The purpose here is not to propose a specific alternative but to

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> although the bill faces uncertain prospects in the House. In Oklahoma and Kansas, legislative committees will be studying the issue intensively over the next few weeks. Gov. Sam Brownback of Kansas has made it clear he hopes the state Senate will embrace some form of a 401(k)-type plan. Texas is also considering a switch. . . . The new governors of Florida and Kansas, Rick Scott and Mr. Brownback, and lawmakers in North Dakota, Oklahoma, Virginia and several other states are seriously discussing adopting 401(k)-type plans for state employees.

Id.; John Beshears et al., *Behavioral Economics Perspectives on Public Sector Pension Plans* 19 (NBER State & Local Pensions Conference, Jan. 15, 2010), *available at* http://www.economics.harvard.edu/faculty/laibson/files/Behavioral%2BEconomics%2BPerspectives%2Bon%2BPublic%2BSector%2BPension%2BPlans.pdf; *see also* PEW CTR. ON THE STATES, ROADS TO REFORM: CHANGES TO PUBLIC SECTOR RETIREMENT BENEFITS ACROSS STATES 1, 3-6 (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Roads_To_Reform.pdf?n=1145.

> Alaska put all its new employees in a defined contribution plan in 2005. . . . Georgia moved to a hybrid retirement system in 2008, offering new hires both a defined benefit plan that provides about half of the payout of the existing plan and a defined contribution plan with a mandatory 1 percent employee contribution and employer match. Employees may opt out of the 401(k)-style plan after 90 days. . . . Michigan, which in 1997 became the first state to scrap its defined benefit plan for new employees, expanded the program in 2010 to include newly hired K-12 teachers. They now will be offered a combination defined benefit and defined contribution plan. Employees hired before 1997 are still in the defined benefit plan.

Id. at 3-4, 6; Tim Hoover, *Pension Plans a Sticking Point for Colorado's PERA*, DENV. POST, Apr. 10, 2011, http://www.denverpost.com/legislature/ci_17811063 ("[Colorado] in 2006 under Gov. Bill Owens, a Republican, gave new employees the option of choosing either the traditional PERA defined benefit plan or a defined contribution plan.").

174. For a description of the shortcomings of 401(k) plans, see Eleanor Laise, *Big Slide in 401(k)s Spurs Calls for Change*, WALL ST. J., Jan. 8, 2009, at A1, *available at* http://online.wsj.com/article/SB123137714796462913.html.

> The most obvious pitfall is that 401(k) plans shift all retirement-planning risks—not saving enough, making poor investment choices, outliving savings—to untrained individuals, who often don't have the time, inclination or know-how to manage them. But even when workers make good choices, a market meltdown near the end of their working careers can still blow their savings to smithereens.

Id.; Joshua D. Rauh, *Start Paying or Stop Promising*, N.Y. TIMES, Feb. 27, 2011, http://www.nytimes.com/roomfordebate/2011/02/27/why-not-401ks-for-public-employees/start-paying-or-stop-promising.

175. *See Purpose and History*, THRIFT SAVINGS PLAN, https://www.tsp.gov/planparticipation/about/purposeAndHistory.shtml (last visited Sept. 22, 2011).

suggest a move away from expensive DB models to viable alternatives as part of a package of reforms designed to bring public sector pension options in line with those available to private employees.

A great deal has been made lately of the importance of public sector benefits (pensions in particular) as setting a floor below which private sector benefits should not fall.[176] Ironically, this argument fails to appreciate the political

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> The Thrift Savings Plan (TSP) is a retirement savings and investment plan for Federal employees and members of the uniformed services, including the Ready Reserve. It was established by Congress in the Federal Employees' Retirement System Act of 1986 and offers the same types of savings and tax benefits that many private corporations offer their employees under 401(k) plans.
>
> The TSP is a defined contribution plan, meaning that the retirement income you receive from your TSP account will depend on how much you (and your agency, if you are eligible to receive agency contributions) put into your account during your working years and the earnings accumulated over that time.

Id. The Federal Retirement Thrift Investment Board oversees TSP accounts. *See generally* FED. RETIREMENT THRIFT INVESTMENT BOARD, http://www.frtib.gov/ (last visited Feb. 26, 2012). For investment returns, see *TSP Funds*, TSP FOLIO, http://www.tspfolio.com/funds (last visited Feb. 26, 2012). Advantages of the TSP plan include: tax deferred contributions, very low administrative and investment expenses, matching contributions up to 4% and catch-up contributions. *See* Walter Updegrave, *Thrift Savings Plans: Retirement Plans Done Right*, CNN MONEY (July 6, 2011), http://money.cnn.com/ 2011/07/05/pf/expert/thrift_savings_plan.moneymag/.

> TSPs, which are like a 401(k)s for federal employees and people in the military, could actually serve as a model for private-sector retirement savings plans. One of the TSP's biggest attributes is its razor-thin costs. . . . Another big plus is that TSPs offer a menu of investing options that are broad enough to build a well-balanced portfolio, but not littered with niche investments that are unnecessary (and unhelpful) distractions. . . . A third TSP feature that I like is that it has no percentage-of-salary limit. While many 401(k) plans may limit your contribution to a certain percentage of your pay, TSPs allow you to put as much of your salary into the plan as you want—up to the maximum elective deferral ceiling, which is $16,500 this year (just keep in mind that you can't contribute more than you earn). . . . The plan also has a pretty generous matching contribution policy.

Id.

176. Many commentators argue that private sector workers should follow public sector workers to organize and demand comparative benefits from the wealthy elite, rather than fight one another. *See, e.g.*, John Bellamy Foster, Opinion, *Public Sector Workers Are a 'Privileged New Class,' Says Billionaire*, PBS (Jan. 17, 2011), http://www.pbs.org/wnet/need-to-know/opinion/public-sector-workers-are-a-privileged-new-class-says-billionaire/6442/.

> This is nothing but the age-old strategy of divide and conquer adopted by ruling classes throughout history, particularly in times of crisis when their own position is most shaky. The answer is to turn worker against worker, under the mantra that "the people divided will always be defeated." What the moneyed interests fear most is the united political struggle of the vast majority (private and public sector workers alike) in the interest of a more democratic, more egalitarian society—a world of common humanity.

dimension of any expense taxpayers are asked to bear. As some government unions feared,[177] GASB 45 focused unprecedented attention on the cost of public employee benefits. The gradual realization by taxpayers that police officers, teachers, sanitation workers, and motor vehicle clerical workers enjoy relatively lavish health care and pensions was certain to provoke a reaction because taxpayers are obliged to finance such commitments. As private taxpayers' own benefits were adjusted to reflect the increased cost of health care, greater longevity, and employer risk-shedding of pensions, it was only a matter of time before public benefits would encounter pressure to fall in line with private benefits. Squeezed by recession, a weak stock market, and declining wealth following collapse of the housing market, taxpayers realized that they are (in an attenuated way) the true "employer" in the public sector and, in many states, decided that it was time to rationalize employee benefit costs via the political

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Id.

177. *See* Keating & Berman, *supra* note 29, at 259.

> At the GASB public hearing on GASB Nos. 43 and 45 in May 2003, union representatives testified, (a rarity at a GASB hearing), urging that the exposure draft be set aside and arguing that it could lead to the curtailment of long-standing governmental defined benefit plans. The unions' willingness to fight became apparent during the Christmas shopping season of 2005. Thirty thousand New York City transit workers went on strike illegally, primarily to protest being required to contribute for the first time to their health care costs. The Metropolitan Transit Authority was asking workers to contribute only 1.5 percent to their current and retiree health care costs.

Id.; *see also* Bill Turque, *Costly Change Looming for Retiree Benefits*, WASH. POST, Jan. 30, 2006, www.washingtonpost.com/wp-dyn/content/article/2006/01/29/AR2006012900923.html.

> Maryland state employees, smarting from steep increases in prescription drug co-payments last year, worry that GASB 45 will eventually prompt the kind of wholesale reduction in benefits that private-sector workers began experiencing in the 1990s—triggered, at least in part, by a similar change in accounting procedures.
>
> "As public employees, we felt we would be immune from that," said Curtis Johnson, president of the American Federation of State, County and Municipal Employees Local 266. . . . "We're infuriated that they would even consider it," said Royce Treadaway, 46, also a union leader and a market analyst for the Maryland Port Authority in Baltimore. . . . Gino Renne, president of United Food and Commercial Workers Local 1994, which represents about 6,000 Montgomery and Prince George's employees, said changes in accounting standards were used as "an excuse" by the private sector to cut benefits. Rather than focus on cuts, he said, the issue for state and local governments should be how to contain the growth of health care costs.

Id.; *The Attack on Pensions and Retirees Heats Up: GASB and FASB*, UE INFORMATION WORKERS, http://www.ueunion.org/stwd_gasbfasb.html (last visited Sept. 22, 2011).

> Already some cities and towns are talking about reducing or eliminating health insurance for retirees as a way to reduce or eliminate these new liabilities. Even where unions are able to stop this, we will see millions of dollars that could be usefully spent diverted into banks, into new trust funds that will be set up to pay for OPEBs.

Id.

process. The popularity of Governors Christie (in New Jersey), Walker (in Wisconsin) and Daniels (in Indiana) reflects the determination of a majority of the electorate to right-size public sector benefits.[178]

D. Realistic Rates of Return and Amortization

In the near future, GASB is expected to add refinements to GASB 45. Numerous commentators expect they will specify a discount rate and require increased prominence on the balance sheet of total unfunded debt.[179] The expectation, clearly based on a growing realization that the states have continued to underestimate their benefits liabilities, is that rates of amortization and return will no longer be elective and disclosure will be even more prominent.

> Among the board's proposed changes is disclosure of pension liabilities on the face of an entity's financial statements, as opposed to the footnotes. It also wants governments in some cases to calculate the present value of pension liabilities more conservatively, with a discount rate based on high-quality municipal bonds, rather than a plan's own expected return. Proposals also would require governments to amortize some pension costs based on an employee's time until retirement, rather than over [thirty] years.[180]

It is hard to see how, in light of recent experience, accounting standards designed to enhance transparency and push governments toward accurate evaluation of their plan assets and liabilities could be anything other than positive. It is true that lower discount rates will mean larger liabilities; however, pushing the public sector to mimic the practices of the private sector with respect to health care and pension benefits seems like a reasonable response. Indeed, as we have seen, the core problem in the public sector is its tendency to spend lavishly in good times, even locking taxpayers into imprudent commitments from which they cannot extract themselves. This spending is sanctioned, of course, by politicians intent on pleasing large blocks of voters who can then be counted on to return the favor at election time. Any reforms that encourage taxpayers to function like shareholders and others with a serious stake in the financial health of a private enterprise should provide some degree of pushback to this

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178. Each of these governors has made it a personal mission to get their state budgets under control. Most have sacrificed support at the polls for dramatic budget reform. Approval numbers are as follows: Chris Christie: 43% (Statehouse Bureau Staff, *Poll Shows Gov. Christie's Approval Rating Dive After Public Worker Benefits Overhaul, Budget Cuts*, NJ.COM (July 21, 2011), http://www.nj.com/news/index.ssf/2011/07/poll_shows_gov_christies_appro.html); Scott Walker: 43% (*Wisconsin Governor Walker: 43% Approval Rating*, RASMUSSEN REPS. (Mar. 4, 2011), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/wisconsin/wisconsin_governor_walker_43_approval_rating); Mitch Daniels: 75% (Katrina Trinko, *Mitch Daniels's Next Hurdle*, NAT'L REV. ONLINE (Nov. 18, 2010), http://www.nationalreview.com/articles/253474/mitch-danielss-next-hurdle-katrina-trinko).

179. *See* David Reilly, *Pension Bombs Need Spotlight*, WALL ST. J., June 17, 2010, at C10.

180. *Id.*

widespread moral hazard problem.

E. Fundamental Change in Power—Prohibition on Collective Bargaining over Benefits in the Public Sector

Wisconsin and several other states recently received a great deal of attention as governors and state legislators considered the serious question of whether, in effect, the problem of rent seeking described in this Paper is so severe as to warrant a partial or complete ban on bargaining about benefits in the public sector.[181] The argument in favor of a ban is simply that the incentives to behave in a morally hazardous way are so strong that no amount of tinkering (e.g., insisting on accurate discount and amortization rates) will make any difference. To borrow an example from insurance law, where there is no insurable interest,[182]

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181. *See* Steven Greenhouse, *Ohio's Anti-Union Law is Tougher than Wisconsin's*, N.Y. TIMES, Mar. 31, 2011, at A16, *available at* http://www.nytimes.com/2011/04/01/us/01ohio.html?_v=2 ("After Wisconsin's labor battle seized the nation's attention, after nearly 100,000 people rallied in Madison to protest a bill to curb public-sector collective bargaining, the Ohio legislature has, with far less fanfare, enacted a bill perhaps even tougher on unions."); Amy Merrick, *Wisconsin Union Law to Take Effect*, WALL ST. J., June 15, 2011, http://online.wsj.com/article/SB10001424052702303848104576386122936205978.html ("Republican Gov. Scott Walker said the measure was needed to help tackle the state's budget deficit and give local governments needed flexibility. Democrats said it was an attack on unions."); Richard Pérez-Peña, *In New Jersey, Bill Advances on Public Workers' Benefits*, N.Y. TIMES, June 20, 2011, http://www.nytimes.com/2011/06/21/ nyregion/nj-senate-votes-to-make-workers-pay-more-for-benefits.html?_r=1.

> Mr. Christie insists that he is not trying to eliminate collective bargaining, but union leaders say the New Jersey bill would have a similar effect. Under current state law, in a contract impasse, a governor or mayor can go through a series of steps and impose terms on most employee groups—on every issue except health care. "If you take away health care bargaining, you take away bargaining," Hetty Rosenstein, state director of the Communications Workers of America, said. "It's the only leverage we have."

Id.; Richard Simon, *Union Battles Spread: More States Join Push as Wave of GOP-led Bills Sweep Country*, CHI. TRIB., Apr. 2, 2011, at 1 ("The National Conference of State Legislatures is tracking an explosion of 744 bills that largely target public-sector unions, introduced in virtually every state. . . . Nearly half of the states are considering legislation to limit public employees' collective bargaining rights.").

182. BALLENTINE'S LAW DICTIONARY 642 (3d ed. 1969) ("[I]nsurable interest: An essential of a valid contract of insurance, being, in general, that which takes a contract out of the class of wagering policies; best defined in reference to the particular risk or thing insured."); *see also* BLACK'S LAW DICTIONARY 886 (9th ed. 2009).

> [*I*]*nsurable interest*. . . . A legal interest in another person's life or health or in the protection of property from injury, loss, destruction, or pecuniary damage. . . . To take out an insurance policy, the purchaser or the potential insured's beneficiary must have an insurable interest. If a policy does not have an insurable interest as its basis, it will usu[ally] be considered a form of wagering and thus be held unenforceable.

Id. For a textbook description, see ANTHONY STEUER, QUESTIONS AND ANSWERS ON LIFE

insurers and state regulators will generally not permit the issuance of a policy of life insurance because of the strong possibility that a hard-to-resist incentive to commit murder is created.[183] Even though it is surely the case that some beneficiaries would never engage in the ultimate act of moral hazard in the hope of securing a life insurance payout, sad experience has taught that incentives should not be ignored.[184]

Proponents of a ban on collective bargaining by public employees about benefits likewise point to a long and sorry history of behavior by elected officials who simply spend public dollars with far less care than they would spend private dollars.[185] The question is how to properly align the spending of public dollars

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INSURANCE: THE LIFE INSURANCE TOOLBOOK 310 (2007).

183. 3 LEE R. RUSS, COUCH ON INSURANCE § 36:78.

> [T]he most frequently advanced rationale is that the collateral effect of an assignment to a person having no insurable interest, generally speaking, is to afford temptation to the commission of crime. That is to say, where assignment of a life-insurance policy is permitted without requiring an insurable interest, there is a temptation to commit murder in order to obtain the proceeds of the policy.

Id. (footnotes omitted); *see* Liberty Nat'l Life Ins. Co. v. Weldon, 100 So. 2d 696 (Ala. 1957).

184. For a spectacular recent case, see *California v. Rutterschmidt*, 98 Cal. Rptr. 3d 390 (App.), *superseded by* 220 P.3d 239 (Cal. 2009); JEANNE KING, SIGNED IN BLOOD: THE TRUE STORY OF TWO WOMEN, A SINISTER PLOT, AND COLD-BLOODED MURDER (2009); John Spano, *Police Probe of Women Accused of Killing Men for Death Benefits Widens*, L.A. TIMES, Aug. 18, 2006, http://www.latimes.com/news/la-me-olgahelen18Aug18,1,7245670.story. For a discussion of the famous horse murders, see KEN ENGLADE, HOT BLOOD: THE MONEY, THE BRACH HEIRESS, THE HORSE MURDERS (1996); William Nack & Lester Munson, *Blood Money: In the Rich, Clubby World of Horsemen, Some Greedy Owners Have Hired Killers to Murder Their Animals for the Insurance Payoffs*, SPORTS ILLUSTRATED, Nov. 16, 1992, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1004483/1/index.htm. For a discussion of the recent trends in life insurance settlement and stranger-originated life insurance, including Larry King's sensational case, see Anita Huslin, *Wealthy Engage in Controversial Re-Selling of Life Insurance Policies*, WASH. POST, Nov. 27, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/26/AR2007112602182.html; *see also* Ariella Gasner, Note, *Your Death: The Royal Flush of Wall Street's Gamble*, 37 HOFSTRA L. REV. 599 (2008). Even in cases where there is an insurable interest, sometimes the temptation towards homicide is too strong to resist. *See* Prudential Ins. Co. of Am. v. Athmer, 178 F.3d 473 (7th Cir. 1999); Reynolds v. Am.-Amicable Life Ins. Co., 591 F.2d 343 (5th Cir. 1979); Cal.-W. States Life Ins. Co. v. Sanford, 515 F. Supp. 524 (E.D. La. 1981).

185. *See, e.g.*, John Fund, *Cross Country: What's at Stake in Wisconsin's Budget Battle*, WALL ST. J., Feb. 19, 2011, at A13, *available at* http://online.wsj.com/article/SB10001424052748704900004576152172777557748.html.

> Mr. Walker's proposals are hardly revolutionary. Facing a $137 million budget deficit, he has decided to try to avoid laying off 5,500 state workers by proposing that they contribute 5.8% of their income towards their pensions and 12.6% towards health insurance. That's roughly the national average for public pension payments, and it is less than half the national average of what government workers contribute to health care. Mr. Walker also wants to limit the power of public-employee unions to negotiate

contracts and work rules—something that 24 states already limit or ban.

The governor's move is in reaction to a 2009 law implemented by the then-Democratic legislature that expanded public unions' collective-bargaining rights and lifted existing limits on teacher raises.

Id.; Steven Greenhouse, *Strained States Turning to Laws to Curb Unions*, N.Y. TIMES, Jan. 4, 2011, at A1, *available at* http://www.nytimes.com/2011/01/04/business/04labor.html?pagewanted=all.

Republican lawmakers in Indiana, Maine, Missouri and seven other states plan to introduce legislation that would bar private sector unions from forcing workers they represent to pay dues or fees, reducing the flow of funds into union treasuries. In Ohio, the new Republican governor, following the precedent of many other states, wants to ban strikes by public school teachers. Some new governors, most notably Scott Walker of Wisconsin, are even threatening to take away government workers' right to form unions and bargain contracts. "We can no longer live in a society where the public employees are the haves and taxpayers who foot the bills are the have-nots," Mr. Walker, a Republican, said in a speech. . . . In the 2010 elections, Republicans emerged with seven more governor's mansions and won control of the legislature in 26 states, up from 14. That swing has put unions more on the defensive than they have been in decades. . . . Many of the state officials pushing for union-related changes say they want to restore some balance, arguing that unions have become too powerful, skewing political campaigns with their large war chests and throwing state budgets off kilter with their expensive pension plans.

But labor leaders view these efforts as political retaliation by Republicans upset that unions recently spent more than $200 million to defeat Republican candidates. "I see this as payback for the role we played in the 2010 elections," said Gerald W. McEntee, president of the American Federation of State, County and Municipal Employees, the main union of state employees. Mr. McEntee said in October that his union was spending more than $90 million on the campaign, largely to help Democrats.

Id.; Nicholas Riccardi & Abigail Sewell, *Deadline Nears, Layoffs Loom: Wisconsin Governor Says Failure to Pass His Budget Bill on Friday Will Cost 1,500 Jobs*, CHI. TRIB., Feb. 25, 2011, at C13.

At a news conference Thursday evening, Walker said he wants to remove collective bargaining to give local governments the flexibility to avoid layoffs. "One of the toughest decisions I ever made was laying people off," said Walker, the former chief executive of Milwaukee County. "We need to avoid layoffs for the good of the workers, for the good of the people."

Id.; Sabrina Tavernise, *Ohio Senate Passes Bill to Weaken Collective Bargaining Clout of Public Workers*, N.Y. TIMES, Mar. 3, 2011, http://www.nytimes.com/2011/03/03/us/03states.html.

Ohio took its first step Wednesday toward passing sweeping legislation that would curtail collective bargaining rights for public sector workers by banning strikes and putting the power of breaking labor impasses in the hands of local elected officials. . . . Unions call the bill the biggest blow to public sector workers since the legal framework was put in place to protect them in 1983. Republican lawmakers argued that it was required in order to keep financially pressed local governments solvent. "This is the first big step in restoring fiscal responsibility in Ohio," said Kevin Bacon, a Republican senator. . . . Lawmakers who supported the bill said it would allow government to function more like the private sector, with the flexibility to have more control over its

with the best interests of the owners of those dollars—i.e. taxpayers. Taxpayers are notoriously disorganized and unfocused;[186] on the other side of the table are public employee unions which, to their credit, have every incentive to focus and target politicians who can be of assistance as the unions seek (as they should) better pay, working conditions and benefits for their members.

Opponents of a ban, and there are many,[187] argue that collective bargaining

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> operating costs. But its opponents argued that the private sector had slashed older workers, something the new bill was in danger of allowing.

Id. For further discussion, see Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87 (2010).

186. *See supra* notes 12, 147; *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 286 (1988) ("The free rider problem means that social and economic difficulties will not always stimulate group formation, especially for large, diffuse groups like consumers and taxpayers, and that (in contrast) small, elite groups might more easily organize, though for no other reason than to raid the public fisc.").

187. Professor Paul Secunda of Marquette University Law School is a vocal critic of bans on collective bargaining. *See* Paul M. Secunda, *Paul M. Secunda: Walker's Attack on Unions Is Un-American*, CAP. TIMES, Feb. 19, 2011, http://host.madison.com/ct/news/opinion/column/article_4004e07d-aad3-54e6-9697-3f6e058e6357.html. For further commentary by Professor Paul Secunda, see J.H., *Wisconsin's Governor Takes Shot at Public Unions*, WORKPLACE PROF BLOG (Feb. 12, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/02/wisconsins-governor-takes-shot-at-public-unions.html; see also Brady Dennis & Peter Wallsten, *Obama Joins Wisconsin's Budget Battle, Opposing Republican Anti-union Bill*, WASH. POST, Feb. 18, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/17/AR2011021705494.html ("'Some of what I've heard coming out of Wisconsin, where they're just making it harder for public employees to collectively bargain generally, seems like more of an assault on unions,' Obama told a Milwaukee television reporter. . . ."); Kate Zernike, *More Standoffs and Protests, Plus a Prank Call*, N.Y. TIMES, Feb. 24, 2011, at A20, *available at* http://www.nytimes.com/2011/02/24/us/24states.html?pagewanted=all.

> In Wisconsin, Democratic lawmakers said the state's Republican governor, Scott Walker, was out purely to bust the unions, noting that the unions had already agreed to the concessions on wages and benefits to balance the budget. . . . B. Patrick Bauer, the minority speaker of the [Indiana] House, said from Urbana that the union legislation had been but one of many "wrongful bills" that would "rip the heart out of the middle class."

Id. But see Rosalind S. Helderman, *Union-Free State Not Spared Fiscal Woes*, WASH. POST, Mar. 20, 2011, at C1, *available at* http://www.washingtonpost.com/local/politcs/union-free-virginia-note-spared-state-pension-woes/2011/03/16/abkokfx_story.html.

> Virginia helps illustrate a reality that complicates the political rhetoric for both sides in the debate over public employee unionization: When it comes to retirement plans, there seems to be little correlation between union membership rates and either the generosity of states as employers or the financial stability of their systems.
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> The reality suggests that if more states went the way of Virginia and eliminated collective bargaining, it could be that neither union members' worst fears nor many Republicans' best predictions for retirement benefits would come true.

is a fundamental human right[188] and that its absence or restriction has implications far beyond the simple question of whether or not public employees' benefits are the product of a process that profoundly disadvantages taxpayers. The passion generated by initiatives to restrict collective bargaining suggests that, at a minimum, this option should be viewed as a last resort. In cases, however, where public employee unions are intransigent and unfazed by the prospect of bankruptcy or a state government reduced to a sole, benefits paying

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> Virginia's hostility to public sector unions is long-standing, dating at least to 1946, when Gov. Bill Tuck (D) delivered a harangue against unionization in his annual State of the Commonwealth Address to the General Assembly, calling it "utterly incompatible with sound and orderly government."
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> In 1977, the Virginia Supreme Court ruled that collective bargaining by local governments was illegal, and the General Assembly codified its long-standing prohibition against the practice in the state workforce in 1993.

Id.. For further discussion, see Ann C. Hodges, *Lessons From the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735 (2009); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369 (2009).

188. The ILO, a United Nations agency that promotes labor rights, is one of many groups that believe collective bargaining is a democratic right, not a mere economic procedure. *See* Health Servs. & Support-Facilities Subsector Bargaining Ass'n v. B.C. [2007] 2 S.C.R. 391 (Can.).

> The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work. . . . Collective bargaining is not simply an instrument for pursuing external ends, . . . [r]ather, [it] is intrinsically valuable as an experience in self-government. . . . Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.

Id. (citations omitted); *Freedom of Association and the Right to Collective Bargaining*, INT'L LABOUR ORG., http://www.ilo.org/global/topics/freedom-of-association-and-the-right-to-collective-bargaining/lang--en/index.htm (last visited Sept. 27, 2011) ("The right of workers and employers to form and join organizations of their own choosing is an integral part of a free and open society. In many cases, these organizations have played a significant role in their countries' democratic transformation."); *see also The Universal Declaration of Human Rights*, Art. 23, U.N. GENERAL ASSEMBLY (1948), *available at* http://www.un.org/en/documents/udhr ("Everyone has the right to form and to join trade unions for the protection of his interests."); *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOUR ORG. (86th Sess., 1998), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm.

> Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining. . . .

Id.

function, the game changing option of simply taking collective bargaining of benefits off the table may be a reasonable response.

Lost in much of the recent discussion about the relationship of the public sector to the private sector is the important fact that while the private sector has come to rely on the public for certain functions—defense, roads, public education, prisons and certain human services to name a few—with the possible exception of defense, everything that is done in the public sector can (and sometimes is) performed by the private sector. Private schools,[189] private hospitals,[190] private prisons,[191] and private roads[192] are all commonplace in the

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189. Private universities dominate the rankings of *U.S. News & World Report*'s top undergraduate universities. *See National University Rankings*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/spp+50 (last visited Sept. 27, 2011). Private secondary schools also tend to have a better reputation and overall better student performance than public secondary schools. *See* Paul E. Peterson & Elena Llaudet, *On the Public-Private School Achievement Debate* (Am. Political Sci. Ass'n, PEPG 06-02, 2006), *available at* http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG06-02-PetersonLlaudet.pdf.

190. Private hospitals also make a strong showing in *US News & World Report*'s ranking of the top hospitals. *See Best Hospitals 2011-12: The Honor Roll*, U.S. NEWS & WORLD REP., http://health.usnews.com/health-news/best-hospitals/articles/2011/07/18/best-hospitals-2011-12-the-honor-roll (last visited Sept. 22, 2011); *see also Public Hospitals Decline Swiftly*, WASH. TIMES, Aug. 16, 2005, http://www.washingtontimes.com/news/2005/aug/16/20050816-102614-7824r/.

191. *See* Stephanie Chen, *Larger Inmate Population Is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, http://online.wsj.com/article/SB122705334657739263.html.

> Outsourcing incarceration to prison companies can reduce a government's cost of housing those prisoners by as much as 15%, according to a study by the Reason Foundation, a research organization in Los Angeles. Private operators say they can build prisons more quickly and operate them less expensively than governments because their payroll costs are lower and they can consolidate prisoners from many far-flung jurisdictions into facilities located in areas where land and building costs are very low. . . . The American Civil Liberties Union has filed lawsuits involving several prison companies over the past decade alleging poor treatment of inmates. Last year, the organization and other parties filed a lawsuit against Corrections Corp. and the Department of Homeland Security's Immigration and Customs Enforcement arm in federal court in San Diego, alleging that the company was operating an overcrowded, unsafe immigrant-detention center in that city. Detainees were routinely assigned in groups of three to sleep in two-room cells--meaning one had to sleep on the floor near the toilet--or to temporary beds in recreation rooms and other common spaces, according to the complaint. The suit also alleged that detainees had little access to mental-health care.

Id.; W.W., *The Perverse Incentives of Private Prisons*, ECONOMIST (Aug. 24, 2010), http://www.economist.com/blogs/democracyinamerica/2010/08/private_prisons ("Inmates in private prisons now account for 9% of the total US prison population, up from 6% in 2000."). For additional reports, see DOUGLAS MCDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE (1988), *available at* http://www.abtassociates.com/reports/

United States. Indeed, in many cases, the reputation enjoyed by comparable private institutions far outweighs that of the corresponding public ones. Public schools and hospitals are the obvious examples here.

The reverse is not true. Recent experiences with private sector economies, dwarfed by a huge public sector, are not encouraging. The ongoing spectacle of painful restructuring that is just beginning in, for example, Greece,[193] Spain,[194]

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priv-report.pdf; for a variety of prison statistics, see *National Prisoner Statistics*, BUREAU JUST. STAT., http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=269 (last visited Jan. 19, 2012).

192. Examples here include a recent deal for an Indiana toll road, *see* Daniel Schulman & James Ridgeway, *The Highwaymen*, MOTHER JONES, Jan./Feb. 2007, http://motherjones.com/politics/2007/01/highwaymen; the Reedy Creek Improvement District operated by Disney subsidiaries in the greater Orlando area, *see* OFFICE OF PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, CENTRAL FLORIDA'S REEDY CREEK IMPROVEMENT DISTRICT HAS WIDE-RANGING AUTHORITY (2004), *available at* http://www.oppaga.state.fl.us/reports/pdf/ 0481rpt.pdf; and the Chicago Skyway, *see Socialism in Reverse*, WALL ST. J., July 29, 2006, at A10. For a discussion of the history of private roads, see Gerald Gunderson, *Privatization and the 19th-Century Turnpike*, 9 CATO J. 191 (1989). For a discussion of the current trend towards privatization of public roads, see Emily Thornton, *Roads to Riches*, BLOOMBERG BUSINESSWEEK (May 7, 2007), http://www.businessweek.com/magazine/content/07_19/b4033001.htm; see also PHINEAS BAXANDALL ET AL., U.S. PIRG EDUC. FUND., PRIVATE ROADS, PUBLIC COSTS 1, 9-16 (2009), *available at* http://cdn.publicinterestnetwork.org/assets/H5Ql0NcoPVeVJwymwlURRw/Private-Roads-Public-Costs.pdf.

193. For an interesting analysis of the background of the current Greek debt crisis, see generally Michael Lewis, *Beware of Greeks Bearing Bonds*, VANITY FAIR, Oct. 1, 2010, http://www.vanityfair.com/business/features/2010/10/greeks-bearing-bonds-201010; see *also If Greece Goes. . .* , ECONOMIST, June 23, 2011, http://www.economist.com/node/18866979; News Release, Eurostat Press Office, Provision of Deficit and Debt Data for 2010—First Notification: Euro Area and EU27 Government Deficit at 6.0% and 6.4% Respectively (Apr. 26, 2011) [hereinafter Eurostat, News Release], *available at* http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-26042011-AP/EN/2-26042011-AP-EN.PDF (explaining the size of the Greek government's debt is 142.8% of its GDP); *Why Greeks Venerate Their 'Inefficient' Public Sector*, BBC (June 30, 2011), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/9526090.stm ("Up until now jobs in public institutions have been for life. Early retirement is common. Retirement packages are guaranteed and generous. About one in every four working people is believed to work for the state in one form or another."); *Greece*, 2012 INDEX ECON. FREEDOM, http://www.heritage.org/index/country/Greece ("The fiscal deficit remains unsustainable, with public debt exceeding 140 percent of GDP."). For information about the IMF bailout, see generally *Frequently Asked Questions: Greece*, INT'L MONETARY FUND, http://www.imf.org/external/np/exr/faq/greecefaqs.htm#q7 (last visited Jan. 19, 2012).

194. *See* Eurostat, News Release, *supra* note 193 (explaining the total size of Spain's public debt is 60.1% of GDP); *see also Spanish Public Sector on Strike Against Austerity Plan*, BBC (June 8, 2010), http://www.bbc.co.uk/news/10261567.

> Spain has suffered one of the toughest recessions in the EU, and has its highest unemployment rate. It recently had its credit rating downgraded, amid fears it could follow Greece into a debt crisis. More than 2.5 million Spaniards work in the public

Ireland,[195] and Portugal[196] is an example of the significant depths to which societies may be forced to sink when they finally confront their unsustainable debt levels. Public enterprises cannot and do not perform most functions as efficiently as their private corollaries; this is not because people in the private sector are smarter or morally superior. It is simply because the incentives in the public sector, with its lack of effective competition, emphasize job security, thereby maximizing compensation and job retention. In the private sector, competition and the absence of moral hazard in the setting of salaries and benefits results in generally nimble enterprises that can and must respond quickly to changing conditions.

In addition, many see the loss of the right to bargain collectively as a

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> sector, and the strikes were reported to be affecting hospitals and schools, fire stations and local government. Emergency responders were providing minimum services. With a budget deficit currently running over 11%, the government is under pressure from the EU to slash spending. In May, Spanish Prime Minister Jose Luis Rodriguez Zapatero announced a 5% cut in public sector pay, starting this month. Salaries will be frozen in 2011, pensions will no longer be adjusted for inflation and tax breaks for new parents will be dropped.

Id. For a current discussion of Spain's austerity measures, see Miles Johnson, *Spain Approves More Spending Cuts*, FIN. TIMES (June 24, 2011), http://www.ft.com/intl/cms/s/0/d9671dd8-9e66-11e0-8e61-00144feabdc0.html#axzz1nxjbw2ek.

195. For a dramatic narrative describing the background of the Irish debt crisis, see generally Michael Lewis, *When Irish Eyes Are Crying*, VANITY FAIR, Mar. 2011, http://www.vanityfair.com/business/features/2011/03/michael-lewis-ireland-201103.

> An Irish economist named Morgan Kelly, whose estimates of Irish bank losses have been the most prescient, made a back-of-the-envelope calculation that puts the losses of all Irish banks at roughly 106 billion euros. (Think $10 trillion [in terms of the U.S. economy]). At the rate money currently flows into the Irish treasury, Irish bank losses alone would absorb every penny of Irish taxes for at least the next three years.

Id.; *see also* Eurostat, News Release, *supra* note 193 (asserting Ireland's government debt stands at 96.2% of GDP and has a current budget deficit equal to 32.4% of GDP). For a discussion of Ireland's austerity measures, see Richard Wolf, *Ireland's Debt Crisis, Austerity Offer a Lesson for Obama*, USA TODAY, May 23, 2011, http://www.usatoday.com/money/world/2011-05-21-ireland-obama_n.htm; see also Landon Thomas Jr., *Irish Debt Crisis Forces Collapse of Government*, N.Y. TIMES, Nov. 23, 2010, at A1, *available at* http://www.nytimes.com/2010/11/23/world/europe/23ireland.html.

196. *See* Eurostat, News Release, *supra* note 193 (explaining how Portugal faces a public debt that is 93% of GDP). For a discussion of Portugal's bailout, see Henry Chu, *Europe Scrambles to Rescue Portugal from Debt Crisis*, L.A. TIMES, Apr. 8, 2011, http://articles.latimes.com/2011/apr/08/world/la-fg-portugal-debt-20110408; see also *Portugal's 78bn Euro Bail-out is Formally Approved*, BBC (May 16, 2011), http://www.bbc.co.uk/news/business-13408497. Portugal's credit rating is now at junk status. *See* Sandrine Rastello & John Detrixhe, *Portugal Government-Bond Ratings Cut to Junk by Moody's on Financing Risk*, BLOOMBERG (July 5, 2011), http://www.bloomberg.com/news/2011-07-05/portugal-s-bond-ratings-are-cut-to-junk-by-moody-s-with-a-negative-outlook.html.

profound attack on the value and dignity of public employees and, by extension, all workers.[197] This view demands a response and a reminder about the fundamental distinctions between public and private employees. Unlike their counterparts in the private sector, public employees do not typically generate profits. The goal of private sector unions—to secure a larger share of profits created by employees—has no corollary in the public context. Public employees negotiate simply to obtain a larger slice of taxpayer dollars in the form of benefits and other compensation.[198] When public employees strike, they strike against taxpayers, and President Roosevelt considered this possibility "unthinkable and intolerable."[199] As late as the 1950s, organized labor unions agreed that collective

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197. *See supra* note 187; *see also* Julianna Goldman & Roger Runningen, *Obama Tells Governors Public Workers Must Not Be 'Vilified,'* BLOOMBERG BUSINESSWEEK (Feb. 28, 2011), http://www.businessweek.com/news/2011-02-28/obama-tells-governors-public-workers-must-not-be-vilified-.html.

> President Barack Obama said public employees shouldn't be "vilified" or lose collective bargaining rights as states seek to balance their budgets. . . . "If all the pain is borne by only one group, whether it's workers or seniors or the poor, while the wealthiest among us get to keep or get more tax breaks, we're not doing the right thing," he said. "I don't think it does anybody any good when public employees are denigrated or vilified or their rights are infringed upon."

Id. Many commentators agree. *See* Susan Brooks Thistlethwaite, *We Need a New Social Gospel: The Moral Imperative of Collective Bargaining*, WASH. POST, Feb. 23, 2011, http://onfaith.washingtonpost.com/onfaith/panelists/susan_brooks_thistlethwaite/2011/02/we_need_a_new_social_gospel_the_moral_imperative_of_collective_bargaining.html; Edgar Moore, *Midlands Voices: Collective-Bargaining Rights Essential to Worker Dignity*, OMAHA.COM (May 6, 2011), http://www.omaha.com/article/20110506/NEWS0802/705069989/-1; Michael Zimmer, *Collective Bargaining as a Human Right*, MICHAEL ZIMMER.ORG (Feb. 20, 2011), http://michaelzimmer.org/2011/02/20/collective-bargaining-as-a-human-right/.

198. *See* sources cited *infra* note 199.

199. Letter from Franklin D. Roosevelt, President of the United States, to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15445#axzz1TzS8bSgQ; *see also* Sherk, *supra* note 141. For further discussion and some history of the letter, see John Reiniers, *FDR's Warning: Public Employee Unions a No-No*, HERNANDO TODAY, Oct. 17, 2010, http://www2.hernandotoday.com/news/hernando-news/2010/oct/17/ha-fdrs-warning-public-employee-unions-a-no-no-ar-291004/.

> "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations. . . . The very nature and purposes of Government make it impossible for . . . officials . . . to bind the employer. . . . The employer is the whole people, who speak by means of laws enacted by their representatives. . . .
>
> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. Upon employees in the federal service rests the obligation to serve the whole people. . . . This obligation is paramount. . . . A strike of public employees manifests nothing less than an intent . . . to prevent or obstruct . . . Government. . . . Such action, looking toward the paralysis of

bargaining was inappropriate in the public sector.[200] Indeed, the AFL-CIO Executive Council provided the following advice in 1959: "In terms of accepted collective bargaining procedures, government workers have no right beyond the authority to petition Congress—a right available to every citizen. . . ."[201]

The implications for governments are grim, squeezed at the moment in the United States by declining tax revenues, and increasing health care costs and life expectancy rates. Failure to come to grips with the underlying dynamic of rent seeking by politicians in flush times may well lead to a historical first—bankruptcy by one or more states.[202] Assuming the federal government does not intervene,[203] bankruptcy could result in leaner, more flexible states—much like the post-bankruptcy freedom GM now enjoys.[204] Of course,

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> Government . . . is unthinkable and intolerable."
>
> To get this in historical context, Congress enacted the landmark National Labor Relations Act ("Wagner Act") in 1935—the Magna Carta of the American labor movement. It excluded federal, state and local employees. It created the National Labor Relations Board to enforce the rights of labor.

Id. (alterations in original) (quoting Letter from Franklin D. Roosevelt, *supra*).

200. *See* Sherk, *supra* note 141.

201. LEO KRAMER, LABOR'S PARADOX: THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO 41 (1962) (alteration in original); *see* Sherk, *supra* note 141; *see also* JAMES SHERK, THE HERITAGE FOUND., MAJORITY OF UNION MEMBERS NOW WORK FOR THE GOVERNMENT 2-3 (2010), *available at* http://www.heritage.org/research/reports/ 2010/01/majority-of-union-members-now-work-for-the-government.

202. Armand Thieblot, *Unions, the Rule of Law, and Political Rent Seeking*, 30 CATO J. 23, 23-24, 34-35 (2010).

203. *See supra* note 150; *see also* Michael Corkery, *Global Finance: Group to Target States' Woes*, WALL ST. J., June 23, 2011, at C3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/27/AR2011022702931.html; Zachary A. Goldfarb, *Obama Has Few Options to Aid States*, WASH. POST, Feb. 28, 2011, at A5, *available at* http://www.washingtonpost/wp-dyn/content/article/2011/02/27/AR2011022702931.html; R. Eden Martin, Opinion, *Unfunded Public Pensions—the Next Quagmire*, WALL ST. J., Aug. 29, 2010, at A17.

> The troubles in Illinois and other states may soon force the federal government to choose among three options. The first is to do nothing—in which case some pension plans will go bankrupt, retirees will suffer, and many local governments will face emergency cost-cutting and taxing scenarios that will drive out businesses and jobs.
>
> The second option is to yield to the pressures, especially from state officials and organized labor, for condition-free bailouts and loans. Finally, the feds could choose to pressure ("incentivize") states and cities to straighten out their own affairs through loans to which they attach stringent conditions.
>
> The consequences of doing nothing would be painful. But they would be far less harmful than the consequences of an unconditioned federal bailout, which would mean massive new fiscal commitments at the federal level.

Id.; James Pethokoukis, *When States Go Bust*, 16 WKLY. STANDARD, Feb. 14, 2011, *available at* http://www.weeklystandard.com/articles/when-states-go-bust_541424.html.

204. *See* Peter Whoriskey & Dana Hedgpeth, *GM Swings to First Profit in 3 Years: U.S. to*

there are lots of unknowns in a first-ever state bankruptcy, and it is hard to predict what kind of rent-seeking response one might see from politicians during and after such an event. Where possible, the more modest reforms—accurate amortization and discount rates, conversion of DB plans to DC plans, greater transparency, and even limiting benefits as a subject of collective bargaining—are probably worth pursuing first.

CONCLUSION

The public employee benefits crisis described in this Paper is a direct result of taxpayer ignorance and apathy, morally hazardous behavior by elected officials concerned with pleasing public organized labor, and public unions' willingness to trade current salary increases for generous future benefits. Public-sector unions have behaved just as we would expect—they actively sought to extract the largest amount of compensation possible for their members. This is neither surprising nor, by itself, particularly disturbing. However, when the predictable union push for an ever larger share of taxpayer dollars confronts an inattentive public and eager-to-please elected officials, the result is looming financial catastrophe. The only way forward is a series of reforms that address the underlying problem—i.e. the absence of a counterbalance to the tendency of politicians to over-promise with no regard for the consequences. In states with modest financial problems, some simple accounting changes, such as mandated rates of return and amortization, may be sufficient to avoid a future crisis scenario. In the many states with far more serious issues—those facing bankruptcy, for example—the elimination of DB plans in favor of DC plans, and even the prohibition of collective bargaining by public unions over employee benefits, may be the only viable solutions.

Spend $800 Million to Help Redevelop Plants, WASH. POST, May 18, 2010, at A13, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/17/AR2010051700907.html; *see also* Nick Bunkley, *G.M.'s $4.3 Billion Loss Masks Progress*, N.Y. TIMES, Apr. 8, 2010, at B4, *available at* http://www.nytimes.com/2010/04/08/business/08motors.html.

> G.M. said Wednesday that it had positive cash flow of $1 billion in the six months after it emerged from bankruptcy protection last July, but that it lost $4.3 billion in that period, mostly because of the cost of settling with the United Auto Workers union over retiree health benefits, one of the burdens that helped bring the company to its knees. . . . The bankruptcy cleared $83 billion in liabilities from G.M.'s balance sheet, the company said. Wiping out that debt already has saved G.M. billions of dollars in interest; it paid $28.6 million a day in interest in the months before bankruptcy, but those payments dropped 86 percent, to $4 million a day, after bankruptcy. With those debts gone, G.M. said gross margins on vehicle sales edged into positive territory, at 1.9 percent, compared with negative 18.5 percent in early 2009.

Id.

HUMAN TRAFFICKING VICTIM IDENTIFICATION: SHOULD CONSENT MATTER?

SAMUEL VINCENT JONES*

INTRODUCTION

It is widely accepted that human trafficking is a global phenomenon that poses a significant problem within the United States.[1] Despite its wealth and sophisticated law enforcement paradigms, the United States is the third largest destination country for human trafficking victims.[2] In fact, human trafficking in the United States is increasing.[3] Scholars have advanced a myriad of reasons to explain this problem. For example, some have pronounced the conscious neglect of men and boys in the investigation, reporting, and publicity of human trafficking a serious impediment to progress in combating trafficking.[4] The ease

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1. *See* KEVIN BALES ET AL., HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 1, 5 (Free the Slaves & Human Rights Ctr. ed. 2004), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=forcedlabor (discussing the problem of forced labor in the United States); HEATHER J. CLAWSON ET AL., ESTIMATING HUMAN TRAFFICKING INTO THE UNITED STATES: DEVELOPMENT OF A METHODOLOGY 2 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/215475.pdf (noting that the United States is also a destination for human trafficking); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 406-08 (2006) (discussing the global epidemic of human trafficking); *see also* Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 CARDOZO J.L. & GENDER 909, 910 (2006) (questioning the effectiveness of law enforcement efforts); *see generally* Judith Dixon, *The Impact of Trafficking in Persons*, *in* AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 81, 81 (United Nations Office on Drugs & Crime ed., 2008), *available at* http://www.ungift.org/docs/ungift/pdf/knowledge/background_paper.pdf (analyzing the global impact of human trafficking).

2. Buckwalter et al., *supra* note 1, at 407; *see also* Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 4 UTAH L. REV. 1143, 1148 (2010) [hereinafter Jones, *Invisible Man*].

3. Jones, *Invisible Man*, *supra* note 2, at 1148; Sarah Leevan, Note, *Comparative Treatment of Human Trafficking in the United States & Israel: Financial Tools to Encourage Victim Rehabilitation and Prevent Trafficking*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 773, 800 (2008); Marisa Nack, Note, *The Next Step: The Future of New York State's Human Trafficking Law*, 18 J.L. & POL'Y 817, 824-25 (2010).

4. *See* Megumi Makisaka, *Human Trafficking: A Brief Overview*, SOCIAL DEVELOPMENT NOTES: CONFLICT, CRIME AND VIOLENCE, No. 122, Dec. 2009, at 1,6 ("Along with women and girls, both adult men and boys are also the victims of trafficking . . . but the trafficking cases of men are extremely underreported."); *see generally* Jones, *Invisible Man*, *supra* note 2 (discussing the

with which corporations avoid prosecution under the Trafficking Victims Protection Act of 2000 (TVPA) has been cited as a leading obstacle to thwarting trafficking.[5] The U.S. government's disproportionate focus on prosecuting poor and powerless individuals has also ignited concern.[6] In addition, the dismal enforcement results reveal that the neglect of ethnic minority victims has contributed to the proliferation of trafficking schemes.[7] Finally, even the disproportionate focus on sex trafficking and the manner in which feminist ideology negatively influences anti-trafficking measures has been explored to a significant degree.[8]

Despite sufficient and well-examined scholarly literature regarding human trafficking, perhaps the most perplexing obstacle to prevention of human trafficking lies in the inability of governments and nongovernmental organizations to properly identify victims of human trafficking and quantify their numbers.[9] Indeed, the wide body of scholarship relative to human trafficking

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role of men and boys in human trafficking).

5. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3033-35 (2006); *see also* Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 82-89 (2006) (arguing for harsher penalties against corporations that violate immigration laws); *see generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 28 U.S.C., 42 U.S.C.).

6. *See* Chacón, *supra* note 5, at 3035-36.

7. *See* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 249-50 (2007); Anna Gekht, *Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings*, 37 DENV. J. INT'L L. & POL'Y 29, 38 (2008).

8. *See* Shelley Cavalieri, *The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 31 N. ILL. U. L. REV. 501, 510-13 (2011) (asserting that the "[d]isproportionate prosecution of sex trafficking . . . is symptomatic of the excessive focus on sex trafficking that permits the public and those charged with addressing human trafficking to overlook instances of trafficking into other labor sectors"); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1702-03 (2010) (discussing the means by which certain strands of feminist ideology situates all women as "victims of crime"); Jones, *Invisible Man*, *supra* note 2, at 1151 (stating that "female sex trafficking is erroneously regarded as the principal undertaking of human traffickers"); Cynthia L. Wolken, *Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 407, 421-24 (2006).

9. *See* DEP'T OF JUSTICE ET AL., ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 5 (2004), *available at* http://www.justice.gov/archive/ag/annualreports/tr2004/us_assessment_2004.pdf (recognizing "an inability to determine the precise number of people who are victimized by traffickers each year"); ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 22 n.54 (2010) ("[T]here does not seem to be a clear definition of what it means to be a U.S. citizen trafficked within the United States. For example, some would argue that all prostitutes who have

reveals stark inconsistencies in representations of the number of human trafficking victims, which various sources claim "range from the hundreds of thousands to millions per year."[10] One source estimates that each year "[twenty-seven] million people worldwide are enslaved," and up to four million are trafficked across international borders.[11] Another source claims that each year as many as two million women and children are trafficked across international borders,[12] with other sources pointing to potentially millions of men and boys who are also victims of human trafficking.[13] Other reports state "that at any given time, about 12.3 million people are trapped in situations" of some form of forced labor.[14] Another commentator notes that "the U.S. government estimate[s] that between 600,000 and 800,000 men, women, and children are trafficked across international borders each year."[15] Some estimates place the number of victims trafficked into the United States each year at between 14,500 and 17,500; others estimate the number to be closer to 100,000 or even higher.[16] Finally, some admit that the number of human trafficking victims in the United States is simply "unknown."[17]

The lack of consensus regarding the number of human trafficking victims is largely attributed to the lack of agreement regarding who is, in fact, a victim of human trafficking.[18] The conundrum arises from an inability to isolate the jurisprudential, conceptual, and practical distinctions between victims of human trafficking (those forced to perform certain acts) and smuggled migrants (those who consent to being transported across international borders as means to engage in certain acts). Granted, the conceptual distinction between the human trafficking victim and the smuggled migrant appears well established in juridical constructions, as the divergent objectives of each crime determine the culpability

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pimps are victims of trafficking."). Some commentators have argued that the "largest number of trafficking victims in the United States are U.S. citizen children, and . . . the number of these victims [is] . . . between 100,000 and 300,000." *See id.*

10. David E. Guinn, Ambiguous Knowledge: Seeking Clarity in the Effort to Define and Assess Trafficking and the Sexual Exploitation of Children 2-3, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997677 (prepared for and presented at the International Seminar on the Prevention and Sanction of Trafficking in Persons in Mexico, June 21-22, 2007).

11. Bravo, *supra* note 7, at 209.

12. UNITED NATIONS DEV. FUND FOR WOMEN, VIOLENCE AGAINST WOMEN: FACTS AND FIGURES 5 (2007), *available at* http://www.unifem.org/attachments/gender_issues/violence_against_women/facts_figures_violence_against_women_2007.pdf.

13. Jones, *Invisible Man*, *supra* note 2, at 1156.

14. Chacón, *supra* note 5, at 2982 (referring to "bonded labor, forced child labor, sexual servitude, and involuntary servitude") (citation omitted).

15. *Id.* (citation omitted).

16. *Id.*; *see also* Jones, *Invisible Man*, *supra* note 2, at 1148.

17. SISKIN & WYLER, *supra* note 9, at 22 n.54 (stating "[t]he number of U.S. citizen trafficking victims in the United States is unknown").

18. *See* Makisaka, *supra* note 4, at 4.

and blameworthiness associated with offenders.[19] Despite different objectives, though, the empirical line of demarcation between the crimes is not readily identifiable because the difference turns on consent.[20]

Contemporary literature has not investigated whether theories of consent situate moral culpability and blame well enough to adequately inform the distinction between human trafficking and migrant smuggling. Instinctively, one might reason that the effectiveness and legality of consent that distinguishes human trafficking victims from smuggled migrants rests on the presence or absence of obstructive agents, such as coercion, in their transactions. Indeed, human trafficking legislation, to some degree, reflects this position,[21] the underlying rationale being that a person becomes a victim once force, fraud, or coercion vitiates the individual's consent or interrupts his or her autonomy.[22] Absent the presence of such interference with the individual's autonomy, the person is deemed a consenting participant and thus is branded a criminal.[23] This Article critiques that view.

By isolating the normative point at which the shift from consenting participant to human trafficking victim occurs, this Article challenges existing approaches to identifying human trafficking victims. It demonstrates that consent may, in some cases, expire before the onset of fraud, force, or coercion, particularly in the face of unpalatable alternatives. Nevertheless, this Article will illustrate that consent may be viable despite the absence of palatable alternatives. In so doing, this Article questions whether individuals can be neatly bifurcated into two distinct categories—migrant smuggling and human trafficking—and instead points to at least five classifications that arguably fit under the ambit of migrant smuggling, human trafficking, or both, depending on one's theory of consent. Finally, this Article examines existing autonomies between migrant smuggling and human trafficking and questions whether the role of consent in each case is truly antithetical.

In short, this Article attempts to take a first step in fashioning a decision-making paradigm for resolving the consent question. This paradigm incorporates the moral imperative to respect human dignity and permit individuals to determine their own direction, without compromising the undeniable empiricism of commercial exploitation and victimization. Part I distinguishes between human trafficking and migrant smuggling and evaluates the jurisprudential basis for five classifications of individuals within the human trafficking–smuggled migrant spectrum. In so doing, it highlights how the desire to migrate acts as a catalyst and sociological contributor to drive demand for human trafficking and migrant smuggling, and ultimately encourages individuals to consent to high-risk

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19. *See id.* at 3 (discussing differences between migrant smuggling and human trafficking).

20. *Id.* For purposes of this Article, the term *consent* relates to adults of sound mind and excludes children and the mentally impaired.

21. *See* Traffic Victims Protection Act, 22 U.S.C. § 7102(8) (2006) (defining "severe forms of trafficking" to include "force, fraud, or coercion").

22. *See infra* Part I.A.

23. *See* Chacón, *supra* note 5, at 3021-22.

exchanges. Giving particular attention to historical accounts, Part I also evaluates the manner in which voluntariness and coercive agents inform ideas about victimization and criminality and ultimately influence anti-trafficking law enforcement efforts. Part II explores the conceptual basis for deciding the voluntary nature and dispositive treatment of consent in the victim identification process and introduces the two dominant, but competing, jurisprudential approaches to defining and respecting consent. This Article concludes by positing that although the two dominant approaches to defining and respecting consent both center largely on ideas about human dignity and moral culpability, only one approach operates as a legitimate safeguard for respecting each when evaluating consent.

I. DISTINGUISHING BETWEEN MIGRANT SMUGGLING AND HUMAN TRAFFICKING FOR PURPOSES OF IDENTIFYING VICTIMS

As alluded to, misunderstandings regarding the distinction between human trafficking and migrant smuggling, or other immigration-related offenses, tend to impede law enforcement processes.[24] In some circumstances, law enforcement officials misidentify smuggled migrants as trafficked victims, and in other instances misidentify trafficked victims as smuggled migrants.[25] The distinction between the two crimes is frequently misunderstood or completely ignored.[26] Although similar conditions give rise to both crimes, logic suggests that careful recognition of the significant differences between human trafficking and migrant smuggling could often make the difference between freedom and continued

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24. *See* Mike Dottridge, *Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Levels*, *in* AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 103, 110 (United Nations Office on Drugs & Crime ed., 2008), *available at* http://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf (discussing and criticizing legislative and other anti-trafficking efforts). For example, five years ago Washington became the first state to make human trafficking a crime, but the law has yet to result in a single conviction. Ruth Teichroeb, *State's Human Trafficking Law Fails to Snag a Conviction*, SEATTLE POST-INTELLIGENCER, July 21, 2008, http://www.seattlepi.com/local/article/State-s-human-trafficking-law-fails-to-snag-a-1279944.php (noting that "[t]he biggest impediment seems to be that police and prosecutors don't recognize trafficking victims when they encounter them. . . .").

25. Law enforcement officials equate human trafficking with prostitution—"sex work involving women from other countries." GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 1, 15 (2007) [hereinafter COLLATERAL DAMAGE], *available at* http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf (reporting and analyzing the results of studies done in eight countries worldwide on the impact of anti-trafficking legislation on human rights). Police pick up "victims" who have not been trafficked and are just migrant sex workers who want to go back to earning money and do not need protection from their employers. *Id.* at 15.

26. Chacón, *supra* note 5, at 2985-86.

enslavement for trafficked victims.[27] But, as demonstrated later in this Article, the distinction between migrant smuggling and human trafficking is typically conditioned upon one's ability to consent in the relational transaction. As discussed later, identifying the role of consent in the victim identification process, though effective in most instances, potentially causes grave harm or leaves a wide multitude of harms suffered by certain categories of victims completely unabated.[28]

A. Standard Human Trafficking

In contrast to smuggled migrants, human trafficking victims do not willingly violate the law.[29] The trafficked victim has no reasonable alternative to obeying the commands of the human trafficker. Unlike smuggled migrants, who are generally treated as business allies by their smugglers,[30] trafficking victims are subjected to threats, forced isolation, and other forms of coercion, fraud, deception, or abuse in order to guarantee obedience.[31] The human trafficker's foremost purpose is to profit from continued exploitation of the trafficked person.[32] Therefore, the trafficking enterprise invests vigorously in the continued exploitation and manipulation of the victim so as to maximize its economic gain.[33]

In many cases of human trafficking, the trafficker induces the victim through deception and fraud, rather than coercion or force. For instance, Gladys Vasquez Valenzuela, Mirna Jeanneth Vasquez Valenzuela, Gabriel Mendez, Maria de los Angeles Vicente, and Maribel Rodriguez Vasquez (the "Vasquez ring") were convicted of various counts of human trafficking.[34] The Vasquez ring lured

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27. *See* HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 4 (2006) [hereinafter FACT SHEET], *available at* http://www.state.gov/documents/organization/90541.pdf (listing differences between human smuggling and human trafficking); Kevin Shawn Hsu, Note, *Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude*, 14 GEO. J. ON POVERTY L. & POL'Y 489, 507 (2007) (exploring the difference between human smuggling and human trafficking).

28. *See infra* Part II.A–D.

29. Hsu, *supra* note 27, at 507.

30. FACT SHEET, *supra* note 27, at 2.

31. *See id.* at 4; Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 371 (2006). The force requirement does not apply in the case of a minor involved in commercial sex acts. FACT SHEET, *supra* note 27, at 4.

32. FACT SHEET, *supra* note 27, at 2.

33. *See* Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT'L L.J. 131, 133 (2008).

34. Jones, *Invisible Man*, *supra* note 2, at 1178-79 (citing Press Release, U.S. Dep't of Justice, Five Defendants Convicted of International Sex Trafficking for Forcing Central American

Central American women across the U.S.-Mexico border with promises of legitimate employment within the United States.[35] After the women reached their desired destination, the Vasquez ring forced the women into prostitution and maintained control over them through torture and beatings, including threats of rape and murder of their family members.[36] The Vasquez ring was ultimately convicted of conspiracy, sex trafficking, and importation of aliens for purposes of prostitution and sentenced to at least thirty years imprisonment.[37]

In other cases, deception may not have a role in luring the victim; rather, coercion and force may be employed to secure the victim's cooperation. One example involves Varsha Sabhnani, who was charged with forced labor and involuntary servitude after one of the two Indonesian women whom Sabhnani and her husband had kept as slaves for years escaped and sought help.[38] The couple, owners of a multimillion-dollar perfume business, kept two women in their home and forced them into domestic servitude.[39] When Sabhnani found the work unsatisfactory, she would beat the women with broomsticks, slash them with knives, and force them to eat vomit.[40]

Some human trafficking cases involve mentally impaired or handicapped individuals. To illustrate, Waquita Wallace "tortur[ed] a mentally disabled teenager and rent[ed] her out for sex."[41] Wallace took the eighteen-year-old hostage and forced her to "pay off her cousin's $3,300 debt to Wallace" through prostitution.[42] Wallace not only forced the teenage girl into prostitution, she "also beat, burned, tortured, and humiliated" the mentally disabled teenager.[43] Wallace pled guilty to one count of sex trafficking.[44]

Very young adults and children may become human trafficking victims as

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Girls and Women into Prostitution (Feb. 12, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crt-117.html; *see also* Press Release, U.S. Dep't of Justice, Five Sentenced for Forcing Guatemalan Girls and Women to Work as Prostitutes in Los Angeles (Aug. 18, 2009), *available at* http://www.fbi.gov/losangeles/press-release/2009/la081809.htm).

35. Jones, *Invisible Man*, *supra* note 2, at 1179.

36. *Id.*

37. *Id.*; *see also id.* at 1178 (discussing Olga Mondragon, who was sentenced to seven years of imprisonment and, along with her seven co-defendants, ordered to forfeit over $1 million to the 120 injured women whom she forced into indentured servitude).

38. *Slaves of Long Island*, N.Y. TIMES, May 20, 2007, http://www.nytimes.com/2007/05/20/opinion/nyregionopinions/LI-Slaves.html.

39. *Id.*

40. Dan Herbeck, *Retired Agent Says Slavery Cases Bothered Him More than Others*, BUFFALONEWS.COM (Nov. 30, 2009), http://www.buffalonews.com/city/article23758. ece.

41. Jeremy Kohler, *Woman Admits to Sex Trafficking Waquita "Goddess" Wallace Rented Disabled Teen Out for Sex, Faces 15 Years to Life in Prison*, ST. LOUIS POST-DISPATCH, Apr. 14, 2009, at A3.

42. *Id.*

43. *Id.*

44. *Id.*

well.[45] To cite but a few examples, Shanaya Hicks was found guilty for her participation in a prostitution ring.[46] She admitted forcing two juveniles and two adults into prostitution through fraud and coercion.[47] Hicks recruited the females and subsequently held them against their will and subjected them to repeated rapes and beatings.[48]

Likewise, Jessica King admitted to recruiting, enticing, and employing juveniles to become prostitutes, from August 2007 to October 2007.[49] King took photographs of the juveniles in lingerie and would post them on the classified advertising website Craigslist to "solicit dates."[50] The advertising arrangement allowed the responder to purchase sex with underage females.[51] On January 20, 2009, Jessica King and two other defendants pled guilty to one count of conspiracy to engage in sex trafficking of children and one count of coercion and enticement of a juvenile into prostitution.[52]

In other instances children are lured by fraud. For example, in 1999, Maude Paulin took a fourteen-year-old Haitian girl into her home after Paulin's mother smuggled the girl into the United States under the false pretense that she was a niece of the family.[53] For six years, Paulin forced the young girl to work in domestic servitude, cleaning, cooking, and washing clothes.[54] She worked up to fifteen hours a day and at night was forced to bathe out of a bucket and sleep on the floor.[55] Paulin, age fifty-two and a former middle school teacher, repeatedly beat the young girl with shoes and brooms.[56] It was reported that on several occasions Paulin's husband had to step in to stop the beatings.[57]

Similarly, Sandra Bearden, "a homemaker and native of Mexico, was found

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45. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8-9 (2011), *available at* http://www.state.gov/documents/organization/164452.pdf (describing gravity of child victims of labor trafficking).

46. Edmund H. Mahony, *10 Accused of Running Sex Ring; 56-Count U.S. Indictment Alleges Men Held Woman Captive*, HARTFORD COURANT, Mar. 24, 2006, at B1, *available at* http://articles.courant.com/2006-03-24/news/063240119_1_prostitution-ring-accused-ring-leaders.

47. Press Release, U.S. Attorney's Office Dist. of Conn., Woman Sentenced to 46 Months in Prison for Role in Prostitution Ring that Victimized Women and Minors (Apr. 1, 2008), *available at* http://www.justice.gov/usao/ct/Press2008/20080401-1.html.

48. *Id.*

49. Press Release, U.S. Attorney's Office, S. Dist. of Cal., Three Plead Guilty to Sex Trafficking of Children (Jan. 20, 2009), *available at* http://www.justice.gov/usao/cas/press/cas90120-Arnold.pdf.

50. *Id.*

51. *Id.*

52. *Id.*

53. Ani Martinez, *Slave Case Penalty: 7 Years in Prison*, MIAMI HERALD, May 21, 2008, at B1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

guilty o[f] . . . injury to a child and aggravated kidnapping."[58] Bearden agreed to home-school a twelve-year-old girl after the girl was sent from her family in Mexico to Bearden "to clean and provide childcare in exchange for schooling."[59] Once the girl arrived, Bearden forced her into domestic servitude and kept her shackled in the backyard after she had completed her work for the day.[60] Bearden starved the child and would spray pepper spray in the child's eyes when she fell asleep.[61] Upon rescue, the young girl was "so weak [that] she had to be carried on a stretcher."[62]

Not surprisingly, victims of human trafficking may be a visitor or legal resident that entered into a written contract to lawfully work in the United States or another country.[63] Some victims might even be citizens of the very country in which they are relegated to slavery or indentured servitude.[64] Other victims might include individuals whose legal right to be in a country may have expired that are eager for employment and to avoid returning to their home country. For example, Jasmin Rivera, age thirty-one, and her brother Antonio Rivera, age thirty-four, owned and operated two bars in Long Island, New York.[65] From September 2007 until August 2009, the two lured women, some as young as seventeen, into the bars to work as wait staff and hostesses.[66] "After the [young] women began working in the bars, the [Riveras] forced them to engage in sex[ual] acts with bar patrons in exchange for money. . . ."[67] If the women refused, they were beaten and sexually assaulted by the Riveras.[68] Obedience and cooperation from the women were also maintained through threats to reveal them to U.S. immigration authorities.[69] The Riveras now face charges of sex trafficking, conspiracy, forced labor, and alien harboring.[70]

In some cases, human traffickers conduct business with the tacit approval of

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58. Stephanie Armour, *Part I: Some Foreign Household Workers Enslaved*, USA TODAY, Nov. 21, 2001, http://www.usatoday.com/money/general/2001/11/19/cover.htm.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 41 (10th ed. 2010), *available at* http://www.state.gov/documents/organization/142979.pdf.

64. FACT SHEET, *supra* note 27, at 3.

65. Press Release, U.S. Immigration and Customs Enforcement, ICE Breaks Up Sex Trafficking Ring in Long Island: Owners and Managers of Two Bars Accused of Sex Trafficking and Alien Harboring (Aug. 10, 2009), *available at* http://www.ice.gov/news/releases/0908/090810newyork.htm.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Press Release, U.S. Dep't of Justice, Three Arrested in Long Island Sex Trafficking and Alien Harboring Case: Owners and Manager of Lake Ronkonkoma and Farmingville Bars Charged (Aug. 10, 2009), *available at* http://www.justice.gov/usao/nye/pr/2009/2009aug10.html.

corporations, companies, and professionals. For instance, Rozina Mohd Ali, a lawful U.S. resident from Malaysia, hired a woman through an Indonesian employment agency to work as a housekeeper.[71] Two weeks later, Ali brought the woman to the United States on a temporary visa.[72] After arriving in the United States, Ali confiscated the woman's passport and identification.[73] Ali forced the thirty-two-year-old victim to work long hours in domestic servitude for Ali and her relatives for five years, and would beat and threaten the woman.[74] Ali was sentenced to one year in prison and ordered to pay more than $72,000 in restitution to the victim.[75]

Perhaps one of the most publicized episodes of corporate involvement occurred in the case of *United States v. Kil Soo Lee*.[76] *Kil Soo Lee* is recognized by observers as the most significant human trafficking case to date because of the sheer number of victims rescued and the subsequent publicity generated thereby.[77] The case involved foreign defendants who operated a garment factory in American Samoa and were forcing individuals to work in the factory.[78] These individuals were held under guard and threatened with confiscation of their passports and false arrest.[79] After a jury trial, Kil Soo Lee, the owner of the factory, was convicted on almost all counts.[80]

What is undeniably revealed by these examples—a conclusion for which there is nearly unanimous consensus—is that human trafficking is a heinous crime that can result in severe injury or death to its victims. The daily life of victims is characterized by anxiety, fear, torture, poverty, and social isolation.[81] The victims are trafficked for commercial sexual exploitation; forced to perform "labor on farms[,] in restaurants, nursing homes, private homes, construction sites, and factories;" or forced into the drug trade or gang activity.[82] In short,

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71. Cindy George, *Sugar Land Woman Gets Prison, Fine for Forced Slavery*, HOUSTON CHRON., Apr. 4, 2008, http://www.chron.com/news/houston-texas/article/sugar-land-woman-gets-prison-fine-for-forced-1598670.php.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. 159 F. Supp. 2d 1241 (D. Haw. 2001), *aff'd*, 472 F.3d 638 (9th Cir. 2006); *see also* Chacón, *supra* note 5, at 3034.

77. Chacón, *supra* note 5, at 3034.

78. United States v. Kil Soo Lee, 472 F.3d 638, 639-40 (9th Cir. 2006).

79. *See* Adam C. Clanton, *How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa*, 29 U. HAW. L. REV. 325, 365-66 (2007).

80. Chacón, *supra* note 5, at 3034; *see also Kil Soo Lee*, 472 F.3d at 639 ("Kil Soo Lee . . . was convicted of extortion, money laundering, conspiring to violate the civil rights of others, and holding workers to a condition of involuntary servitude.").

81. Jones, *Invisible Man*, *supra* note 2, at 1148.

82. *Id.* at 1148-49; *see also* Franklyn M. Casale, President, St. Thomas University, Miami, Fla., International Trafficking in Persons: Suggested Responses to a Scourge of Humankind, Statement Presented to the United States House of Representatives Committee on Foreign Affairs

human trafficking is nothing short of "modern-day slavery."[83]

B. Standard Migrant Smuggling

The next category of migrants includes those whose relationship with the human smuggler ends once the migrant crosses the border and pays the smuggling fee.[84] Migrant smuggling "is always transnational in nature, since it requires crossing a national border and . . . involves an 'illegal entry' of a person into a country of which such a person does not have legal status."[85] The migrant smuggling transaction does not *require* violations of the migrant's consent, autonomy, or consumerist identity (though it may end up including such violations). The migrant's illegal entry and subsequent freedom is the outcome desired by both parties involved in the migrant smuggling transaction. Unlike the individuals in Category A (standard human trafficking victims), Category B individuals—smuggled migrants—willingly violate immigration laws.[86] In short, the migrant smuggling transaction is a voluntary criminal transaction between the smuggler and the smuggled migrant.[87] The two parties generally cooperate with one another.[88] Their transaction is intended to be a mutually beneficial arrangement whereby one party benefits financially or materially, and the other party benefits via his or her illegal entry into a foreign state.[89] The smuggled migrant's relationship with the smuggler traditionally ends once the border is crossed and the smuggling fee is paid.[90] This outcome, however, is not the same for every smuggled migrant.

C. Fraudulently Induced Smuggled Migrant and Human Trafficking Victims

Category C consists of smuggled migrants who become victims of human trafficking after initially agreeing to be transported across an international

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(Oct. 18, 2007), *in* 3 INTERCULTURAL HUM. RTS. L. REV. 343, 344 (2008).

83. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 162 (2007).

84. *See* Nagle, *supra* note 33, at 133; *see also* FACT SHEET, *supra* note 27, at 2.

85. Mattar, *supra* note 31, at 370 (citation omitted). "Illegal entry . . . means 'crossing borders without complying with the necessary requirements for legal entry'" into the destination country. *Id.* (quoting Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/55/383, at Art. 3(b) (Nov. 15, 2000)).

86. *See* FACT SHEET, *supra* note 27, at 4 (listing as one difference between human trafficking and smuggling, as "[p]ersons smuggled are complicit in the smuggling crime").

87. *Id.* at 2 ("[S]muggling is generally with the consent of the person(s) being smuggled . . . .").

88. *Id.* at 4.

89. *See* Sarah King, *Human Trafficking: Addressing the International Criminal Industry in the Backyard*, 15 U. MIAMI INT'L & COMP. L. REV. 369, 371 (2008) (comparing definitions of human trafficking and smuggling).

90. *See* FACT SHEET, *supra* note 27, at 2; Nagle, *supra* note 33, at 133.

border.[91] After crossing the border, the smuggled migrants are divested of their means to control their own destiny. The human trafficker robs these individuals of their freedom and treats them as profit-generating instruments rather than human beings.[92] Rather than being set free after crossing the border, this category of migrants is coerced into performing sex or labor.[93] To cite but a few examples, in the aftermath of Hurricane Katrina, Signal International recruited more than one hundred Indian metal laborers to work in shipyards off the Gulf Coast.[94] The men allegedly paid $20,000 to enter the United States after being promised "green cards."[95] The men claimed they received only ten-month temporary worker visas,[96] and lived "like pigs in a cage in [the] company-run work camp," which housed twenty-four laborers to a room.[97] Signal International deducted $1050 from each man's paycheck for these atrocious accommodations.[98] Contrary to their expectations, the victims' documents were allegedly stolen and their wages were withheld as a means to isolate and trap them.[99]

Their captors forced the men to live in isolation, helplessly awaiting a rescue that would never occur because the plight of the men was consciously ignored by the Immigration and Customs Enforcement Agency (ICE).[100] According to sworn testimony, rather than assist the enslaved men, ICE officials advised Signal International on how to deal with the enslaved men, whom Signal's chief operating officer described as "chronic whiners."[101] One ICE official purportedly advised, "[t]ake them all out of the line on the way to work; get their personal belongings; get them in a van, and get their tickets, and get them to the airport, and send them back to India."[102] Several laborers managed to escape and protest

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91. *See* Lisa Trigg, *Human Rights Day: FBI Agent Offers Ways to Stop Human Trafficking*, TRIB. STAR, Apr. 20, 2010, http://tribstar.com/news/x993507071/Human-Rights-Day-FBI-agent-offers-ways-to-stop-human-trafficking (describing situations where migrant workers pay to be smuggled into the United States, and are then forced to work to pay off the debt).

92. *See* Nagle, *supra* note 33, at 133.

93. FACT SHEET, *supra* note 27, at 1.

94. Editorial, *They Pushed Back*, N.Y. TIMES, June 29, 2010, at A30 [hereinafter *They Pushed Back*].

95. *Id.*

96. Pamela Constable, *Indian Workers Decry Recruitment Tactics*, WASH. POST, June 12, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/11/AR2008061103445.html.

97. Steve Phillips, *Indian Workers Accuse Signal International of "Human Trafficking,"* WLOX13, Mar. 6, 2008, http://www.wlox.com/Global/story.asp?S=7977223 (internal quotation omitted).

98. *Id.*

99. *See They Pushed Back*, *supra* note 94 (reporting that the workers were "told they would be fired and deported if they tried to leave or made trouble.").

100. *See* Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12, *available at* http://www.nytimes.com/2010/02/02/us/02immig.html?_r=1.

101. *Id.*

102. *Id.*

the abuse.[103] Afterward, hundreds of Indian workers walked off the job and filed civil rights claims against Signal International, claiming that they were victims of human trafficking.[104] Signal International denied the allegations.[105]

Similarly, in July 2006, Mabelle de la Rosa Dann transported a woman into the United States from Peru and forced her into domestic servitude.[106] Dann, a Peruvian native herself, confiscated the victim's passport and identification, making the victim think that she would be falsely accused of theft if she tried to flee.[107] Dann forced the smuggled woman to cook, clean, and provide childcare for twenty-one months without pay and repeatedly subjected her to humiliating and degrading treatment.[108] Through the help of local residents, the victim eventually escaped.[109] Dann was subsequently sentenced to five years in prison and ordered to pay more than $100,000 in restitution.[110]

Along these lines, in 2003, federal officials detained 250 undocumented immigrants working in Wal-Mart stores throughout the United States who alleged that after agreeing to work for cleaning contractors used by Wal-Mart, they were subjected to severely substandard employment conditions.[111] Many of the undocumented employees complained that Wal-Mart underpaid them,[112] and, in some cases, locked the workers inside its stores overnight.[113] Prosecutors never filed human trafficking charges against Wal-Mart or its subcontractors. Instead, Wal-Mart was charged by plaintiffs with violations of human smuggling laws and RICO enterprise claims after agreeing to pay the U.S. government $11 million.[114]

Similarly, Global Horizons was investigated for human trafficking in the

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103. *See* Phillips, *supra* note 97.

104. *See id.*

105. *Id.* Signal International issued a news release stating that the allegations were "baseless and unfounded," and maintained that their facilities and labor practices had already been inspected and approved by the Department of Labor and the federal Immigrations and Customs division. *Id.* As of July 2008, the workers were staying in New Orleans, hoping that the Department of Justice would launch an investigation. *Id.*

106. Press Release, U.S. Dep't of State, California Woman Sentenced to Five Years Imprisonment for Forced Labor of Domestic Servant (Apr. 15, 2010), *available at* http://www.state.gov/m/ds/rls/140326.htm.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million in Lawsuit on Immigration Workers*, N.Y. TIMES, Mar. 19, 2005, http://query.nytimes.com/gst/fullpage.html?res=990CEED8113CF93AA25750C0A9639C8B63; *see also* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 300-01 (D. N.J. 2005).

112. *Zavala*, 393 F. Supp. 2d at 301.

113. *Id.* at 334.

114. *See id.* at 300 n.2, 315-16 (holding that the plaintiffs did not allege sufficient facts to support the RICO claim against Wal-Mart); Greenhouse, *supra* note 111.

summer of 2007.[115] Pennsylvania's Creekside Mushrooms hired Global Horizons to recruit laborers from Thailand to pick mushrooms.[116] Creekside Mushrooms paid Global Horizons, but Global Horizons did not pay the laborers.[117] The laborers complained that they did not get paid despite having spent $20,000 each to come to the United States in reliance on a promise of three-year employment.[118] The men had to go fishing on some nights just to eat.[119] Global Horizons denied all allegations of human trafficking.[120]

Category C individuals share a commonality with Category A individuals: There is a coercive symmetry between Category A and Category C individuals after they cross the border, because each is divested of their freedom and autonomy and subject to coercive agents.[121] Therefore, Category C individuals are morally and legally entitled to protection just as Category A individuals would be, on the ground that their initial consent to cooperate was vitiated by subsequent coercion.[122]

Although it is relatively simple to classify Category C individuals whose consent is vitiated by coercion, other categories of individuals within the migrant smuggling–human trafficking spectrum are not as ascertainable or easily identified, because coercion is not readily obvious or present in many cases. As a result, conceptual vagueness arises, particularly in circumstances in which individuals, despite knowing the inhumane conditions under which they will labor, consent to remain in the custody of a criminal enterprise or coercive agent.

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115. *Company in Pennsylvania, USA Accused of Trafficking*, HUMANTRAFFICKING.ORG (Aug. 5, 2007), http://www.humantrafficking.org/updates/669.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* In 2010, Western Union agreed to pay the state of Arizona $94 million as settlement of anticipated human smuggling charges. Randal C. Archibold, *Western Union to Pay in Border-Crime Deal*, N.Y. TIMES, Feb. 12, 2010, at A22, *available at* http://www.nytimes.com/2010/02/12/us/12arizona.html. The settlement was apportioned as follows: $50 million to support law enforcement agencies working on combating human smuggling in Arizona, $21 million to the state of Arizona, $19 million to improve Western Union's own efforts, and $4 million to a private monitor. *Id*. Evidence against Western Union began to emerge after law enforcement agents discovered the body of a Mexican immigrant inside a raided bungalow in Los Angeles, California, and linked the death to wire transfers to Western Unions in Caborca, Mexico. Josh Meyer, *Blood Money Flows by Wire to Mexico*, L.A. TIMES, June 8, 2009, http://articles.latimes.com/2009/jun/08/nation/na-western-union8. Earning the notorious name of "blood wires," money in a Western Union transmitter system was paid to traffickers between 1999 and 2007. *Id.* Despite the loss of a life due to the smuggling operations, Western Union was never charged. Rather, Western Union paid millions to avoid criminal prosecution. *See* Archibold, *supra*.

121. *See* Hsu, *supra* note 27, at 507 (concluding that in some instances the difference between human trafficking and human smuggling is largely immaterial).

122. *See id.*

D. The Consenting Debtor

Category D individuals constitute an often-overlooked, but very significant part of the human trafficking–migrant smuggling spectrum. These individuals willingly agree to perform sex or labor as payment for having been transported across an international border. As one astute FBI special agent attested, there are cases in which "migrant workers are actually 'slaves' who have paid their way to be illegally smuggled into the [United States] and now are working off their debt by earning wages for the human trafficker."[123] With the exception of Category E individuals, this category of individuals has the greatest potential to generate confusion, particularly among law enforcement officials, because Category D individuals are smuggled migrants who consent to engage in high-risk criminal transactions. Although they are conceptually quite distinct from Category C individuals, who are subject to coercive agents and influences after crossing the border, Category D and Category C individuals nearly mirror one another because the somatic distinction between one who is enslaved by a coercive agent and one who freely consents to be a slave is not readily discernible. Consequently, persons who are forcibly enslaved on a marijuana farm to pay off their smuggling debts, after willingly entering the United States illegally, are easily perceived as criminals who freely consented to engage in such work rather than as victims of coercive agents. This outcome is often facilitated by attitudes among some law enforcement agents that a person who deliberately participates in a criminal exchange such as migrant smuggling can never qualify as a victim.[124] The challenge of classifying Category D individuals is rivaled only by the challenges posed when attempting to identify and treat individuals in Category E, which remains an open question for the reasons discussed in the next subsection.

E. The Consenting Participant

Similar to Category D, this group consists of individuals who may not have crossed a border illegally, but nonetheless are in such dire need of money, shelter, or food that they willingly consent to perform sex or slave labor. Consider the case of the "pig iron" laborers.[125] Pig iron is the main component of any steel-containing product manufactured in the United States.[126] Deep inside the Brazilian Amazon, labor inspectors discovered Alexandre Pereira dos Reis

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123. *See* Trigg, *supra* note 91.

124. *See* William Lacy Swing, Editorial, GLOBAL EYE ON HUMAN TRAFFICKING, July 2009, at 2, *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/projects/showcase_pdf/global_eye_sixth_issue.pdf ("In the eyes of . . . the law [victims] may even be suspect as too often they will be living and working . . . in close proximity to criminal elements.").

125. Michael Smith & David Voreacos, *"This Is Slavery": It's in Many Products We Use Every Day: Dishwashers, Refrigerators, Cars. Steel. And in the Steel? In Some Startling Cases, Forced Labor*, SEATTLE TIMES, Jan. 21, 2007, at F1.

126. *See* Michael Smith & David Voreacos, *The Secret World of Modern Slavery*, BLOOMBERG (Nov. 17, 2006), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aul9sXScm.QE.

("Reis"), a laborer dressed in soiled rags, worn-out plastic sandals, and plagued by a wheezing cough, who had been working at a charcoal labor camp near the city of Tucurui, where he shoveled charcoal from a kiln.[127] He labored six days a week and lived "in a shack with no ventilation, running water, or electricity."[128] He told the labor inspectors of the widespread malaria, episodes of chronic cough, and scorching ninety-five-degree temperatures that were prevalent at the camp.[129] Slave-labor camps like Transcameta, where Reis worked, "are scattered along the Amazon in Brazil, in a rain forest that covers an area [ten] times the size of France."[130] The Brazilian labor ministry reports that individuals like Reis "are people who have absolutely no economic value except as cheap labor under the most inhumane conditions imaginable."[131] What might surprise some is that Reis, "[l]ike hundreds of thousands of workers in Latin America, [does not] collect[] . . . wages."[132] More shocking is that camp managers admit that the working conditions are "degrading."[133]

Despite the fact that the men do not earn any wages, and despite the presence of armed guards and treacherous working conditions,[134] the camp's managers denied that the men laboring at the camps were slaves—because the men work at the camp voluntarily.[135] Because of their lack of money and shelter, and their location in the deep jungle, laborers like Reis choose to remain at the labor camp.[136] Reis confirmed the voluntary nature of his presence at the camp, claiming, "I would leave if I could, but I need the work."[137] Individuals like Reis, who profess consent to working as slaves, serve as a catalyst for inconsistent jurisprudential treatment relative to the dispositive nature of consent when ascertaining a person's status as a victim or criminal.

On the one hand, some might contend that Reis's consent to working at the labor camp, coupled with the lack of fraud, force, or coercion in obtaining his consent, precludes Reis and, by extension, other individuals in Categories D and E from being classified as victims of human trafficking. On the other hand, some might assert that Reis, and other individuals in similar circumstances, are indeed victims of human trafficking, given their lack of palatable alternatives to working at the labor camp because of their dire need for money, food, and shelter. Under this view, if Reis, or others in like circumstances, were to engage in prostitution or drug trafficking, they would be branded as victims rather than criminals. This latter claim, at least conceptually, argues that individuals like Reis should be

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* (noting that some pig iron workers are forced to work at gunpoint).
135. *Id.*
136. *Id.*
137. *Id*.

afforded the same status as individuals in Category A. Indeed, legitimate debate regarding treatment of individuals in Categories D and E is justifiable given that Category D and E individuals do not fit traditional conceptions of human trafficking victims or smuggled migrants. Nonetheless, proper classification of Category D and E individuals is of critical importance and largely dependent upon intuitive understandings about consent and moral culpability, which may preclude or enable a legitimate finding of coherency among Categories A, D, and E.

II. THE CONSENT QUESTION

A. Consent Informs Moral Culpability

The consent and voluntary nature of the conduct of individuals in Categories D, E, and perhaps C, shape their moral culpability and consequently encourage the apportionment of blame despite the harm suffered by the individual. The basis for the placement of blame is the undeniable connection between the individuals' risk-producing consent or deliberate actions and the harmful sequence that follows—namely, their becoming victims of human trafficking or indentured servants.[138] The trafficking or exploitation of autonomous individuals is not something thrust upon them by a coercive agent, but is instead a consequence of their deliberate conduct, which creates, to some degree, moral symmetry between the consenting agents.[139]

The presence of consent in some arrangements (e.g., Categories D and E) and the absence of consent in other arrangements (e.g., Category A—the standard human trafficking victim) is significant enough to act as a basis for apportioning blame and moral culpability to Categories D and E, but not to Category A. The moral culpability that attaches to individuals in Categories D and E nullifies, or at least substantially weakens, any claim to victim status by individuals in Categories D or E. This perceived moral asymmetry between individuals in Category A, and those in Categories D and E, certainly highlights and shapes practical approaches to combating human trafficking and migrant smuggling.

On one hand, to divest individuals in Categories D and E of human trafficking victim status might strike some as intuitively incongruent with the purpose of anti-trafficking judicial constructs that purport to ban modern forms of slavery. On the other hand, some might be inclined to embrace the idea that divesting them of victim status is consistent with the American ethos and the fundamental reality that all individuals—particularly citizens of the United States—have a natural right to determine for themselves the direction of their lives without interference; individuals are not only entitled to the rewards produced by their decisions, but they are also responsible for any negative outcomes or consequences of their choices. As discussed later, each view has

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138. *See* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 223 (1989) (discussing the connection between behavior and intent or purpose).

139. *See id.*

certain limits as applied to the consent question.

B. The Competing Theories of Consent and Victimization

The extent to which an individual who consents to perform sex work or slave labor should be classified as a human trafficking victim or a willing participant has been the subject of heated debate among commentators.[140] Such commentators have explored the distinction between human trafficking and migrant smuggling in relation to the consent question.[141] A 2000 United Nations report could not have been clearer regarding the role of consent in the human trafficking–migrant smuggling scheme: It stated that "[i]t is the non-consensual [sic] nature of trafficking that distinguishes it from other forms of migration."[142] The report went on to warn:

> The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration. At the heart of this distinction is the issue of consent.[143]

Years later, Navanethem Pillay, then United States High Commissioner for Human Rights, quite forcefully offered a slightly differing view, declaring that "when the elements of the crime of trafficking have been established, the consent of the individual is irrelevant."[144] This claim, at least by implication, holds that an individual's consent to engage in certain conduct may in fact be present, but may be ignored for purposes of satisfying the elements of the crime of human trafficking.[145] The quintessential question then becomes: *Should* it be?

One view, which I term the Liberal approach,[146] prioritizes consent by applying blame and moral culpability for the offense only under circumstances in which consent is negated by fraud, force, or coercion. Another view, which I

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140. *See* Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 17-19 (2009) (outlining debates over consent and human trafficking law).

141. *See generally id.*

142. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, Comm'n on Human Rights, ¶ 12, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomaraswamy).

143. *Id.*

144. Navanethem Pillay, *Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Sexual Violence: Standing by the Victim*, 35 LAW & SOC. INQUIRY 847, 852 (2010).

145. *See id.*

146. The author's use of the term, "Liberal," relates to a widely accepted belief that, in a liberal democracy, respect for individual liberty and equality between all citizens is a fundamental prerequisite for social functionality and moral authority.

term the Gendered approach,[147] discounts the individual's consent, claiming instead that consent is irrelevant in circumstances in which the actor/consenter is being exploited. Each view is arguably supported by some component of anti-trafficking legislation. For instance, the Liberal view aligns squarely with the U.S. Department of Justice Model Criminal Statute ("DOJ Model"), which mandates that an individual's consent to an activity precludes that individual from being classified as a victim of human trafficking because the DOJ Model requires that "forced labor or services" be "obtained or maintained through" coercion.[148] Similarly, under the TVPA, an individual's consent to engage in certain conduct or work would preclude him or her from being classified as a victim of human trafficking, because criminality attaches only upon a finding of "force, fraud, or coercion."[149] Conversely, the Gendered approach arguably parallels the jurisprudential foundations of the UN Protocol relative to consent, which posits that the "consent of a victim of trafficking . . . to the intended exploitation . . . [is]

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147. The author's use of the term, "Gendered," relates to a claim, made by some, that all citizens are not equally autonomous, and therefore, responsibility and accountability for the exercise of free choice or consent should not be ascribed evenly between citizens.

148. DEP'T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE § 2(4), at 70-71 (2007), *available at* http://www.csg.org/knowledgecenter/docs/pubsafety/ModelStateAnti-TraffickingCriminalStatute.pdf. Specifically the DOJ Model lists the following acts as sufficient to establish "forced labor or services":

> (A) causing or threatening to cause serious harm to any person;
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> (B) physically restraining or threatening to physically restrain another person;
>
> (C) abusing or threatening to abuse the law or legal process;
>
> (D) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any actual or purported government identification document, of another person;
>
> (E) blackmail; or
>
> (F) causing or threatening to cause financial harm to [using financial control over] any person.

Id. (alteration in original).

149. The TVPA, defines "severe forms of trafficking in persons" as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
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> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Trafficking Victims Protection Act, 22 U.S.C. § 7102(8) (2006). It defines the term "coercion" as:

> (A) threats of serious harm to or physical restraint against any person;
>
> (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
>
> (C) the abuse or threatened abuse of the legal process.

Id. § 7102(2).

irrelevant. . . ."[150] Though both positions are prone to significant jurisprudential challenge, the Liberal position appears most compatible with the requirement for laws to maintain and promote moral authority, jurisprudential practicability, and fairness.

C. Consent Is Relevant

The Gendered approach, which functionally trivializes the role of voluntary undertakings in human transactions or characterizes consent as irrelevant, suffers from several conceptual and empirical realities. First, it cannot reasonably be denied that individuals may in fact view certain types of sex work or slave labor as necessary or even favorable.[151] Second, individuals sometimes make poor or morally questionable decisions even after having the benefit of good information, time to deliberate, and the availability of reasonable alternatives.[152] Third, irrationality, temporal deficiencies in cognitive and emotional capacities (that fall short of mental impairment), and conscious ignorance can be inimical to the exercise of good judgment. These human realities do not, collectively or individually, nullify the individual's consent or vitiate the voluntary nature of an individual's conduct. Thus, the justification under the Gendered approach for interfering with or ignoring an individual's voluntary actions in such circumstances cannot be based on the absence of, or the tainted nature of, the actor's consent; rather, it must rest on the rationale that the actor's voluntary behavior or consent to engage in certain acts is so objectionable that consent to perform the act is irrelevant.[153] That is, the Gendered views the actor's conduct and perceived exploitation as so morally objectionable that the voluntary nature of the individual conduct can be ignored. Put succinctly, the role and importance of consent under the Gendered view are not determined by the free will of the individual, but rather by the consequences such consent produces.

The Gendered position thus rests on a claim that a third party should have the

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150. G.A. Res. 55/25, Annex II, art. 3(b), U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter U.N. Women & Children Protocol].

151. *See* Chuang, *supra* note 8, at 1702 (recognizing the "possibility that 'trafficked women' may be migrant sex workers or migrant women attempting to meet their own needs or responding to labor demands in the West. What is called 'trafficking' when it involves sex is often called 'international labor migration' when it involves other kinds of work."); Heidi Fleiss & Nadya Labi, *In Defense of Prostitution*, LEGAL AFFAIRS, Sept.-Oct. 2003, at 35, 35-36 (disclosing that she came from an upper middle-class family, chose prostitution because of the money, became a millionaire after only four months, and that her prostitutes were happy); Bob Sullivan, *Lawyer Turns Topless Dancer to Pay the Bills*, MSNBC, Sept. 13, 2011, http://redtape.msnbc.msn.com/_news/2011/09/12/7730301-lawyer-turns-topless-dancer-to-pay -the-bills (attorney turned stripper states that she is "glad" she had the option to work in a strip club after she got laid off from her law-practicing job).

152. HERZOG, *supra* note 138, at 237.

153. *See id.* (noting that, despite objections to paternalism, some choices are so bad, that we don't care if they were voluntary).

right to ignore the actor's consent, or deny the actor's right to consent to engage in certain conduct, when the third party finds the actor's conduct morally objectionable. In effect, the Gendered claim permits third parties to impose their judgment and morals upon the actor (consentor) under the guise of saving or protecting the actors from themselves and oppressors, and upholding the actors' human dignity.[154] In this way, the Gendered claim is virtually indistinguishable from paternalism.[155] This feature of the Gendered claim produces several harmful effects.

First, the claim potentially disparages or patronizes actors by interfering with their ability to determine for themselves the scope and direction of their own choices, because it ignores an actor's choices and desires. Secondly, the Gendered approach's disregard of actors' consent or the voluntary nature of their undertakings and choices stands in sharp contrast to respect for the actors' human dignity. Indeed, one of the most salient paradoxes of the Gendered ideology exists in an enduring theoretical endeavor to protect human dignity alongside an equally ubiquitous failure to respect the actor's dignity.[156] To respect individuals' dignity means to acknowledge their right as human beings to be "free to determine their own purposes and functionality."[157] Respect for another's right to determine his or her own purpose is the moral foundation upon which Immanuel Kant based his famous means-end principle.[158]

Kant believed that "[b]ecause of a person's moral personality, he or she possesses an intrinsic, unconditional, and absolute value"[159] to determine his or her direction, which should remain "uninfluenced by the opinion or estimation of another [or] . . . by feelings, impulses, heredity, social rank, or . . . advantages" that the actor's behavior might procure.[160] For Kant, respecting a person's

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154. The tenets of the Gendered claim align in many respects with the protestations of various groups in the United States that have attempted to redefine "trafficking in persons" under the United Nations definition to include all forms of prostitution. SISKIN & WYLER, *supra* note 9, at 38; *see also* Chuang, *supra* note 8, at 1702 (recognizing that "[w]hat is called 'trafficking' when it involves sex is often called 'international labor migration' when it involves other kinds of work").

155. *See* HERZOG, *supra* note 138, at 237 ("[P]aternalism exists as an uneasy complement to consent theory."); *see also* GERALD DWORKIN, PATERNALISM (1971), *reprinted in* PHILOSOPHY OF LAW 230, 230 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (stating that paternalism involves limiting another's freedom for their own interest).

156. One cannot respect an individual's dignity without that person's choices regarding their profession and personal life. *See* R. Kent Greenawalt, *The Right to Silence and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 192, 193 (Michael J. Meyer & W.A. Parent eds., 1992).

157. Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 930 (2010).

158. *See id*.

159. *Id.* at 931 (citing ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 68 (1994)).

160. *Id.* (citing SULLIVAN, *supra* note 159, at 68 and IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46-47 (Lewis White Black trans., Liberal Arts Press 1959) (1785)).

choices was synonymous with respecting the person's dignity.[161] Hence, Kant's position, at least by implication, is that even though slave laborers like Reis may not have any property of monetary value, they have a human-dignity value by virtue of their being able to decide for themselves their own destiny, make their own choices, and exercise their autonomy. To take away, ignore, trivialize, or obstruct their choices and voluntary undertakings, Kant would argue, does more harm to these human agents than would divesting them of their property, because the value of their human dignity is worth more than their personal property.[162]

One of the most ancient illustrations of respecting human dignity in circumstances where a person's exercise of free will produces objectionable results resides within the Judeo-Christian theological memorialization of the relationship between the Lord God, Adam, Eve, and the Serpent, as articulated in the *Book of Genesis*.[163] There, the Lord God created the world, all of its animals, and two human beings, Adam and Eve.[164] The Lord God told Adam and Eve not to eat from the Tree of Knowledge.[165] Being all powerful, the Lord God could have imposed His will upon Adam and Eve and prevented them from eating from the Tree of Knowledge. But the Lord God, loving Adam and Eve above all other creatures, gave them the free will to decide the direction of their own lives by either obeying the Lord God's wishes or consenting to the requests of the Serpent. When Adam and Eve chose to eat from the Tree of Knowledge, the Lord God did not absolve them of responsibility for consenting to the Serpent's request to eat from the Forbidden Tree under the presupposition that the beguiling Serpent exploited their vulnerabilities. Rather, the Lord God chose to respect their choice and held Adam and Eve accountable for their actions despite the Lord God's awareness of the unfavorable impact their actions had on their existence.[166]

In his famous and influential work, *Summa Theologica*, St. Thomas Aquinas posits that the Lord God in the *Book of Genesis*, though not willing evil be done, decides that it is better for Him to allow human beings (Adam and Eve) to exercise free will, and permit evil in His world, rather than for Him to deny human beings free will and ban evil.[167] Hence, St. Thomas Aquinas, like Kant,

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161. *Id.*

162. *Id.* at 931-32.

163. *Genesis* 3:1-24.

164. *See id.* at 2:7, 2:18-23.

165. *See id.* at 3:3.

166. *See id.* at 3:16-19.

167. *See* Saint Thomas Aquinas, *Summa Theologica*, Vol. I, Q. 19, Art. 9, (stating that "God . . . neither wills evil to be done, nor wills it not to be done, but wills to permit evil to be done; and this is a good."); *see id.* at Vol. I, Q. 22, Art. 2 (stating that man "has not a prefixed operating force determined to only the one effect, as in the case of natural things which are only acted upon as though directed by another towards an end, and do not act of themselves, as if they directed themselves towards an end, like rational creatures, free choice, by which they take counsel and choose . . . free is traced to God as to a cause, it necessarily follows that everything happening from the exercise of free will must be subject to divine providence."); *see id.* ("Since a rational creature

would reason that there is a fundamental and unalterable duty to respect every person's inherent right to be free to exercise his self-regarding choices that supersedes or outweighs any duty to interfere with those choices in order to avoid morally objectionable results.[168] Secondly, Aquinas and Kant would reason that there exists a benefit to humanity that resides in every person, as a rational agent, having an unfettered right to direct his self-regarding conduct that dwarfs any detriment that might befall him because of his exercising such a right.[169] In this light, each would reject the Gendered approach on grounds that it authorizes more harm upon humanity by divesting actors of their inherent human dignity and autonomy, which, in and of itself, constitutes a form of oppression and servitude.

In addition to individual harm, a societal harm results from applying the Gendered approach, given the fundamental necessity for laws to have moral authority.[170] Anti-trafficking statutes, as legal constructs, cannot rest upon "opaque or amoral" principles, because the potential for anti-trafficking statutes "to constrain behavior is limited or subject to override by moral demands."[171] Therefore, anti-trafficking statutes must be aligned with social morality. Today, few obligations and actions are more recognized by society than the moral requirement arising from voluntary conduct.[172]

Consent is widely accepted as an exercise of autonomy and freedom necessary to enter an agreement. When an individual freely consents to perform certain work, his or her consent is virtually impossible to ignore or discount because of the perceived moral rightness of the agreement. Indeed, it is within the sphere of agreements that the "moral universe of guilt, conscience, and duty

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has, through its free choice, control over actions . . . it is subject to divine providence in a special manner, so that something is imputed to it as a fault, or as a merit; and there is given it accordingly something by way of punishment or reward.").

168. *See supra* note 167 and accompanying text.

169. *See* Aquinas, *supra* note 167, at Vol. I, Q.22, Art. 2; *see also supra* notes 159-62 and accompanying text.

170. *See* Samuel Vincent Jones, *Darfur, The Authority of Law and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 97, 111 (2007) (discussing arguments that "the law is limited by morality and . . . the obligation to obey it may be overridden in extreme cases") (citing H.L.A. HART, THE CONCEPT OF LAW 225 (1961); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897)); *see also* Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT'L L. 249, 294 (2006) (stating that although "there is a duty of obedience or an obligation to comply with IHL, the moral preeminence of the socio-contractarian influences on conduct may cause the civilian[s] to deem themselves excused from their obligation[s] to obey the law or refrain from hostilities").

171. *See* Samuel V. Jones, *The Moral Plausibility of Contract: Using the Covenant of Good Faith to Prevent Resident Physician Fatigue-Related Medical Errors*, 48 U. LOUISVILLE L. REV. 265, 293 (2009) [hereinafter Jones, *The Moral Plausibility of Contract*] (discussing the need for moral authority behind contractual relationships).

172. *Id.*

. . . [takes] its inception."[173] Our belief that consent begets moral obligation emanates from the idea that when parties form agreements with one another, each believes that he or she is made better off by the transaction.[174] The assumption that each individual knows what is best for his or her life metamorphoses into a belief that what the individual is agreeing to is right for him or her.[175] As a result, individuals' right to form and execute agreements without interference, so that they can achieve better outcomes based on their own individual specific knowledge and interest, supersedes any judgment of others who might disagree with the outcome or consequences of an actor's voluntary conduct.[176]

The Gendered position presumes to ignore the societal value in respecting agreements by exercising authority over an individual's choices regarding matters that are often fundamentally personal and inherently immune to sovereign governance or scrutiny. This approach is inconsistent with well-established jurisprudential principles regarding social interference and individual liberty. As John Stuart Mill reasoned in his famous work *On Liberty*, when one overrules or denies another's choice of direction and exercise of autonomy on self-regarding matters, the intrusion can only be "grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied" given that no one is more acquainted with the individual's personal circumstances than he or she.[177] Mill justifies his position by highlighting the interest and knowledge disparities between the actor and the person interfering:

> [The actor] is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong. . . .[178]

Mill's reasoning, coupled with the perceived moral rightness inherent in consensual agreements, the inclination to respect human dignity, and societal

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173. *Id.* at 292-93 (first alteration in original) (quoting Friedrich Nietzsche, *On the Genealogy of Morals* (1887), *reprinted in* CLASSICAL READINGS IN CULTURE AND CIVILIZATION 95, 99 (John Rundell & Stephen Mennell eds., 1998)).

174. *Id.* at 291.

175. *Id.*

176. *See id.*

177. *See* Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 291 (2011) (quoting JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* PHILOSOPHY OF LAW 219, 221-22 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991)).

178. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* PHILOSOPHY OF LAW 219, 221 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

respect for personal autonomy, catapults consent or "free choice into the realm of moral rightness."[179] An actor's right to choose for himself is a humanistic and societal good that is independent of the wisdom of his choices. Because the Gendered approach fails to recognize the individual and the societal cost of interfering with or ignoring an individual's consent, Mill would assert that it is ill positioned, as any benefits that might be gained are wholly outweighed by the harm it produces collectively and individually within society.

D. Consent and Reasonable Alternatives

As discussed, respecting consent or recognizing the preeminence of consent is well justified. Nevertheless, reliance on consent in the victim identification process cannot be defended without careful examination of the merit of the purported consent on which it relies. To do so, one must consider the circumstances under which the purported consent is tendered. Don Herzog posits, rather persuasively, that in order for consent to be effective, there must be some reasonable alternative to withholding it.[180] He reasons that if giving consent is the only means to survive or avoid starvation, as may be the case for Category D and E individuals, the purported consent is ineffective, because there is no reasonable alternative to withholding it.[181] To support his claim, Herzog poses the following scenario: If "a merchant [is] at sea, and a vicious storm blows up; [and] the only way [the merchant] can survive is to throw . . . goods overboard" and he does so, the merchant does not act voluntarily.[182] Herzog claims that the harmful nature of the storm and the merchant's need to survive vitiate the voluntary nature of the merchant's actions, because there is no reasonable alternative to the merchant's throwing the goods overboard.[183] Herzog's claim presents at least one crucial challenge to the merit of the Liberal claim as it relates to consent.

Indeed, interpretations or approaches to victim identification that view consent as effective so long as it is not tainted by the presence of obstructive agents, such as fraud, force, and coercion, are limited given that such obstructive agents need not be present to nullify or vitiate consent. As Herzog's merchant hypothetical illustrates, one can be faced with circumstances that vitiate consent even in the absence of obstructive interferences such as coercion.[184] The emphasis on fraud, force, and coercion, as illustrated in anti-trafficking juridical frameworks, arises from the basic premise that an obstructive agent like coercion is merely one clear means to highlight the lack of reasonable alternatives available to the actor, which Herzog argues must be present in order for consent to be effective.[185] Hence, the merit or validity of an individual's consent is

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179. Jones, *The Moral Plausibility of Contract*, *supra* note 171, at 291.

180. HERZOG, *supra* note 138, at 225.

181. *Id.* at 226-27.

182. *Id.* at 227.

183. *Id.*

184. *Id.*

185. *Id*. at 225 ("[T]o say one has consented requires that there have been some way of

inextricably connected to the factual context under which the consent is purportedly given. Herzog's contention, however, does not nullify the merits of Liberal reliance on the preeminence and effectiveness of consent even in cases where there is a clear lack of reasonable alternatives to withholding it.

Herzog's claim regarding the availability of reasonable alternatives as a prerequisite for consent appears strained by his neglect of certain empirical realities. First, very few people can live without subordinating or subjecting themselves to others to some degree. In that sense, virtually everyone is in a position of vulnerability, and therefore is subject to making choices, even of an unpalatable nature, that are forced upon them because of their status within the social hierarchy. The underlying premise for this view is advanced and defended by Robert Nozick in his influential piece *Anarchy, State, and Utopia*.[186] Nozick argues, contrary to Herzog, that an individual's compulsion to choose between working or starving does not render the apparent consent to work involuntary.[187] He asserts that the actor's consent is voluntary so long as the actor's choice between two "unpalatable alternatives" was not the result of improper actions or intentions of the person to whom the consent is given.[188] Hence, so long as the person to whom consent is given is not the cause of the impending starvation, or lack of reasonable alternatives, then the consent is voluntary.[189]

Turning to the Reis example, Nozick's claim, when taken to its logical limit, would be that so long as the slave labor camp is not responsible for the lack of palatable alternatives Reis finds himself faced with, Reis's choice to work at the labor camp is just as voluntary as the labor camp's choice to permit him to work.[190] Herzog would likely contend that because Reis had no reasonable alternative to working at the slave labor camp, given that his alternative would be to starve and live without shelter, Reis's consent is involuntary. Although neither Herzog's nor Nozick's treatment of the consent question sufficiently considers

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withholding consent. . . . [T]o say some action [is] voluntary requires that there were alternatives.").

186. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

187. *Id.* at 263-64 ("A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.").

188. *Id*.

189. For example, Nozick states:

> Similar considerations apply to market exchanges between workers and owners of capital. *Z* is faced with working or starving; the choices and actions of all other persons do not add up to providing *Z* with some other option. (He may have various options about what job to take.) Does *Z* choose to work voluntarily? (Does someone on a desert island who must work to survive?) *Z* does choose voluntarily if the other individuals *A* through *Y* each acted voluntarily and within their rights.

Id. at 263.

190. *See id.* Our right to engage in certain transactions is attached to another's right to engage, or not, in the same transaction. *Id.* at 264 ("Rights to engage in relationships or transactions have hooks on them, which must attach to the corresponding hook of another's right that comes out to meet theirs.").

the connection between an individual's choices and the resulting condition that gave rise to the risk-producing alternatives, Nozick's treatment offers the more effective approach because it holds both the consentor and consentee accountable as autonomous beings for their choices. While conversely, Herzog's approach seemingly ignores accountability and autonomy.

To illustrate, let's draw from Herzog's illustration regarding the merchant.[191] Herzog asserts that the throwing of the goods into the water is involuntary because of the merchant's need to survive.[192] Herzog claims that if the goods were being shipped for someone else, that person would not be justified in blaming the merchant for discarding the goods, because the merchant had no real choice but to throw the goods overboard.[193] Herzog's contention, however, fails to consider the conduct of the merchant that shaped or facilitated the conditions under which the merchant found himself. To ascribe merit to Herzog's claim, one must rely on there being no connection between the merchant's actions and the perilous situation in which he found himself, which may not be the case in all situations.

Let's assume that the merchant was told before sailing off that there was a very high probability that a storm might cross his path. Let's also assume that the merchant was informed that the goods should not be shipped in the vessel he chose, given the high probability of the storm and the small size of the vessel. Additionally, let's say that the merchant fully understood the risks, but knew that his compensation for sailing with the goods would be much greater than it would be on another day, using a larger vessel. Finally, let's assume that the merchant, fully aware of the facts, deliberately sets sail with the goods in order to maximize his financial position, with knowledge of the conditions he will likely encounter. If the storm hits, the merchant knows he will throw the goods overboard because that was the planned action in the event his decision to sail did not yield a favorable result. The act of jettisoning the goods in this scenario is not the result of an immediate sudden crisis thrust upon him, but rather a predetermined result of a sequence of choices that the merchant knew or suspected he would make in the event the decision to sail did not yield the intended favorable results. Whether the merchant's voluntary undertaking is born out of ill-conceived ambition or careful deliberation, the merchant's decision to sail would be entitled to respect and any goods lost because of his decision would rightfully subject the merchant to blame. The merchant's decision to accept the risk and sail may indeed constitute a very poor and morally objectionable decision. But any error the merchant has committed against advice and warning would be far outweighed by what John Stuart Mill described as the "evil" of allowing others to restrict the merchant's freedom based on their notions of what the merchant should do under the guise of protecting him from himself or from being exploited.[194]

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191. *See supra* notes 180-85 and accompanying text.

192. HERZOG, *supra* note 138, at 227.

193. *Id.*

194. *See* MILL, *supra* note 178, at 222 ("[I]n each person's own concerns, his individual spontaneity is entitled to free exercise. . . . All errors which he is likely to commit against advice

Hence, when Category D and E individuals agree to perform certain acts, those acts may not be born out of immediacy, but may emanate from deliberate actions and informed choices of the actor. An individual's deliberate choices and exercise of consent determine or set conditions under which the individual acts, pursues future choices, or submits to conditions under which there is a lack of possible choices. Thus, a proper evaluation of consent considers the availability of reasonable alternatives in conjunction with an examination of the actor's exercise of autonomy and choices that produced the condition of limited palatable or reasonable alternatives. Put differently, evaluation of the effectiveness of an individual's consent must incorporate some investigation into the availability of the individual's reasonable alternatives to withholding the consent and the circumstances that led the actor to a condition of vulnerability and lack of palatable alternatives.

To offer a simplistic illustration of this claim, assume that one finds oneself in the middle of a jungle without food or water after a plane crash, and the only means to acquire necessities is to consent to work for a slave labor camp or brothel in Las Vegas. Most would reasonably agree that the consent is vitiated by the stark lack of reasonable alternatives to withholding consent. But if the same consent is given as a means to procure wine and caviar rather than food and water, which is plentiful, or if the consent to work in the brothel or slave labor camp is necessitated by the actor having willingly gambled and drunk away a small fortune the night before, the claim of victimization on the basis of forced consent is substantially weakened by the deliberate actions of the actor that created the unfortunate circumstances.

Under this view, one might find that laborers such as Reis, and other Category D and E individuals, may not have consented to the exchange sufficiently to bar them from being classified as victims. However, the fact that they find themselves vulnerable and faced with unpalatable choices does not, in and of itself, entitle them to victim classification or nullify their consent. The question remains complex. What appears more certain is that if consent is a question that cannot be decided without consideration of the reasonable alternatives and the conditions that led to the circumstances giving rise to the lack of alternatives, then distinguishing between migrant smuggling and human trafficking criminals and victims is not possible in many circumstances.

CONCLUSION

Issues surrounding social influence and the limits of consent within the context of the migrant smuggling and human trafficking phenomenon are complex. By isolating the jurisprudential, conceptual, and practical distinctions between victims of human trafficking and willing participants in migrant smuggling schemes, one can readily ascertain that the capacity to distinguish between the two is largely informed by societal notions about human dignity and

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and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.").

moral culpability and how each situates consent.

In carefully weighing the two dominant approaches, this Article proposes a jurisprudential paradigm that recognizes consent as a necessary prerequisite to respecting human dignity and advancing the law's authority. The Gendered approach to resolving questions of consent and victim identification not only fails to account for the moral rightness of consent, but also discounts the connection between human dignity and the exercise of personal autonomy. The Liberal approach, as discussed, safeguards the preeminence of consent and respect for human dignity and voluntary undertakings. To be effective, though, a careful evaluation of the availability of reasonable alternatives and sequence of choices that gave rise to the lack of palatable alternatives is necessary. Regardless of whether one is jurisprudentially inclined to agree with the Gendered or Liberal approach, what appears undeniable is that each view is supported by an anti-trafficking construct. Hence, confusion regarding victim identification is likely to continue—and probably increase—so long as the contours of consent remain ill-defined within the spectrum of human trafficking and migrant smuggling jurisprudential framework.

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NOTES

THE IMPACT OF PROHIBITING LEGAL SERVICE CORPORATION OFFICES FROM REPRESENTING UNDOCUMENTED IMMIGRANTS ON MIGRANT FARMWORKER LITIGATION

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INTRODUCTION

In July 2010, a federal court enjoined Arizona's controversial law that requires officers, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States . . . to determine the immigration status of that person."[1] As a result, the place of immigrants in American society—especially those who are undocumented or do agricultural work—is again prominent in the national discourse.[2] The federal government has also been re-evaluating the role of the Legal Services Corporation (LSC) in the U.S. civil litigation regime, increasing its funding to approximately $420 million.[3] It also allowed LSC offices to take attorney fee-generating cases under certain circumstances in 2009.[4] In 2010, Congress proposed allowing LSC offices to

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1. Support Our Law Enforcement and Safe Neighborhoods Act, ARIZ. REV. STAT. § 11-1051 (2010), *invalidated in part by* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

2. *See, e.g.*, Chris Collins, *Whose Jobs Are Done by Illegal Immigrants?*, FRESNO BEE, Nov. 18, 2010, http://www.fresnobee.com/2010/11/18/2163652/whose-jobs-are-done-by-illegal.html#storylink=mirelated.

3. Linda E. Perle, *Congress Increases LSC Funds and Eliminates Attorneys' Fees Restriction*, CENTER L. & SOC. POL'Y (Dec. 10, 2009), http://www.clasp.org/issues/in_focus?type=civil_legal_assistance&id=0002.

4. Fee-Generating Cases, 45 C.F.R. § 1609.3 (2010).

undertake class action lawsuits.[5] In light of these events, it is important to examine LSC's history with migrant and seasonal farmworkers,[6] how that relationship has changed, and what effects those changes have had.

Each year hundreds of thousands of migrant and seasonal agricultural workers travel to Midwestern states to perform a wide variety of agricultural tasks. The number of migrants (workers and their families) varies widely by state, from approximately 10,000 in Iowa to more than 160,000 in Michigan in 1993.[7] According to the U.S. Department of Labor, 53% of those workers are undocumented immigrants.[8] In many cases, these workers experience very poor working and living conditions. Regarding working conditions, this has meant underpayment, undisclosed or unauthorized deductions, manipulation of wage rates by their supervisors, and a lack of job security.[9] Regarding living

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5. Hans A. Von Spakovsky, *In the Omnibus Bill, a Treat for the Litigation Industry*, NAT'L REV. ONLINE (Dec. 16, 2010), http://www.nationalreview.com/corner/255500/omnibus-bill-treat-litigation-industry-hans-von-spakovsky. This prohibition on class action lawsuits does not apply to collective action suits under the Fair Labor Standards Act (29 U.S.C. § 216(b) (2006)), since those are not governed by Federal Rule of Civil Procedure 23 (45 C.F.R. § 1617.2(a) (2010)). Voicemail from Lisa Krisher, Attorney, Ga. Legal Servs., to author (Mar. 7, 2011, 2:00 PM) [hereinafter Krisher]; *see also*, Brian Herrington, *Fair Labor Standards Collective Action vs. Rule 23 Class Action*, BARRETT LAW GROUP, P.A. (Jan. 15, 2010), http://www.bherringtonlaw.com/2010/01/fair-labor-standards-act-collective-action-vs-rule-23-class-action/.

6. The law only differentiates between migrant and seasonal farmworkers by definition, not the protections offered. Pursuant to 29 U.S.C. § 1802(8)(A), "the term 'migrant agricultural worker' means an individual who . . . is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A). A seasonal farmworker is defined as "an individual who . . . is not required to be absent overnight from his permanent place of residence." *Id.* § 1802(10)(A). Since both groups are protected almost identically under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and Fair Labor Standards Act (FLSA), the term "migrant farmworkers" in the body of this Note encompasses both groups.

7. NAT'L CTR. FOR FARMWORKER HEALTH, INC., MIGRANT AND SEASONAL FARMWORKER DEMOGRAPHICS 3 (2009) (citing ALICE LARSON & LUIS PLASCENCIA, OFFICE OF MINORITY HEALTH, MIGRANT ENUMERATION STUDY (1993)), *available at* http://www.ncfh.org/docs/fs-Migrant%20Demographics.pdf. 1993 was the most recent year for which I could find data on all fifty states. Indiana had approximately 30,000 migrant and seasonal farmworkers that year. *Id.*

8. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002, at ix (2005), *available at* http://www.doleta.gov/agworker/report9/naws_rpt9.pdf; *see also* Mark Heller, Managing Attorney, Advocates for Basic Legal Equal., Inc. (ABLE), History and Demographics of Migrant Farmworkers in the United States at the 2010 Committee on Regional Training (CORT), Midwest Farmworker and Immigrant Worker Law Training (June 2, 2010) [*hereinafter* CORT Training]. The CORT Training was held June 2-4, 2010 to train legal outreach workers on how to engage, advise, and perform intake with migrant and seasonal farmworkers.

9. *See* MICH. CIVIL RIGHTS COMM'N, A REPORT ON THE CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS IN MICHIGAN 34-35 (2010) (internal citations omitted), *available at* http://www. michigan.gov/documents/mdcr/MSFW-Conditions2010_318275_7.pdf.

conditions, "[m]igrant farmworkers and their families are often forced to endure substandard housing conditions including structural defects, overcrowding, close proximity to pesticides and poor sanitation."[10]

To combat these conditions, two federal laws provide a private right of action for farmworkers and their families: the Migrant and Seasonal Agricultural Workers Protection Act (AWPA)[11] and the Fair Labor Standards Act (FLSA).[12] The AWPA generally requires that workers receive prompt, full payment and safe, healthy housing.[13] The FLSA affords workers liquidated damages of up to 100% of their delinquent pay and provides for attorney fees.[14] Each summer, farmworkers are informed of their rights under these laws by attorneys and interns from migrant farmworker legal programs traveling to the camps and hotels where workers stay.[15] Many such programs are operated by Legal Services Corporation (LSC) offices, independent state legal aid offices that receive federal funding to provide legal representation for indigent community members.[16] However, due to changes in funding in 1996, LSC offices are almost completely prohibited from representing undocumented workers outside of initial intake services.[17] In many states there are no other legal aid organizations besides these offices for low-income individuals or families with dedicated programs to help migrant farmworkers.[18] Therefore, many undocumented farmworkers lack the resources to bring their claims at all.[19]

Part I of this Note presents a historical overview of the relationship between LSC and migrant farmworkers and the laws protecting workers. Part II discusses how LSC critics influenced the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) and how the restrictions impacted LSC

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10. *Id.* at 10 (citing William Kandel, U.S. Dep't of Agric., Profile of Hired Farmworkers, A 2008 Update 28 (2008)).

11. 29 U.S.C. §§ 1801-72 (sometimes abbreviated MSAWPA, MSWPA, or MSPA).

12. *Id*. §§ 201-19 (2006 & Supp. 2010).

13. *Id*. §§ 1822-23 (2006).

14. *See id.* § 219(b); Leach v. Johnston, 812 F. Supp. 1198, 1214 (M.D. Fla. 1992), *disapproved of by* Aimable v. Long & Scott Farms, 20 F.3d 434 (11th Cir. 1994).

15. The CORT Training annually brings together outreach workers from six Midwestern states for training on legal aspects and outreach. After the training, the outreach workers travel to workers at their residences to inform them of their legal rights and begin the representation process if there are violations of applicable federal or state law and the workers wish to be represented against their bosses.

16. BRENNAN CTR. FOR JUSTICE, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? 2 (2001) [hereinafter BRENNAN CTR.].

17. Restrictions on Legal Assistance to Aliens-Prohibition, 45 C.F.R. § 1626.3 (2010).

18. At the 2010 CORT Training, there were no non-LSC outreach workers from Indiana, Wisconsin, or Iowa.

19. *See* David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 577-78 (1995) (discussing how, if a legal services attorney cannot take a claim because of conflict of interest, the practical effect is a bar to representation for an indigent client altogether).

representation of migrant workers. Part III is an analysis of the Note's two hypotheses: (1) the prohibition on LSC offices representing undocumented immigrants has correlated with a sharp drop in migrant farmworker litigation; and (2) the litigation rates in states that do not have non-LSC offices handling migrant farmworker litigation are lower than those that do. Part IV offers specific recommendations on how to ensure the legal needs of all migrant farmworkers are adequately met.

I. OVERVIEW AND BACKGROUND

A. LSC

The history of LSC and its offices' interaction with migrant farmworkers began in 1964 with the creation of the Office for Economic Opportunity (OEO), established by the Economic Opportunity Act of 1964.[20] OEO provided federal funding for quasi-independent legal aid organizations across the country to provide legal access to indigent clients.[21] Recognizing even then the difficult working and living conditions that migrant farmworkers faced, "[t]he only specific national earmarking of funds was for services to Native Americans and migrant farmworkers."[22] However, OEO legal aid quickly fell out of favor with many, as lawyers in OEO offices "lustily sued local authorities across the [United States] on behalf of poor clients."[23] As a result, the Richard Nixon Administration, under the auspices of OEO director (and staunch legal aid opponent) Howard Phillips,[24] "began dismantling the OEO during the early [19]70s."[25] Congress transferred the responsibility for indigent legal aid to the newly-formed LSC.[26] LSC is subject to increased oversight by Congress and the President, "funded by Congress but run independently, by eleven board members named by the President and confirmed by the Senate."[27] LSC oversees hundreds of legal aid offices across the United States.[28] These offices are prohibited or

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20. Economic Opportunity Act of 1964 (EOA), Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

21. Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 36 (2007).

22. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POL'Y, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 9 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0158.pdf.

23. *The Law: Corporation for the Poor*, TIME, July 1975, at 64 [hereinafter *The Law*], *available at* http://www.time.com/time/magazine/article/0,9171,913362,00.html.

24. *See* BRENNAN CTR., *supra* note 16, at 3 ("Phillips nearly succeeded in entirely eliminating federal funding for legal aid.").

25. *The Law*, *supra* note 23, at 64.

26. *See History of Civil Legal Aid*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/About/About_HistoryCivil (last visited Jan. 22, 2012).

27. *The Law*, *supra* note 23, at 64.

28. There are LSC offices in all fifty states, the District of Columbia, and four U.S. territories

severely restricted from undertaking impact litigation (such as criminal or selective services cases) or prohibited political activities,[29] and are supposed to focus on helping individual indigent clients.[30] The earmark allocated to assisting migrant farmworkers remained.[31] This money is primarily spent in outreach by staff attorneys and legal interns visiting farmworkers at their residences to educate them on legal protections and to ascertain if the workers are experiencing any problems.[32]

Even with this narrowed and less-controversial focus, LSC continued to be criticized by groups and prominent individuals concerned that LSC was "a haven for ideologically-driven lawyers who use public funding to further their own aims, rather than to help low-income people."[33] Harry Bell, board member of the American Farm Bureau Federation ("Farm Bureau"), has been a vocal critic.[34] Farm Bureau has maintained that legal outreach workers were "soliciting business and stirring up controversy particularly among migrant and seasonal farmworkers."[35] Farm Bureau advocated abolishing LSC during Ronald Reagan's Administration.[36] While the Reagan Administration was unsuccessful in eliminating the program entirely,[37] LSC's funding was substantially reduced in inflation-adjusted dollars.[38] However, this did not quiet critics of LSC. As its

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or commonwealths. *LSC Programs*, LEGAL SERVICES CORP., http://www.lsc.gov/find-legal-aid (last visited Jan. 22, 2012).

29. *See* Alan W. Houseman & Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 242, 242 (Ilze Sprudsz Hirsh ed., 2002).

30. Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 62 (2007). "I want everyone to know the reason for the prohibitions is because legal services . . . [was intended] to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency or suing a legislature or suing the farmers as a class." *Id*. at 61 n.50 (statement of Sen. Pete Domenici).

31. *See* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 613 (2001).

32. For example, LSCs are budgeted only ten dollars per potential client and spend an average of only $150 on an actual client. *Id.* Indiana Legal Services, on the other hand, spent approximately $2000 per week on salaries and expenses for migrant farmworker outreach in summer 2010. E-mail from Melody Goldberg, Dir., Migrant Farmworker Law Ctr. at Indiana Legal Services (Jan. 6, 2011, 11:24 AM EST) (on file with author).

33. BRENNAN CTR., *supra* note 16, at 2.

34. *Id*.

35. *Id.* at 5-6.

36. *Id.* Farm Bureau partnered in this effort with the Conservative Caucus and Moral Majority. *Id*. at 5

37. Memorandum from David Hoppe of Government Relations, *Without Reforms, the Legal Services Corporation Bill Deserves a Veto* (Sept. 23, 1988) [hereinafter Hoppe], *available at* http://www.policyarchive.org/handle/10207/bitstreams/12418.pdf. The first seven budgets submitted by the Reagan Administration sought to abolish LSC completely. *Id*.

38. *See id.* ("The Administration proposes to fund LSC at $250 million, down $45 million

budget began to rise during the last two years of George H.W. Bush's presidency[39] and the first two years of the Bill Clinton Administration,[40] critics renewed their calls for LSC's reduction or transformation.[41] As is discussed later in this Note, they were successful starting in 1995.[42]

B. Migrant Farmworkers

For decades, migrant and seasonal farmworkers have played an integral role in the U.S. agricultural economy.[43] As of 1993—the last year data was available for all fifty states—there were more than three million migrant and seasonal workers in the United States.[44] Over 1.3 million were working in Texas, California, or Florida.[45] While 75% of the workers were initially born in Mexico, workers tend to be full-time U.S. residents; almost twice as many have lived in the United States for at least fourteen years as have entered within the past twelve months.[46] Despite the low pay and seasonal nature of the work, for many farmworkers it is the only income they earn during the course of the year.[47] These workers often lack skills, education, and English proficiency that would enable them to find non-agricultural work.[48] Thus, they provide a willing workforce, despite in many cases traveling over 1,000 miles[49] and working

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from fiscal 1988."); *see also* BRENNAN CTR., *supra* note 16, at 2 (noting in 1981 the budget was approximately $300 million).

39. HOUSEMAN & PERLE, *supra* note 22, at 34.

40. *Id*. at v. For Fiscal Years 1994 and 1995, Congress appropriated approximately $400 million per year. *Id*.

41. *See* Mauricio Vivero, *From "Renegade" Agency to Institution of Justice: The Transformation of Legal Services Corporation*, 29 FORDHAM URB. L.J. 1323, 1327-28 (2002).

42. *Infra* notes 147-70 and accompanying text.

43. Holley, *supra* note 31, at 583-85 (emphasizing that the abuses workers suffered in the 1940s and 1950s under the bracero program (workers from Mexico) and the original H-2 guest worker program gave rise to the Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983), the forerunner to the AWPA).

44. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 4.

45. *Id.* at 3-4.

46. *Id.* at 1.

47. *See id.* at 3 (indicating that only ten percent of the aggregate man-days of migrant farmworkers were spent doing non-farm work, compared to twenty-three percent of man-days spent not working).

48. *Id.* at 2 (noting a slight plurality of respondents (forty-two percent) believed that they did not possess the requisite skills to find other employment, whereas thirty-seven percent believed they did).

49. *See* Vivian D. Roeder & Ann V. Millard, *Gender and Employment Among Latino Migrant Farmworkers in Michigan* 7 (Julian Samora Research Institute, Working Paper No. 52, 2000), *available at* http://web.jsri.msu.edu/pdfs/wp/wp52.pdf (finding that sixty percent of migrant Latino farmworkers in Michigan come from Florida or Texas).

conditions hazardous to both their short-term and long-term health.[50] Conversely, most medium and large-scale farmers are dependent upon migrant workers as reliable low-wage labor because much of fruit and vegetable harvesting must be done by hand.[51] Indeed, farmers would not be able to maintain their profit margins without laborers willing to work long hours at minimum wage.[52] Farmers have a financial incentive to find workers who will stay for the entire growing season and are willing to stay in cheap, substandard housing.[53] A 1997 Virginia Tech study showed that almost half the migrant worker housing had communal bathrooms,[54] and almost half the respondents reported structural problems such as leaks in roofs, vermin, and lead paint.[55]

Given these circumstances, one might expect the farmers to ensure that workers are treated well to increase productivity and reduce turnover. Unfortunately, migrant farmworkers face many difficulties, especially with regards to their health and compensation.[56] "Migrant laborers generally have no employment security, no benefits, poor living conditions, poor pay, requirements to travel and work long hours, and are frequently exposed to agricultural chemicals."[57] Many workers start when they are very young.[58] They can work

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50. *See* Stephanie Little et al., Farmworker Legal Servs., Health and Safety: Labor Camp Standards, Field Sanitation, and Pesticides at the CORT Migrant Farmworker Outreach Training (June 3, 2010) (on file with author). In 1998-1999 there were 1156 cases of pesticide-related illnesses reported in California alone. Rupali Das et al., *Pesticide-Related Illness Among Migrant Farm Workers in the United States*, 7 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 303, 306 (2001).

51. *See* Yoav Sarig et al., *Alternatives to Immigrant Labor? The Status of Fruit and Vegetable Harvest Mechanization in the United States*, CENTER IMMIGR. STUD. (Dec. 2000), http://www.cis.org/FarmMechanization-ImmigrationAlternative (noting that "at least 20 to 25 percent of the U.S. vegetable acreage and 40 to 45 percent of the U.S. fruit acreage is totally dependent on hand harvesting" and "[t]he high costs of producing food in the United States, compared to the costs in less developed countries that can sell in the U.S. markets, are pushing American growers out of business").

52. *See* Collins, *supra* note 2 ("Because illegal immigrants will work for almost any wage, employers have little reason to pay other workers more.").

53. See *Howard v. Malcolm*, 658 F. Supp. 423, 427 (E.D. N.C. 1987), *infra* note 111 and accompanying text, for a description of egregious, but not unique, housing conditions facing migrant farmworkers.

54. C. THEODORE KOEBEL & MICHAEL P. DANIELS, CTR. FOR HOUS. RESEARCH, HOUSING CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS 4 (1997), *available at* http://www.vchr.vt.edu/pdfreports/ mfw_final.doc.pdf.

55. *Id.* at 8.

56. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1256-57 (N.D. Okla. 2006); Astorga v. Connleaf, Inc., 962 F. Supp. 93, 94-95 (W.D. Tex. 1996); Leach v. Johnston, 812 F. Supp. 1198, 1214 (M.D. Fla. 1992).

57. Roeder & Millard, *supra* note 49, at 1.

58. 29 U.S.C. § 213(c)(4)(A) (2006) (permitting workers to begin hand harvesting crops when they are as young as ten years old if the corporation has obtained a waiver from the Department of Labor).

in any capacity upon turning sixteen,[59] including in "occupation[s] that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen."[60] Most workers (approximately 79%) are paid hourly with minimum wage as the average wage, while approximately 16% were paid on a piece-rate basis (i.e., workers are paid "X" cents per unit of crop),[61] which makes determining whether workers have been underpaid incredibly difficult. Additionally, a provision of the FLSA exempts farmers from having to pay overtime.[62] Thus, despite half of workers working more than forty hours per week,[63] they may earn only their regular pay (almost always the minimum wage)[64] for the additional hours worked.

In addition to the low pay, agricultural work is "one of the most dangerous occupations in the country."[65] Workers, including minors, are regularly put in danger by "toxic pesticides, heavy machinery, and other hazards."[66] Federal regulations require employers to provide employees with protective equipment if they enter a field after spraying[67] and prohibit spraying within a certain number of hours of workers having to perform general work in the fields.[68] Still, workers frequently exhibit signs of pesticide poisoning when visited by medical workers.[69] Workers in some states face additional risk because agricultural employers are not required to carry worker's compensation insurance.[70] Employers know they are unlikely to be sanctioned for failing to compensate workers for lost time or provide transportation for workers so they can seek medical treatment.[71]

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59. *Id.* § 213(c)(1-2) (offering protections for workers ages fifteen and younger).

60. *Id.* § 213(c)(2).

61. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2; *see also* MICH. CIVIL RIGHTS COMM'N, *supra* note 9, at 3 ("Other testimony . . . established that the accepted industry practice of growers paying piece rates to workers often results in workers being paid less than the required minimum hourly wage.").

62. 29 U.S.C. § 213(b)(12).

63. *See* NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2 (noting that twenty-five percent of all workers average more than fifty hours per week).

64. *Id.*

65. FARMWORKER JUSTICE & OXFAM AM., WEEDING OUT ABUSES: RECOMMENDATIONS FOR A LAW-ABIDING FARM LABOR SYSTEM 1 (2010), *available at* http://www.fwjustice.org/files/immigration-labor/weeding-out-abuses.pdf.

66. OXFAM AM., LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 40 (2004), *available at* http://www.oxfamamerica.org/files/like-machines-in-the-fields.pdf.

67. Entry Restrictions, 40 C.F.R. § 170.112(c)(4) (2011).

68. *Id.* § 170.112(c)(3); *see also* Stephanie Little et al., *supra* note 50.

69. Das et al., *supra* note 50, at 306-07.

70. *See, e.g.*, IND. CODE § 22-3-2-9(a)(2) (2011) (Under the heading of "exempt employees," Indiana law states that "IC 22-3-2 through IC 22-3-6 shall not apply to . . . (2) farm or agricultural employees"). This near-blanket exemption is the exception among Midwestern states. *See* 820 ILL. COMP. STAT. ANN. 305/3-19 (West 2012); MICH. COMP. LAWS ANN. § 418.115 (West 2012).

71. *See, e.g.*, FARMWORKER JUSTICE & OXFAM AM., *supra* note 65, at 4-5.

Therefore, the employers thus have little incentive to do so.[72]

Housing conditions are also problematic, and there are almost as many non-workers living in migrant camps as there are workers living there.[73] A 2001 Housing Assistance Counsel survey "found that 61% of migrant farmworker housing surveyed in Michigan was overcrowded."[74] Forty-five percent of the housing was at least "moderately substandard";[75] of those units, more than one-quarter of houses "lacked at least one working appliance,"[76] while "over 50% of the units surveyed were adjacent to pesticide-treated fields."[77] Despite these issues, farmworkers and their families too often do not know of available remedies.[78]

C. Legal Protection: From the Farm Labor Contractor Registration Act to the Migrant and Seasonal Agricultural Workers Protection Act and Fair Labor Standards Act

Recognizing these difficulties—and the inadequacy of common law remedies—Congress passed the Farm Labor Contractor Registration Act of 1963 (FLCRA) in 1964.[79] The FLCRA created new protections for migrant workers:

(1) requiring farm labor contractors (FLCs) to register with the U.S. Department of Labor prior to engaging in contracting;[80]
(2) stripping FLCs of their licenses if they provided false or misleading information to workers concerning terms of employment[81] or "fail[ing] . . . to comply with the terms of any working arrangements he has made with migrant workers";[82]

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72. At one Indiana farm, an H-2(A) visa holder was told that he would have to pay for medical care for his work-related injury, despite the farmer being required to carry workers compensation insurance. *See* 8 U.S.C. § 1188(b)(3) (2006) (describing the requirements for an employer to get a labor certification to hire H-2(A) workers).

73. ALICE C. LARSON, STATE OF MICH. INTERAGENCY MIGRANT SERVS. COMM., MIGRANT AND SEASONAL FARMWORKER ENUMERATION PROFILES STUDY 21 (2006), *available at* http://www.michigan.gov/documents/dhs/DHS-MSFW-Study-2006_179382_7.pdf (indicating a 2004-2006 study estimated 45,800 migrant farmworkers in Michigan and 44,916 non-workers who were living in camps).

74. MICH. CIVIL RIGHTS COMM'N, *supra* note 9, at 10.

75. *Id*. at 10-11.

76. *Id.* at 11.

77. *Id.*

78. *See* Richard S. Fischer, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531, 535 (1981) ("Employers and their own crewleaders often take advantage of them but beyond bitterness they know of no recourse." (citations omitted)).

79. Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983).

80. *Id*. § 4(a).

81. *Id*. § 5(b)(2).

82. *Id*. § 5(b)(4).

(3) requiring numerous disclosures to workers before starting work concerning the nature of their employment;[83] and
(4) requiring the FLCs to pay workers promptly and provide them with appropriate documentation showing the total hours worked and the applicable tax withholding.[84]

These provisions afforded many new protections to workers and were maintained as the foundation for worker protections when the AWPA[85] was passed to replace the FLCRA.

However, the shortcomings of the FLCRA soon became apparent. First, as farms grew in size and complexity in the years following the passage of the FLCRA, farmers were more likely to contract the labor directly or use a personnel manager rather than an FLC.[86] However, the FLCRA only subjected FLCs to the law and defined them as "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment."[87] This definition excluded producers and farmers who directly hire workers,[88] even though they subject their workers to the same abuses that FLCs do.[89] Thus, the law could not ensure proper treatment for workers in all employment situations.

More problematically, farmworkers had no private right of action under the FLCRA.[90] The only means of FLCRA enforcement was for federal or state department of labor (DOL) officers to inspect the migrants' working conditions or FLC's payroll records and issue fines if the officers observed violations.[91] Unfortunately, this punishment was almost non-existent: A fine was levied only once during the first ten years the FLCRA was in effect.[92]

While there were some in Congress who sought to further reduce the scope of those subject to the FLCRA,[93] the majority of lawmakers understood the

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83. *Id*. § 6(b).

84. *Id*. § 6(e).

85. 29 U.S.C. §§ 1821-1823 (2006).

86. *See* Fischer, *supra* note 78, at 541-42. Even in the mid-2000s, as FLCs have become more prevalent than in years past, almost eighty percent of those responsible for migrant farmworker working conditions would have been able to escape legal repercussions. *See* NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2 (reporting that growing and packing firms hired 79% of workers, while only 21% of workers were hired by FLCs, but emphasizing that this 21% was an increase of 14% in 1993-94).

87. § 3(b), 78 Stat. at 920.

88. "Such term shall not include . . . any farmer . . . who engages in any such activity for the purpose of supplying migrant workers solely for his own operation. . . ." *Id.* § 3(b)(2).

89. Fischer, *supra* note 78, at 541.

90. *Id.* at 535.

91. §§ 7-9, 78 Stat. at 923-24.

92. Fischer, *supra* note 78, at 535.

93. "[A]mending the section defining 'farm labor contractor' to exempt from coverage corporations that hire farmworkers for their own operations, all the permanent and temporary

inadequacies of the law and sought to correct them by replacing the FLCRA with the AWPA.[94]

The AWPA included several new important protections for migrant workers that were not in the FLCRA. The first major change was to subject almost every employer to the worker protection requirements, whether they used an FLC or directly hired workers themselves.[95] The AWPA also lowered an important administrative and judicial barrier to litigation by clearing up "a great deal of confusion among agricultural employers and courts as to whether an employer was subject to the provisions of the FLCRA."[96] This makes it much more difficult for farmers to escape liability by either hiring workers directly or claiming they are powerless over the acts of their contractors, since they could be held jointly and severally liable for damages with FLCs.[97]

Second, the AWPA gives workers a private right of action against their employers without having to first exhaust any administrative remedies: "[a]ny person aggrieved by a violation of this chapter or any regulation under this chapter . . . may file suit in any district court of the United States . . . without regard to exhaustion of any alternative administrative remedies provided herein."[98] This right of action is available to both documented and undocumented workers[99] and decreases the costs of obtaining relief; farmworkers can proceed

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employees of such corporations, and all agricultural cooperatives." *Id.* at 539-40 (quoting the Farm Labor Contractor Registration Act Amendments of 1980, 126 CONG. REC. S9791-92 (daily ed. July 24, 1980)).

94. 29 U.S.C. §§ 1801-1872 (2006).

95. 29 U.S.C. § 1803(a) lists the limited circumstances under which an agricultural employer can be fully exempt from the AWPA.

96. Daniel B. Conklin, Note, *Assuring Farmworkers Receive Their Promised Protections: Examining the Scope of AWPA's "Working Arrangement,"* 19 KAN. J.L. & PUB. POL'Y 528, 535 (2010). There is a narrow exception for family farms that employ non-family members for less than 500 man-days. 29 U.S.C. § 1803(a)(2).

97. *See* Antenor v. D & S Farms, 88 F.3d 925, 929-30 (11th Cir. 1996) (citing the AWPA definition of joint employment [29 C.F.R. § 500.20 (2011)] as "a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a *joint employment* situation does not exist."). Establishing privity between the farmer and FLC, however, remains a challenge in holding farmers directly responsible. *See generally* Aimable v. Long & Scott Farms, 20 F.3d 434 (11th Cir. 1994) (holding that the farmer was not responsible for workers' AWPA damages because the farmer was not a "joint employer" with the FLC).

98. 29 U.S.C. § 1854(a).

99. *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987). In issuing the writ of mandamus, the court also held that litigants' immigration status was not discoverable, even for determining legitimacy of representation. *Id.* ("There is no authority, therefore, to inquire into the documentation of aliens to determine whether the Texas Rural Legal Aid, Inc. [an LSC office], Farm Worker Division, has authority to represent the petitioners in this case.").

directly to litigation without having to go through administrative procedures that the federal or a state department of labor was required to undertake before fining FLCs.[100]

Moreover, the fairly expansive personal jurisdiction for farmers and FLCs[101] means farmworkers have increased access to the federal court system, since in most cases they can sue in either their home state or the state in which they worked.[102] LSC offices are particularly helpful in litigation, since attorneys from the states where workers work during the growing season can coordinate with attorneys in LSC offices in states where the migrant workers live during the non-growing season. For instance, in *Castorena v. Mendoza*,[103] a case involving workers who migrated from the Rio Grande Valley area of Texas to Indiana and Illinois for work, Indiana Legal Services (ILS) worked closely with an attorney in Illinois and with Texas Rio Grande Legal Aid, an LSC office near the workers' homes, filing the lawsuit in Texas.[104]

Third, the AWPA not only provides for restitution to farmworkers for overdue and incomplete pay, it provides statutory damages of $500 per worker per violation by the farmer or FLC;[105] fines assessed under the FLCRA for similar violations did not get paid out to farmworkers.[106]

Finally, the statute provides a remedy for those people living in migrant housing but not working, usually family members of workers. If the employer has not provided safe and adequate housing,[107] anyone residing in that housing

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100. *See* Conklin, *supra* note 96 at 537.

101. *See, e.g.*, Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1193 (9th Cir. 2001) (going to Arizona and recruiting workers to work in another state, "it is reasonable for the [Arizona] district court to exercise jurisdiction over Martin Farms").

102. *See* Holley, *supra* note 31, at 586.

103. Plaintiff's Original Complaint, Castorena v. Mendoza, 1:08-cv-374 (S.D. Tex 2008).

104. E-mail from Melody Goldberg, Dir., Migrant Farmworker Law Ctr. at Indiana Legal Services (Nov. 18, 2010, 4:46 PM EST) (on file with author).

105. 29 U.S.C. § 1854(c)(1). Specifically this section states:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

Id.

106. Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-528, § 9, 78 Stat. 920, 924 (repealed 1983).

107. *See* 29 U.S.C. § 1823; Applicable Federal Standards: ETA and OSHA housing standards, 29 C.F.R. § 500.132(a) (2011). The section states:

> (1) A person who owns or controls a facility or real property to be used for housing

gains a private right of action regardless of whether he or she is employed by the farmer or FLC.[108] In 2006, the State of Michigan Interagency Migrant Services Committee estimated that while there were approximately 45,554 migrant and seasonal farmworkers in the state,[109] there were almost 45,000 non-workers living in migrant housing.[110] This AWPA provision offers workers and their families protection in an area where particularly horrifying abuses are suffered. The court in *Howard v. Malcolm* described an egregious set of violations at a camp in which:

> 1. Mice and vermin were "all around" the camp; 2. Food storage and preparation areas were dirty and unsanitary; 3. There was no hot water in the bathrooms and showers; 4. Toilet paper was rarely available; 5. In Building # 1, some of the screens were torn off the building and there were holes in the floor and walls; 6. In Building # 3, rooms leaked, there was water damage to and rot within the walls, and screens were torn. . . .[111]

Because a farm labor camp operator was ultimately found liable, rather than an FLC,[112] he would have escaped liability under the FLCRA, but was liable under the AWPA.[113]

The FLSA is also a meaningful complement to the AWPA's protections of workers. The FLSA sets the minimum wage that each worker must be paid in

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> any migrant agricultural worker, the construction of which was begun on or after April 3, 1980, and which was not under a contract for construction as of March 4, 1980, shall comply with the substantive Federal safety and health standards promulgated by OSHA at 29 CFR [§] 1910.142. These OSHA standards are enforceable under MSPA, irrespectrive of whether housing is, at any particular point in time, subject to inspection under the Occupational Health and Safety Act.
>
> (2) A person who owns or controls a facility or real property to be used for housing any migrant agricultural worker which was completed or under construction prior to April 3, 1980, or which was under a contract for construction prior to March 4, 1980, may elect to comply with either the substantive Federal safety and health standards promulgated by OSHA [on Temporary Labor Camps] at 29 CFR [§] 1910.142 or the standards promulgated by ETA [on a Housing Site] at 20 CFR [§] 654.404 *et seq.*

Id.

108. 29 U.S.C. § 1854(a) (providing a private right of action to "[a]ny person aggrieved").

109. LARSON, *supra* note 73, at 21.

110. *Id.* at 1 (stating that "[t]he total of all 'MSFW Farmworkers and Non-Farmworkers' in Michigan is 90,716," while "the estimated total of all MSFWs in Michigan is 45,800").

111. Howard v. Malcolm, 658 F. Supp. 423, 427 (E.D. N.C. 1987) (footnotes omitted).

112. *Id.* at 426.

113. *Id.* at 437-38.

any state[114] and provides for attorney fees in the event of a successful claim,[115] whereas the AWPA does not.[116] When AWPA and FLSA claims are part of the same lawsuit, attorney fees can be recovered for time spent on both claims.[117] Because of this provision, many migrant worker lawsuits contain both claims.[118] While the AWPA offered many improvements for farmworkers over the FLCRA, serious shortcomings remain. Most workers, if terminated in retaliation for reporting these violations or trying to get the farmer or FLC to fix his practices, lack the financial means to forego wages in exchange for the prospect of receiving backpay and additional damages from litigation.[119] More basically, too many workers never know about protections offered to them. A recent survey of Latino Workers by the Southern Poverty Law Center found that approximately 80% "had no idea how to contact government enforcement such as the Department of Labor. Many respondents did not know such agencies even exist."[120] Therefore, it is very difficult for workers to exercise their rights of action under the AWPA and FLSA.

II. REACTIONS AND CHANGES TO LSC-MIGRANT WORKER RELATIONS

A. Overview of Interaction and Pre-1997 LSC Involvement

While the AWPA and FLSA provide many rights to farmworkers, challenges remain to farmworkers actually exercising those rights. The remote location of many farms where migrants work and live[121] makes it difficult for members of the

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114. 29 U.S.C. § 206 (2006 & Supp. 2010). However, the law exempts agricultural employers from having to provide extra pay for overtime. *Id*. § 213(b)(12).

115. *Id*. § 216(b).

116. *See, e.g*., Gooden v. Blanding, 686 F. Supp. 896, 897 (S.D. Fla. 1988) (stating, "[t]he Plaintiffs recovered on claims brought under the Fair Labor Standards Act (FLSA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), . . . [while] only the FLSA provides for attorneys fees." (internal citations omitted)).

117. *Id.* (holding that "both of these actions arise out of the same core facts. Accordingly, this Court deems it appropriate that attorneys fees should include all hours reasonably spent on the litigation as a whole." (citing Certilus v. Peeples, No. 81-46-Civ-OC-12, slip op. (M.D. Fla. Dec. 5, 1984))).

118. *See, e.g*., Salinas v. Rodriguez, 978 F.2d 187 (5th Cir. 1992); Antenor v. D & S Farms, 39 F. Supp. 2d 1372 (S.D. Fla. 1999); *Gooden*, 686 F. Supp. 896.

119. U.S. DEP'T OF LABOR, *supra* note 8, at 47 (noting that the average household income range for a migrant farmworker family is $15,000-$17,499). In *Martinez v. Mendoza*, for example, the defendants committed AWPA violations in the summer of 2006, but the plaintiffs were not granted damages until February 2009. Martinez v. Mendoza, 595 F. Supp. 2d 923, 924-25, 928 (N.D. Ind. 2009).

120. S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 6 (2009), *available at* http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf.

121. *See* LEGAL SERVS. CORP., A REPORT ON RURAL ISSUES AND DELIVERY AND THE LSC-SPONSORED SYMPOSIUM 15 (2003).

legal community to reach the workers.[122] Moreover, workers are "scared of being deported, know little about the American legal system, and could not, in any event, hire a lawyer."[123] As stated previously, Congress realized this problem early on, and thus had dedicated earmarks for legal aid offices under the OEO and LSC to service migrant farmworkers.[124]

Each summer, LSC offices employ interns to meet with workers face-to-face at their camps or at their residences.[125] These interns learn about the conditions facing workers, educate the workers on their protections under applicable laws, letting them know whether their rights under the laws have been violated.[126] This education is vital to ameliorating the barriers that indigent and immigrant workers face in accessing the legal system.[127] If the workers meet the LSC eligibility requirements, mainly for income[128] and nature of complaint,[129] the LSC office could represent the workers in initiating demand letters and in litigation,[130] including class actions.[131] While LSC offices were prohibited from using federal funds to represent undocumented immigrants, before 1996 they were allowed to

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122. *Id.* at 10-11. Geography and low population density means services are less prevalent and more expensive since there are far fewer private attorneys in rural areas and there do not exist the economies of scale that legal aid offices can provide in metropolitan areas. *Id.* at 17.

123. Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 493 (2003). This stands in sharp contrast to a citizen or lawful permanent resident (LPR): "[T]hanks to AWPA, if a grower wrongfully terminates a domestic worker, that worker just might go home, find a Legal Services lawyer, and file suit in federal court hundreds or thousands of miles away." Holley, *supra* note 31, at 618.

124. *See* HOUSEMAN & PERLE, *supra* note 22, at 9.

125. For example, at the CORT Migrant Farmworker Training 2010, all seven states (Indiana, Illinois, Iowa, Michigan, Nebraska, Ohio, and Wisconsin) were represented by their respective LSC offices. *See* 2010 CORT Midwest Farmworker and Immigrant Worker Law Training Attendees (June 2, 2010) (on file with author).

126. *See, e.g.*, Arturo Ortiz, Senior Paralegal, ABLE & Miguel Keberlein, Supervisory Attorney, Ill. Migrant Legal Assistance Project, Migrant Outreach at the 2011 CORT Training (June 2, 2011).

127. *See* Sudha Shetty, Note, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, 2 SEATTLE J. SOC. JUST. 565, 565-66 (2004).

128. A client's household's income may not exceed 125% of the federal poverty guidelines. Financial Eligibility Policies, 45 C.F.R. § 1611.3(c)(1) (2010).

129. *See* 42 U.S.C. § 2996f(b) (2006) (prohibiting LSC offices from taking criminal cases or cases dealing with abortion, among other restrictions.).

130. *See, e.g.*, *In re* Reyes, 814 F.2d 168 (5th Cir. 1987); Eliserio v. Floydada Hous. Auth., 455 F. Supp. 2d 648 (S.D. Tex. 2006); Paz v. Bonita Tomato Growers, Inc., 920 F. Supp. 174 (M.D. Fla. 1996); Alfred v. Okeelanta Corp., No. 89-8250-CIV-RYSKAMP, 1990 U.S. Dist. LEXIS 21021, at *1 (S.D. Fla. 1990), *class certification granted*, No. 89-8285-CIV-RYSKAMP, 1991 U.S. Dist. LEXIS 21865 (S.D. Fla. 1991).

131. *See, e.g.*, Murillo v. Texas A & M Univ. Sys., 921 F. Supp. 443 (S.D. Tex. 1996); *Alfred*, 1990 U.S. Dist. LEXIS 21021 at *47 (S.D. Fla. 1990).

use non-congressional funds to represent such workers.[132]

This government funded interaction, and in some cases representation, drew sharp criticism from prominent groups.[133] The most vocal critic in this area was the Farm Bureau, which expressed concern that "legal aid lawyers educate farm employees about their rights and help them take group action to enforce those rights."[134] These criticisms—and their proposed solutions, which included increased administrative barriers to legal aid attorneys representing farmworkers and not allowing LSC employees to make unsolicited visits to camps[135]—had been made for years, as they and other organizations attempted to undermine LSC as a whole.[136] For the most part, these efforts failed to gain sufficient support in Congress.[137]

In the early 1990s Senator Phil Gramm (Republican-Texas) proposed reducing LSC funding by almost $50 million,[138] while Representatives Charlie Stenholm (Democrat-Texas) and Bill McCollum (Republican-Florida) "introduced a series of seven amendments that constituted the most sweeping contemplated congressional [sic] overhaul of LSC to date."[139] They proposed sweeping new restrictions on the cases and activities LSC offices would be able to undertake, such as prohibiting them from class actions and fee-generating cases.[140] The goal was to combat what Representative McCollum termed the "extensive abuses within [LSC] by lawyers with their own political agendas actively recruiting clients, creating claims, and advancing their own social causes."[141] Senator Gramm's proposal was tabled in committee thanks in large part to the influence of "longtime legal services supporter Senator Warren Rudman" (Republican-New Hampshire),[142] while the Stenholm-McCollum proposal could not pass a full House vote.[143] As a result, only two minor restrictions were passed: "the ban on political redistricting cases and some restrictions on LSC-funded lobbying and rule-making."[144] However, the exceptional circumstances in the mid-1990s produced a different outcome.

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132. *See* Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1044; *see also* Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409 (April 21, 1997) (to be codified 45 C.F.R. pt. 1626).

133. *See* BRENNAN CTR., *supra* note 16, at 2.

134. *Id.* at 5.

135. *Id.* at 6.

136. *See generally id.* at 2 (describing attacks by the Conservative Caucus, National Law and Policy Center, and others against LSC as advancing their own agenda, and succeeding in reducing its budget to $278 million in 1995).

137. *See, e.g.*, BRENNAN CTR., *supra* note 16, at 5; Hoppe, *supra* note 37.

138. Vivero, *supra* note 41, at 1326-27.

139. *Id.* at 1326.

140. *Id.*

141. 141 CONG. REC. E1220 (daily ed., June 9, 1995).

142. Vivero, *supra* note 41, at 1327.

143. *Id.* at 1326-27.

144. *Id*. at 1327.

B. 1994-97: The Perfect Storm

In 1994, there was widespread concern over illegal immigration.[145] Specifically, there was concern that undocumented immigrants were taking jobs while their children were becoming public charges[146] at a time when state budgets could not handle the additional expense.[147] This led voters in California, the state with the most migrant workers,[148] to pass Proposition 187 in November of 1994.[149] This ballot initiative—popularly known as Save Our State (SOS)—excluded "illegal immigrants from public social services, non emergency health care and public education."[150] Proposition 187 also required "[v]arious state and local agencies . . . to report anyone suspected of being an illegal immigrant to the state attorney general and U.S. Immigration and Naturalization Service (INS)."[151] While some parts were deemed unconstitutional in 1997,[152]

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145. The following passages demonstrate the heightened urgency that the issue had taken on in the fall of 1994:

> California Governor Pete Wilson declared an "immigration emergency" on September 21 and argued in a third lawsuit against the federal government that the "foreign invasion" of California requires federal reimbursement for educating, incarcerating, and providing emergency health care to undocumented immigrants who arrived since 1986.
> . . .
> Democratic gubernatorial candidate Kathleen Brown on September 13 called for a doubling of the number of Border Patrol agents along the US-Mexican border. . . .

Immigration and the California Election, MIGRATION NEWS, Oct. 1994, *available at* http://migration.ucdavis.edu/mn/more.php?id=435_0_2_0.

146. *Illegal Immigration: Numbers, Benefits, and Costs in California*, MIGRATION NEWS, May 1994, *available at* http://migration.ucdavis.edu/mn/more.php?id=298_0_2_0 ("The massive fraud in this program--perhaps two of three persons [of the 1.1 million seasonal agricultural workers] approved did not satisfy the [Reagan amnesty] program's requirements--encouraged new streams of aliens to head north, and the growth of the false documents industry and labor contracting has enabled illegal aliens to continue to find US jobs."). "In January 1994, Governor [Pete] Wilson estimated that the state incurred $2.3 billion in unreimbursed costs to provide federally-mandated services to unauthorized immigrants." *Id.*

147. *See, e.g.*, LEGISLATIVE ANALYST'S OFFICE, FOCUS BUDGET 1994: HIGHLIGHTING MAJOR FEATURES OF THE 1994 CALIFORNIA BUDGET (1994), *available at* http://www.lao.ca.gov/1994/94budget.html ("[California] faced a 1994-[19]95 budget gap of $4.6 billion. This gap consisted of a $2.2 billion carryover deficit from 1993-[19]94 and a $2.4 billion operating shortfall in 1994-[19]95 between baseline spending and projected revenues.").

148. *See* NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3.

149. *Prop. 187 Approved in California*, Migration News, Dec. 1994, http://migration.ucdavis.edu/mn/more.php?id=492_0_2_0.

150. Nancy H. Martis, *#187 Illegal Aliens. Ineligibility for Public Services. Verification and Reporting*, CAL. J. (1994), *available at* http://www.calvoter.org/archive/94general/props/187.html.

151. *Id.* The referendum was invalidated in large part in 1997 when a California district court held that it was an unconstitutional attempt to regulate immigration on a state level. *California:*

SOS's passage was indicative of the public sentiment toward undocumented immigrants in the mid-1990s.[153]

Meanwhile, the Republican Party won a landslide victory in the 1994 mid-term elections, taking control of both houses of Congress.[154] Many Republicans were elected in part because of a commitment to reducing the size and concentration of power in the federal government, as a balanced budget amendment was a cornerstone of the Contract with America.[155] A component of this was either defunding social welfare programs or turning over control to states through block grants.[156] This attitude in Congress gave LSC critics unprecedented influence over changes to be made to LSC.[157] In 1995, "the House Budget Committee, chaired by John Kasich [Republican] of Ohio, passed a resolution recommending the phase-out of all LSC funding."[158] Also, the Legal Aid Act of 1995 was introduced, which would have devolved legal aid to state agencies, essentially eliminating LSC as a government entity.[159] While neither proposal passed, LSC funding and the scope of its offices' operations underwent significant changes.

With the Omnibus Consolidated Rescissions and Appropriations Act (OCRAA) of 1996, Congress reduced LSC's budget by over 30% to $278 million.[160] This was LSC's lowest funding amount in nominal dollars in at least fifteen years, and a reduction of almost 50% in real dollars from its 1980 peak.[161]

Proposition 187 Unconstitutional, MIGRATION NEWS, Dec. 1997, *available at* http://migration.ucdavis.edu/mn/more.php?id=1391_0_2_0.

152. *California: Proposition 187 Unconstitutional*, *supra* note 151.

153. *See* Adam Sonfield, *The Impact of Anti-Immigrant Policy on Publicly Subsidized Reproductive Health Care*, 10 GUTTMACHER POL'Y REV. 7 (2007) ("Throughout its history, the United States has gone through cycles of anti-immigrant fervor. Such times are marked by claims that immigrants—because of excessive numbers, lack of skills and resources, or cultural isolation and differences—are a danger to the country and a drain on its resources. . . . The mid-1990s was a crest of one such cycle.").

154. R.W. Apple Jr., *The 1994 Elections: Congress - - News Analysis How Lasting a Majority?; Despite Sweeping Gains for Republicans, History Suggests the Power Is Temporary*, N.Y. TIMES, Nov. 10, 1994, http://www.nytimes.com/1994/11/10/us/1994-elections-congress-analysis-lasting-majority-despite-sweeping-gains-for.html.

155. *See The Fiscal Responsibility Act,* HOUSE.GOV, http://www.house.gov/house/Contract/fiscrespd.txt (last visited Jan. 31, 2012) (calling for a balanced budget amendment and a permanent line-item veto to reduce spending as part of the Contract with America).

156. *See, e.g.*, *Personal Responsibility Act*, HOUSE.GOV, http://www.house.gov/house/Contract/persrespb.txt (last visited Jan. 31, 2012) (focusing on capping aggregate welfare spending and empowering states to take over welfare programs).

157. *See* Rose, *supra* note 30, at 62.

158. Vivero, *supra* note 41, at 1328.

159. Legal Aid Act of 1995, H.R. 2277, 104th Cong. § 3 (1995).

160. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 (1996).

161. *See* BRENNAN CTR., *supra* note 16, at 2 ("Today, LSC struggles with an appropriation

These reductions forced LSC to close 300 field offices, and 900 attorneys were terminated.[162] OCRAA also included many new restrictions in the services the remaining offices could provide.[163] While the "legislative history of the prohibition [on LSC offices undertaking class actions] is scant . . . what exists indicates that there were two primary policy reasons for the prohibition. . . ."[164] First, proponents of the restrictions, which by 1995 included longtime LSC supporter Senator Pete Domenici (Republican-New Mexico),[165] wanted LSC offices to "represent individuals only and should not seek to pursue the interests of the poor as a group."[166] Opponents were concerned that, as Senator James Inhofe (Republican-Oklahoma) stated, "over a period of years [LSC] has turned into an agency that is trying to reshape the political and social fabric of America."[167]

Second, these opponents believed that "[a]dvocacy for political and social change for the poor is not an appropriate use of federal funds."[168] Opponents claimed, in the words of Senate Majority Leader Robert Dole (Republican-Kansas), that LSC had "become . . . the instrument for bullying ordinary Americans to satisfy a liberal agenda that has been repeatedly rejected by the voters."[169] Because the fee-generating provisions of the FLSA and the potentially lucrative statutory penalties under the AWPA should convince private attorneys to take on undocumented workers' meritorious cases, proponents reasoned, there

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of just over $300 million. Even without adjusting for inflation, that is less than the program had at its disposal in 1981. When the figure is adjusted for inflation, it is less than half of the 1981 allocation." (emphasis omitted)).

162. Alan W. Houseman, *Legal Aid History*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 18, 22-23 (2002).

163. *See generally*, §§ 501-15, 110 Stat. at 1321-50 to -55.

164. Rose, *supra* note 30, at 61.

165. *See* Alexander D. Forger, *Address: The Future of the Legal Services*, 25 FORDHAM URB. L.J. 333, 335 (1998) (referring to "our great staunch friend, Senator Domenici").

166. Rose, *supra* note 30, at 61 (citing 141 CONG. REC. S14608 (daily ed. Sept. 29, 1995) (statement of Sen. Domenici)). Specifically, Senator Pete V. Domenici commented:

> I want everyone to know the reason for the prohibitions is because legal services, when it was founded by Richard Nixon in association with the American Bar, intended this to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency or suing a legislature or suing the farmers as a class.

141 CONG. REC. S14608.

167. 141 CONG. REC. S14524 (daily ed. Sept. 28, 1995) (statement of Sen. Inhofe).

168. Rose, *supra* note 30, at 61 (citation omitted). The author examined *Velazquez v. Legal Servs. Corp.* when he stated that "in discussing class actions and other restrictions, the [appropriations] committee 'understood that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society[,]' but did 'not believe that such advocacy is an appropriate use of federal funds.'" *Id.* at 61 n.51 (quoting *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 595-96 (E.D.N.Y. 2004), *aff'd in part, vacated in part sub nom.* Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219 (2d Cir. 2006)).

169. 141 CONG. REC. S14605 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

was no reason for LSC offices to continue to do so.[170]

Opponents of these reforms argued that LSC offices and their workers, in many places, were the only legal offices for the disadvantaged with legitimate causes of action to turn.[171] The restrictions would make farmers and FLCs more likely to hire undocumented workers, since these workers do not have no-cost access to the legal system, and thus exacerbate illegal immigration.[172] There were several reasons why those opposed to the restrictions believed such restrictions would lead to this outcome. First, in many areas there are no private attorneys who speak Spanish or Creole[173] and are properly trained to undertake farmworker cases.[174] Second, the availability of lawyers for people poor enough to qualify for LSC assistance belies the premise that private attorneys can adequately replace the representation gaps left by the restrictions[175] since "[t]here is about one lawyer for every 240 non-poor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid."[176] Migrant farmworker families are much more likely to fall into the latter category than the general population, with an average household income in the range of $15,000-17,499 and nearly one in three families living below the poverty line.[177] Not only

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170. *See* H.R. REP. NO. 104-196, at 120 (1995) ("The [Appropriations] Committee believes that Federally-funded legal aid programs should serve as a catalyst, not a replacement, for private bar activity. The Committee believes that cases which provide an opportunity for the collection of attorneys fees can be serviced by the private bar.").

171. *See* Taylor, *supra* note 19, at 577-78.

172. Kuehn, *supra* note 132, at 1045.

173. *See, e.g.*, LINDA BASCH ET AL., NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES 150 (1994) ("Haitians have also become part of the migrant stream of farm workers in the eastern United States.") (citation omitted); KATHY CARMODY & ASSOCS., THE QUEST FOR THE BEST: ATTORNEY RECRUITMENT AND RETENTION CHALLENGES IN FLORIDA CIVIL LEGAL AID 5, 13-14 (2007), *available at* http://www.flabarfndn.org/downloads/ pdf/recruitment.pdf (surveying over 300 legal aid attorneys in Florida, and finding less than 30% reported speaking Spanish, and less than 2% reported speaking Creole).

174. *See generally* Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. REV. 1115, 1123 (1982) ("Conflicted legal aid clients, however, are likely to go without legal assistance if a legal aid office cannot represent them, as significant alternatives to legal aid and supplemental modes of legal representation for indigents exist in only a few areas of the country.").

175. *See* Rose, *supra* note 30, at 64 ("The reality is that private attorneys will not be willing to pursue all worthy class actions on behalf of low-income clients.").

176. Kuehn, *supra* note 132, at 1041 (quoting David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209, 211 (2003)); *see also* Delayed Update of the HHS Poverty Guidelines for the Remainder of 2010, 75 Fed. Reg. 45628-02 (Aug. 3, 2010) [hereinafter Delayed Update] (setting the threshold for civil legal aid in the contiguous forty-eight states and District of Columbia at $18,310 for a family of three and $22,050 for a family of four).

177. U.S. DEP'T OF LABOR, *supra* note 8, at 47. Moreover, the much higher fertility rates for

does this income level make them eligible for civil legal aid, it makes hiring a private attorney cost-prohibitive for most migrant families.[178] Moreover, attorneys who are willing and able to serve indigent clients are not evenly distributed but are instead mostly concentrated in larger urban areas;[179] this is especially true for non-LSC legal aid organizations.[180] As a result, "[a]lthough one in seven Americans lives in poverty, only one percent of attorneys are dedicated to serving the legal needs of the poor."[181] In many states, this only leaves "poor persons to appear in court proceedings pro se,"[182] which many will never do.[183] Thus, opponents argued, farmers and FLCs are likely to subject the undocumented workers to worse working conditions than they would for citizens or documented immigrants, since the former group would likely not have access to low or no-cost legal aid.[184]

However, OCRAA passed largely along partisan lines[185] and contained massive restrictions for LSC offices generally and specifically in respect to immigrants. First, section 504(a)(7) stated, "[n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a 'recipient') . . . that initiates or participates in a class action suit."[186] This restriction on class actions based on Federal Rule of Civil Procedure 23[187] took

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Hispanic women—101.5 live births per 1,000 women aged 15 to 44 in 2006, compared to 59.5 for non-Hispanic white and 70.6 for non-Hispanic black women—means more people may have to survive on that income. Joyce A. Martin et al., *Births: Final Data for 2006*, NAT'L VITAL STAT. REP., Jan. 7, 2009 at 52, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf.

178. *See* Delayed Update, *supra* note 176 (stating that the median income range for migrant farmworker families falls below the income threshold for civil legal aid).

179. *See* LEGAL SERVS. CORP., *supra* note 121, at 17-18.

180. In Indiana, non-LSC legal aid offices are located in only the two largest cities, Indianapolis and Fort Wayne. *See ILAS Basics*, INDIANAPOLIS LEGAL AID SOC'Y, http://www.indylas.org/ (last visited Jan. 26, 2012); NEIGHBORHOOD CHRISTIAN LEGAL CLINIC-INDIANAPOLIS, http://www.nclegalclinic.org/ContactUs.aspx (last visited Feb. 8, 2012); NEIGHBORHOOD CHRISTIAN LEGAL CLINIC-FORT WAYNE, http://www.nclegalclinic.org/ftwayne (last visited Feb. 8, 2012). However, LSC-funded Indiana Legal Services operates in ten cities. *See About Us*, IND. LEGAL SERVICES, http://www.indianajustice.org/Home/PublicWeb/About/Offices (last visited Jan. 26, 2012).

181. Kuehn, *supra* note 132, at 1041.

182. *Id.* at 1046.

183. In the six states examined in Part II of the statistical analysis, there were no pro se AWPA actions filed in the 2005-2009 period. *See infra* notes 201-40 and accompanying text.

184. *See* Kuehn, *supra* note 132, at 1045.

185. Two hundred and seven Republicans and 2 Democrats voted in favor and 21 Republicans, 184 Democrats, and 1 Independent voted against. *Final Vote Results for Roll Call 55*, OFF. CLERK (Mar. 7, 1996), http://clerk.house.gov/evs/1996/roll055.xml.

186. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (1996).

187. Definitions, 45 C.F.R. § 1617.2(a) (2011) ("Class action means a lawsuit filed as, or

away one of the most useful litigation tools for both migrant workers and LSC offices. Migrant workers, with their large numbers and common issues, sometimes met the requirements for class certification.[188] For LSC offices—almost all of which operate on tight budgets[189]—class action suits afforded these offices the chance to pursue claims for many workers in an economically efficient manner.[190]

Class actions were also attractive to LSC offices for migrant farmworker litigation because they could obtain attorney fees if the suit was successful.[191] This enabled LSCs to take cases centered on AWPA claims, which do not otherwise generate attorney fees,[192] in addition to FLSA, which provides for them.[193] However, section 504(a)(13) of OCRAA prohibited LSC offices not only from taking attorney fees, but also from taking cases that could generate those fees (i.e., they could not simply take the case and refuse to collect fees).[194] This restriction meant that LSC offices could not join FLSA and AWPA claims for qualified clients.[195]

Third, and most importantly for this Note, section 504(a)(11) established an absolute bar to undocumented immigrants being represented by LSC offices.[196] The section stated that:

> (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity

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otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. . . . "). As noted above, this restriction does not apply to non-Rule 23 class actions, such as "a collective action claim under the Fair Labor Standards Act [29 U.S.C. §§ 201-19 (2006 & Supp. 2010)]." Krisher, *supra* note 5.

188. *See supra* note 131 and accompanying text.

189. Federal funding accounts for only approximately $10.00 per potential client per year, and LSC offices generally spend approximately $150 per actual client. Holley, *supra* note 31, at 613.

190. *See generally*, *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1435 (2d Cir. 1993) (holding that "[i]n the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights").

191. FED. R. CIV. P. 23(h).

192. *See, e.g.*, Gooden v. Blanding, 686 F. Supp. 896, 897 (S.D. Fla. 1988).

193. 29 U.S.C. § 216(b) (2006).

194. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 104-134, § 504(a)(13), 110 Stat. 1321, 1321-55 (1996) ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a 'recipient') . . . that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees."); s*ee also* General Requirements, 45 C.F.R. § 1609.3 (2010) (repealing the restriction in 2010, but determining that LSC offices may only take on these cases when a non-LSC attorney is unable to).

195. *See supra* text accompanying notes 191-94.

196. § 504(a)(11), 110 Stat. at 1321-54 to -55.

> (11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—
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> (A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).[197]

Despite the statutory language referring only to the LSC-appropriated funds,[198] OCRAA barred offices from using *non*-congressional funds (e.g. private donors, bar associations, interest on lawyers' trust accounts (IOLTAs), etc.) to represent undocumented immigrants.[199] Therefore, to be represented by an LSC attorney, an otherwise-qualified potential client must either prove her status as a legal immigrant[200] or sign an attestation form affirming that she is a U.S. citizen.[201]

The additional restrictions have undoubtedly raised procedural hurdles to migrant farmworkers achieving access to the legal system.[202] However, the

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197. *Id.* Subsections (B)-(F) list additional, minor exceptions. *Id*. § 504. An important additional exception, popularly known as the Kennedy Amendment, was passed later in 1996 to allow LSC offices to represent undocumented immigrants and their children who "ha[ve] been battered or subjected to extreme cruelty in the United States." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a)(2)(C), 110 Stat. 3009, 3009-60 (1996), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 104, 119 Stat. 2960, 2978–79 (2006); *see also* Applicability [on Restrictions on Legal Assistance to Aliens], 45 C.F.R. § 1626.4(a) (2010). The Victims of Trafficking and Violence Protection Act of 2000 was passed in 2000 and amended in 2005 to expand coverage to immigrants who were victims of severe trafficking. 22 U.S.C. § 7105(b)(1)(B) (2006).

198. § 504(a), 110 Stat. at 1321-53 ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity.").

199. Definitions [Regarding Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity], 45 C.F.R. § 1610.2 (2010); Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409 (April 21, 1997) (to be codified at 45 C.F.R. pt. 1626). LSC offices were allowed to represent undocumented immigrants when operating under the 1983 Amendment to the Legal Services Corporation Act, which had only prohibited Congressional funds from being used. Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. at 19,409.

200. Verification of Eligible Alien Status, 45 C.F.R. § 1626.7 (2010). The latter provision is rarely used, because although H-2(A) temporary agricultural workers may be represented by LSC attorneys, they are not protected under the AWPA. 29 U.S.C. § 1802(8)(B)(ii) (2006) ("The term 'migrant agricultural worker' does not include . . . (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under [29 U.S.C. §§] 1101(a)(15)(H)(ii)(A) and 1184(c). . . ."); *Id*. § 1802 (10)(B)(iii) (excluding H-2(A) workers from the term "seasonal agricultural worker").

201. Verification of Citizenship, 45 C.F.R. § 1626.6 (2010).

202. *See, e.g.*, BRENNAN CTR. FOR JUSTICE, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS 6 (2000) (recounting the story of a woman whose class-action suit against Butte County, California was delayed because LSC attorneys had to withdraw).

question of whether this has caused an actual drop in migrant farmworker litigation has not been subject to empirical test, which this Note now does.

III. IMPACT OF LSC RESTRICTIONS ON LITIGATION RATES

A. Explanation of Methodology

This section seeks to test two main hypotheses. The first is that overall litigation on behalf of migrant farmworkers has declined since the passage of the 1996 restrictions, and therefore that private or non-LSC attorneys have not assumed the cases that LSC attorneys were prohibited from taking. The second is that there is a difference in litigation rates between states that have non-LSC legal aid organizations that reach out to and represent migrant farmworkers and those that do not. In other words, when there is not a migrant focused non-LSC organization, undocumented migrant workers have no practical legal recourse.[203] These are two related but distinct concepts that require separate measurements.

For the first hypothesis, I examine the rates of published and unpublished cases filed in the ten years before the restrictions took effect (1987-1996) and the first full ten years after (1997-2006).[204] While this data does not provide complete information on litigation, it is a reasonable metric that covers a time period sufficient to measure the true impact of the restrictions. Moreover, the scope of publications available on electronic databases (on either Public Access to Court Electronic Records (PACER) or private databases such as LexisNexis or Westlaw) for much of this time period does not extend beyond the published and unpublished decisions in many cases.[205] The broad time frame was necessary to ensure there were enough cases from which to draw meaningful conclusions; despite the private right of action afforded to documented and undocumented workers under AWPA and FLSA, neither statute is heavily litigated, as the results show.[206]

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203. *See, e.g.*, Taylor, *supra* note 19, at 577-78.

204. The search was conducted by conducting searches on Westlaw or WestlawNext and LexisNexis for both periods. LEXIS NEXIS, http://lexisnexis.com/lawschool (searching: "Agricultural Workers Protection Act" OR "29 USC 1801" and date (geq (01/01/1987) and leq (12/31/1996)), and date (geq (01/01/1997) and leq (12/31/2006)); "Fair Labor Standards Act" AND migrant w/15 farm! AND NOT "Agricultural Workers Protection Act" and date (geq (01/01/1987) and leq (12/31/1996), and date (geq (01/01/1997) and leq (12/31/2006)). WESTLAWNEXT, http://next.westlaw.com (searching: "Agricult! Work! Protect! Act" between 01/01/1987 and 12/31/1996, and 01/01/1997 and 12/31/2006). WESTLAW, http://lawschool.westlaw.com (searching: "Fair Labor Standards Act" AND migrant w/15 farm! AND NOT "Agricultural Workers Protection Act" and date (geq (01/01/1987) and leq (12/31/1996), and date (geq (01/01/1997) and leq (12/31/2006)).

205. For instance, on WestlawNext, there were 986 documents listed under Pleadings and Motions in civil cases pertaining to the AWPA. None of these documents predates 1995, and only seven predate 2000 (search results on file with author).

206. The low rates of litigation are even more troubling considering that migrant farmworker

I conducted searches on Westlaw and LexisNexis for both periods.[207] After compiling the list of cases, I eliminated the appellate opinions in those cases for which the trial court's opinion was already available or appeals by a farmer or FLC from an adverse administrative decision. This narrowed the list of cases to only farmworker-actuated complaints.

For the second hypothesis, the total filings from the more recent period of 2005-2009 were examined. This was chosen for two reasons. First, electronic copies of court documents had become widely available by this time.[208] Examining case filings allows for more meaningful state-by-state comparisons since it presents a more complete picture of filed litigation than reported and unreported decisions. Second, the filing records indicate whether an LSC office, non-LSC office, or private attorney filed each case. The state-by-state analysis centered on Midwestern states in an attempt to reduce any geographically-derived differences. I examined three states—Indiana, Iowa, and Wisconsin—in which an LSC office was the only state legal aid dedicated to assisting migrant workers, and three states—Illinois, Michigan, and Ohio—where there is a non-LSC indigent legal aid organization with a migrant farmworker outreach program.[209] Each of these states has an LSC-funded migrant outreach program as well.[210] For this section, I conducted a WestlawNext search for AWPA filings from January 1, 2005 through December 31, 2009.[211]

B. Results and Discussion

1. Decided Case Rates.—The results from each test confirmed the hypotheses. In examining the decided case rates, the number of published and unpublished decisions declined by 30% over the decade, from 116 in 1987-1996 to only 81 in 1997-2006. The drop outside the big three migrant states of Florida, Texas, and California (and the Eleventh, Fifth, and Ninth Circuits, respectively) was slightly more pronounced, declining from sixty-five to forty-one cases. The most common states in which suits were filed outside of those three were Michigan and New York (eleven of the forty-one non-Florida, Texas, or

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camps are still seriously lacking in oversight by U.S. and state department of labor inspectors. *See* Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 24 (2010) ("In 2001, the U.S. Department of Labor (DOL) employed just 23 to 24 full-time officials to conduct over 2,000 AWPA investigations. . . . [and] nearly half of those investigations yielded findings of AWPA violations.").

207. *See supra* note 204 and accompanying text.

208. *See supra* note 204 and accompanying text.

209. *LSC Programs*, LEGAL SERVICES CORP., http://www.lsc.gov/find-legal-aid (last visited Jan. 27, 2012).

210. *Id*.

211. The cases listed are those where I found at least one document related to an AWPA filing. I cite to the original complaint where available. I traced the PACER records from one district and obtained filing records from the court clerks in three district courts. In all four instances the records were less complete than what I found on WestlawNext.

California cases). Both states have well-established non-LSC migrant farmworker legal aid programs,[212] and seven of the eleven cases were filed by those agencies.[213] This decline underscores the void that the LSC representation restrictions have created in states where an LSC office is the only indigent legal aid service for migrant workers. It also demonstrates that non-LSC offices and private attorneys are not filling the void created by the drop in LSC litigation. However, an examination of class actions yields an important exception to this finding.

Table 1: Differences in Adjudication Rates Before and After LSC Restrictions

	1987-1996	1997-2006
Total Cases	115	81
Cases Excluding TX, FL, CA	65	41
Total Class Actions	14	16
Class Actions Litigated by LSC Offices	8	0[214]
Class Actions Litigated by Non-LSC Offices	5	8
Class Actions Litigated by Private Attorneys	1[215]	7

Class action suits actually increased slightly in the 1997-2006 period, both in the number of suits filed and as a proportion of all suits filed. Whereas just fourteen suits filed in 1987-1996 were class actions, approximately 12% of the total lawsuits; fifteen were filed in the next ten years, approximately 18%. Moreover, non-LSC and private attorneys helped to almost completely fill the

212. FARMWORKER LEGAL SERVICES N.Y., http://wp.flsny.org (last visited Jan. 27, 2012) (providing services in New York); MIGRANT LEGAL AID, http://migrantlegalaid.com (last visited Jan. 27, 2012) (providing services in Michigan).

213. Javier H. v. Garcia-Botello, 239 F.R.D. 342 (W.D.N.Y. 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); De La Cruz v. Gill Corn Farms, Inc., No. 03-CV-1133, 2005 WL 5419057 (N.D.N.Y. April 13, 2005); Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128 (W.D.N.Y. 2003); Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234 (N.D.N.Y. 2002); Saur v. Snappy Apple Farms, Inc., 203 F.R.D. 281 (W.D. Mich. 2001).

214. Morales-Arcadio v. Shannon Produce Farms, 237 F.R.D. 700, 701 (S.D. Ga. 2006) (noting that an LSC attorney represented some of the plaintiffs in a collective action under FLSA). However, this was not a class action undertaken pursuant to Federal Rule of Civil Procedure 23, which is prohibited under the Omnibus Consolidated Rescissions and Appropriations Act of 1996. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (1996).

215. Hardy v. Ross, No. 9-89-2379-3, 1989 WL 161161, *2 (D. S.C. 1989). Robert Willis, the lead attorney in this case, was not listed as being affiliated with an LSC or non-LSC legal aid organization. *Id*.

void left by LSC restrictions, both in class actions and undocumented immigrant representation. As noted above, this restriction prevents LSC offices from representing documented workers in Rule 23 class action suits.[216] From 1987 to 1996, of the fourteen suits filed, eight were filed by LSC attorneys, five by non-LSC legal aid attorneys, and only one by a private attorney. From 1997 to 2006 the numbers were reversed: nine were filed by non-LSC legal aid attorneys, six by private attorneys, and only one by an LSC attorney. This shows that while private attorneys may not be willing or able to take up regular cases, the more lucrative nature and broader scope of attorney fees from class actions convinces at least some private firms to take on farmworker claims in class actions.[217] The large number of workers at many farms—especially for jobs such as corn detasseling[218]—and the common circumstances facing those workers make them especially good candidates for class action suits. This is discussed in greater detail in Part IV.

2. Multi-state Comparisons.—The comparison of filing rates under the AWPA from the WestlawNext search between LSC-only and non-LSC-only states clearly demonstrates that the concerns voiced by opponents of LSC restrictions have been borne out. The void left by LSC offices being unable to represent undocumented immigrants has not been filled by private attorneys, and the result is that litigation on behalf of undocumented workers is almost nonexistent in LSC-only states. In Indiana, Iowa, and Wisconsin, the three LSC-only states, there were only four suits filed from January 2005 until the end of 2009, and only one was a class action. Three of these cases were filed in Indiana.[219] In each of these cases, an LSC attorney represented documented immigrants or citizens. One of these cases reached a verdict, which awarded the

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216. "*None* of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to *any* person or entity (which may be referred to in this section as a 'recipient') . . . that initiates or participates in a class action suit." § 504(a)(7), 110 Stat. at 1321-53 (emphasis added); *see also supra* note 187 and accompanying text.

217. As noted above, a class action lawsuit provides for attorney fees for AWPA claims where a regular suit would not allow for these. *See, e.g.*, Gooden v. Blanding, 686 F. Supp. 896, 897 (S.D. Fla. 1988). Because of the broader scope of people covered under the AWPA, the number of plaintiffs can be much greater than in a FLSA class action claim. *See supra* notes 107-10 and accompanying text.

218. *See, e.g.*, *LaGrange County Agricultural Labor Camps*, IND. STATE DEP'T OF HEALTH, http://www.in.gov/isdh/22746.htm (last visited Jan. 29, 2012) (providing information on the Howe Military School, the largest migrant labor camp in Indiana in 2010, which was licensed to house up to 331 workers who detassel corn).

219. Complaint, Gallardo-Lopez v. Red Gold, Inc., No. 1:09-cv-0038SEB-JMS, 2009 WL 1968371 (S.D. Ind. 2009); Complaint, Martinez v. Mendoza, 595 F. Supp. 2d 923 (N.D. Ind. 2009) (No. 4:08-cv-00021); Plaintiffs [sic] Original Complaint, Arvizu v. JP McClure Enters., No. 3:07-cv-0417PC, 2007 WL 4446812 (N.D. Ind. 2007). The fourth suit in LSC-only states was a class action. First Amended Class Action Complaint, Martinez v. Twin Garden Sales, Inc., No. 2:09-cv-00653, 2009 WL 2600733 (E.D. Wis. 2009).

farmworkers almost $17,000 in damages from their FLCs.[220] The only Wisconsin case was a class action filed by workers represented by a private attorney.[221] There were no cases filed in Iowa.

States with non-LSC offices, on the other hand, had much more robust litigation, both in gross litigation rates and the proportion of class action suits, with six class actions and sixteen total lawsuits filed in that time period. In Michigan alone, there were eleven lawsuits filed.[222] In ten of these cases, attorneys from Migrant Legal Aid, a non-LSC legal aid organization in Michigan, represented the plaintiffs.[223] This included five class actions. In one non-class action case, plaintiffs were represented solely by a private attorney.[224] In Illinois, four lawsuits were filed,[225] one of which was a class action filed by a private attorney.[226] In two of the cases, the Illinois Migrant Legal Assistance Project (ILMAP)—an LSC agency—represented the plaintiff farmworkers,[227] and in two the workers were represented by Farmworker Advocacy Project, a non-LSC program.[228] In Ohio, there were only two suits filed during this time, one of

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220. *Martinez*, 595 F. Supp. 2d at 928.

221. First Amended Class Action Complaint, *supra* note 219.

222. Lopez v. Sutton, No. 1:08-cv-531, 2009 WL 2777098 (W.D. Mich. 2009); Joint Motion for Dismissal with Prejudice Following Approval of Settlement, Manzano v. Bartley, No. 1:08-cv-204, 2009 WL 3813480 (W.D. Mich. 2009); Jimenez v. Lakeside Pic-n-Pac, L.L.C., 13 Wage & Hour Cas. 2d (BNA) 624 (W.D. Mich. 2007); Plaintiff's Original Complaint, Salinas v. Janssen, No. 07-10979, 2007 WL 1316685 (E.D. Mich. 2007); Third Amended Complaint and Jury Demand, Bautista v. Twin Lake Farms, Inc., No. 1:04-cv-483, 2007 WL 329162 (W.D. Mich. 2007); Plaintiffs' Original Complaint, Barcenas v. Stocchiero, No. 1:07-cv-36, 2007 WL 697632 (W.D. Mich. 2007); Plaintiff's First Amended Complaint & Jury Demand, Flores v. Carini Farms, Inc., No. 1:06-cv-0475, 2006 WL 5171205 (W.D. Mich. 2006); Complaint and Jury Demand, Cano v. Horkey, No. 1:06-cv-0621, 2006 WL 2785322 (W.D. Mich. 2006); Plaintiffs' Original Complaint, Rojas v. Salazar, No. 4:06-cv-0076, 2006 WL 2320329 (W.D. Mich. 2006); Plaintiff's Original Complaint, Palomin v. Hagen, No. 1:05-cv-10171, 2005 WL 2142744 (E.D. Mich. 2005); Class Action Complaint, Guerrero v. Brickman Grp., LLC, No. 1:05-cv-0357, 2005 WL 1521281 (W.D. Mich. 2005).

223. *See Salinas*, 2007 WL 1316685, at *1 (noting that LSC office represented plaintiffs jointly with Migrant Legal Aid).

224. Lopez v. Sutton, 2009 WL 2752111, at *1 (W.D. Mich. 2009). In *Bautista v. Twin Lake Farms, Inc.*, a private attorney partnered with Migrant Legal Aid to represent plaintiff farmworkers. Bautista v. Twin Lake Farms, Inc., 2006 WL 4036514, at *1 (W.D. Mich. 2006).

225. Complaint, Rojas v. Mariani Nursery, Inc., No. 1:09-cv-05667, 2009 WL 3007833 (N.D. Ill. 2009); Complaint, Martinez v. Herbal Garden, Inc., No. 1:07-cv-4238, 2007 WL 2666465 (N.D. Ill. 2007); Complaint, Garcia v. Hubner Farms, No. 2:05-cv-02093, 2005 WL 4114458 (C.D. Ill. 2005) ; Plaintiffs' Petition for Award of Damages, Reyes v. Remington Hybrid Seed Co., No. 02-2239, 2005 WL 5912152 (C.D. Ill. 2005).

226. *Rojas*, 2009 WL 3007833, at *1 (noting that private attorney represented plaintiffs jointly with the Farmworker Advocacy Program).

227. *Garcia*, 2005 WL 4114458, at *1; *Reyes*, 2005 WL 5912152, at *1.

228. *Rojas*, 2009 WL 3007833, at *1; *Martinez*, 2007 WL 2666465, at *1.

which was filed by Advocates for Basic Legal Equality, Inc. (ABLE), a non-LSC legal aid organization.[229] The other suit was filed pro se.[230]

Table 2: Differences in Litigation Rates Between States that Have Non-LSC Legal Aid Offices and Those that Do Not

	LSC-Only States (Indiana, Iowa, and Wisconsin)	Non-LSC-Only States (Illinois, Michigan, and Ohio)
Total Cases Filed	4	16
Cases per Migrant Worker[231]	1 per 16,000	1 per 16,750
Total Class Actions	1	6
Cases Litigated by LSC Office	3	1
Cases Litigated by Non-LSC Office or Private Attorney Excluding Class Actions	0	8

There are limitations to this data, especially the high settlement and low judgment rates[232] and the inability to determine the immigration status of those workers represented by private attorneys and non-LSC offices.[233] Also, the act of filing suit does not necessarily equate with the merits of the case.[234] Nonetheless, several conclusions may be reasonably drawn from these findings. First, while the number of cases is higher in states with established non-LSC migrant worker legal aid programs, the rate is still incredibly low given the number of workers and the rate at which violations are reported or found upon inspection. In 2001, for example, there were nearly 1,000 violations found during

229. Complaint, Villegas v. Wenig Bros. Specialty Crops, Ltd., No. 3:07-cv-02188-JZ, 2007 WL 2400318, at *1 (N.D. Ohio 2007).

230. Complaint, Orozco v. K.W. Zellers & Son, Inc., No. 5:09-cv-00216, 2009 WL 3443710, at *1 (N.D. Ohio 2009).

231. Population data derived from NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3-4.

232. Only *Martinez v. Mendoza* actually had a reported judgment. Martinez v. Mendoza, 595 F. Supp. 2d 923, 928 (N.D. Ind. 2009).

233. *See, e.g.*, *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) ("The district court, therefore, was also in error in concluding that inquiry into the documentation of alien petitioners for purposes of determining coverage under the FLSA and AWPA was warranted.").

234. However, seventeen of the cases were filed by LSC and non-LSC legal aid organizations, which operate on tight budgets and cannot afford to waste resources on baseless or questionable litigation. *See, e.g.*, Rebecca Berfanger, *Cuts Proposed to LSC Budget Would Affect ILS*, IND. LAWYER (Feb. 10, 2011), http://www.theindianalawyer.com/cuts-proposed-to-lsc-budget-would-affect-ils/PARAMS/article/25741.

only 2,000 inspections.[235]

Second, merely examining the rates of litigation as a proportion of the population is misleading. There was approximately one lawsuit filed for every 16,000 migrant workers in the LSC-only states,[236] while there was approximately one filed for every 16,750 workers in the states with non-LSC organizations.[237] However, this does not mean that the quality of the litigation between the states is equivalent. In only one of the four cases filed in LSC-only states did a non-LSC attorney litigate on behalf of migrant workers.[238] That case was a class action.[239] In the states with non-LSC offices, thirteen of the sixteen cases were litigated solely by non-LSC attorneys, including eight suits that were not class actions.

These numbers demonstrate that when a suit filed under AWPA is not a class action—and thus the attorney cannot expect attorney fees from the opposing party—legal aid attorneys are essentially the only ones who will take the cases. In states with non-LSC legal aid options, those agencies have stepped in and filled the gap for migrant workers, many of whom are likely undocumented.[240] In states where there is not such an agency, the gap goes unfilled for workers who do not have sufficient numbers or cannot find a private attorney to institute a class action. Thus, the chief fear voiced by opponents of the LSC restrictions that went into effect with OCRAA in 1996—that the restrictions would close off the only avenue for representation undocumented workers have—appears to have been borne out in states that do not have non-LSC legal aid organizations. Fortunately, there are several relatively simple solutions that could improve representation greatly.

D. Proposed Solutions

At a time when state governments are substantially reducing projects and services to attempt to reduce their operating deficits,[241] and the federal

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235. Chien, *supra* note 206, at 24.

236. There were approximately 64,000 workers in 1993 in Iowa, Ohio, and Wisconsin. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3-4.

237. There were approximately 280,865 workers in 1993 in Illinois, Michigan, and Ohio. *Id.* If Alice Larson's 2006 survey of Michigan farmworkers (90,228) replaced the 1993 number (161,020), the total would drop to 210,073 and the proportion would increase to approximately one for every 13,100. LARSON, *supra* note 73, at 21. For the sake of complete comparison, this Note uses the 1993 numbers.

238. First Amended Class Action Complaint, *supra* note 219.

239. *Id.*

240. It is difficult to ascertain the proportion of undocumented workers who are plaintiffs in litigation. However, as stated above, the U.S. Department of Labor estimated fifty-three percent of workers are undocumented immigrants. U.S. DEP'T OF LABOR, *supra* note 8, at ix.

241. *See, e.g.*, Mary Beth Schneider, *Daniels Gets Pushback on Budget*, INDIANAPOLIS STAR, Jan. 14, 2011, at A1.

government examining ways to do so as well,[242] it is probably unrealistic to expect increased funding for the LSC migrant farmworker earmark or for the U.S. or state departments of health or labor to hire more agricultural camp inspectors. Also, the current political discourse makes a full repeal of the ban on representation unlikely. For example, the Obama Administration's fiscal year 2010 and 2011 budgets called for removing the prohibition of LSC offices using non-LSC funds to perform restricted legal activities, restoring the pre-1996 status quo in those areas.[243] However, there is no record of the administration advocating repeal of the outright ban on representing undocumented immigrants.

Therefore, other solutions that have realistic prospects of passing and do not strain budgets must be considered. The easiest—and certainly cheapest—remedy would be to increase the statutory penalties against farmers and FLCs for violations of the AWPA. The current fine of $500 per worker per violation[244] may not be sufficient to deter farmers who only employ a few workers from committing some of the abuses described above. These smaller farms comprise a large number of the total farms employing migrant workers, as the median number of migrant workers at a migrant labor camp registered with the Indiana State Department of Health (ISDH) is twelve.[245] Gradually increasing the fine to $2,000 per worker per violation (annually or biennially in $500 increments) may provide sufficient incentive for farmers to treat workers fairly under the law, since they would not want to risk litigation and potential fines four times greater than what they face now. However, this does not seem to be too great an amount to be unduly punitive.

The increased fines may also incentivize private attorneys to take meritorious cases on contingency, since the payoff for the plaintiffs (and, consequently, the attorney) would be larger. Increased fines for repeat offenders may also deter farmers or FLCs from taking the chance that they can abuse their workers and not be sued or investigated again.[246] Given the anemic rates of AWPA inspections

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242. *See, e.g.*, Jackie Calmes, *Panel Seeks Social Security Cuts and Higher Taxes*, N.Y. TIMES, Nov. 10, 2010, at A1, *available at* http://www.nytimes.com/2010/11/11/us/politics/11fiscal.html.

243. *National Campaign to Fix the Legal Services Restrictions*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/pages/lsc_national_campaign (last visited Feb. 15, 2012) [hereinafter *National Campaign*]. However, it did not pass in the fiscal year 2010 or 2011 budgets. *FY2011 Appropriations Process for Civil Legal Services*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/resource/FY11_legal_services/ (last visited Jan. 29, 2012).

244. 29 U.S.C. § 1854(c)(1) (2006).

245. A review of the fifty-nine camps registered with the ISDH from 2008 until June 2010 shows that, while the average number of potential workers a camp is registered for is 45.33, this number is skewed by seven camps being registered for more than 100 workers. *Agricultural Labor Camps Roster*, IND. STATE DEP'T HEALTH, http://www.in.gov/isdh/23455.htm (last visited Jan. 29, 2012).

246. The Occupational Safety and Health Act allows for a maximum fine to repeat serious offenders of ten times the maximum amount for first-time serious offenders. 29 U.S.C. § 666. While an increase of that magnitude is probably not feasible or even desirable, tripling fines for repeat offenders would still likely have the desired deterrent effect.

and litigation,[247] these may be the most effective means of improving conditions.

The more robust rates of non-LSC litigation in states where there are non-LSC migrant legal aid agencies[248] demonstrates that the best, and perhaps only, way to effectively advocate for undocumented immigrants is for states to have non-LSC offices that deal with migrant issues. To achieve this end, state legislatures and bar associations should provide funding to non-LSC legal aid offices to hire attorneys who can undertake such cases. Alternatively, the funding could be used to set up a trust to pay attorney fees for private attorneys who agree to take on non-class action AWPA cases, since successful AWPA claims alone will not generate attorney fees. This funding should also go toward furthering partnerships between LSC offices and those attorneys who would take on the cases for undocumented workers. With LSC outreach workers using their federal funding to make the initial contacts with workers and perform the initial intake, the time and expense for the representing attorney in finding the clients may be reduced. With this close collaboration, undocumented workers would have their most comprehensive access to the legal system since the LSC restrictions took effect.

Finally, as the empirical findings revealed, the rate of class actions have held steady amidst a sharp drop in overall litigation rates, and private attorneys and non-LSC offices have played a major role in making that happen.[249] Section 504(a)(7) of OCRAA, the prohibition on LSC offices undertaking Rule 23-based class action suits,[250] could be relaxed to allow these offices to represent documented workers in AWPA class actions.[251] This would be a sensible compromise between those who advocate a full repeal of the prohibitions on class actions and representing undocumented immigrants[252] and those who want to maintain a complete barrier or defund LSC altogether.[253]

Implementing a fund to provide fees for private attorneys to take on undocumented worker cases will take time. In the meantime, documented workers—especially in those states where there is not a non-LSC office available to represent them—should not be put at a disadvantage by having the class action option closed off to them. Also, as *Bautista v. Twin Lake Farms, Inc.* demonstrates, LSC and non-LSC offices in the same state have worked together

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247. *See supra* notes 220-40 and accompanying text.

248. *See supra* notes 220-40 and accompanying text.

249. *See supra* notes 220-40 and accompanying text.

250. *See* 45 C.F.R. § 1617.2(a) (2010).

251. *See supra* note 186 and accompanying text.

252. *See, e.g.*, Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT'L L. 1121, 1144-45 (2010) (describing the need for this reform for H-2(A) guestworkers). As stated above, a full repeal of the class action prohibition was proposed as part of the Fiscal Year 2011 (FY11) omnibus spending bill. Von Spakovsky, *supra* note 5. However, this was not included in the FY11 budget. *National Campaign*, *supra* note 243.

253. *See, e.g.*, Peter Flaherty, *New Congress Must Defund Legal Services Corporation, AARP, and Soros*, NAT'L LEGAL & POL'Y CENTER (Nov. 11, 2010), http://www.nlpc.org/stories/2010/11/11/new-congress-must-defund-legal-services-corporation-aarp-and-soros.

successfully to represent their respective clients against a common adversary.[254] Allowing LSC offices to represent migrant farmworkers in class action suits would achieve two goals. First, it would increase efficiency, since there would not be multiple class actions or one class action and many individual suits against the farmer. Second, it would do so without compromising the effectiveness of representation, since the workers would not have to choose between switching counsel and losing their class membership.

Even without legislative amendment, continued willingness by judges to certify class actions would be a huge assistance in ensuring that migrant workers can obtain relief from unjust practices.[255] Continued accommodation by courts in certifying migrant worker classes would not only ensure continued access to the legal system, it would help to fulfill one of the goals advanced by supporters of LSC restrictions: to refocus LSC offices toward helping the individual indigent client.[256]

CONCLUSION

The lack of access to the legal system for migrant workers has long been recognized as one of the most acute problems facing both workers and the legal system.[257] That aid for migrant workers remains a priority within LSC[258] is evidence that conditions facing migrant and seasonal workers have not markedly improved, despite the greatly increased legal protections afforded by AWPA over the FLCRA.[259] Legal outreach and representation by LSC employees have been essential, given the working conditions and the inadequacy of the regulatory and inspection regimes coordinated by the U.S. and state departments of labor.[260] The perceived political activism of LSC offices, the backlash against undocumented workers, and the Republican takeover of Congress led to the marginalization of many LSC allies.[261] This in turn enabled the prohibition of LSC offices from representing undocumented immigrants.

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254. *See* Bautista v. Twin Lake Farms, Inc., No. 1:04-cv-483, 2007 WL 329162, at *1 (W.D. Mich. 2007).

255. *See supra* Tables 1 and 2.

256. *See* Rose, *supra* note 30, at 61 n.50.

257. Houseman, *supra* note 21, at 36 (noting that migrant farmworker aid was one of only two dedicated earmarks in OEO funding).

258. Each state at the CORT Migrant Farmworker Training has an LSC office and at least one attorney dedicated to migrant farmworker legal assistance.

259. *See, e.g.*, Velasquez v. Khan, No. Civ. S01-0246MCEDAD, 2005 WL 1683768, *2 (E.D. Cal. 2005) (describing thousands of dollars of unpaid wages and housing in "grossly substandard condition").

260. *See* Chien, *supra* note 206, at 24.

261. *See* Forger, *supra* note 165, at 335 (recounting a conversation in which Sen. Domenici (Republican-New Mexico) said, "Although . . . I could live with only a partial restriction on class actions, I think I have to give assurance [to my Senate colleagues] that there are to be no more class actions permitted.").

This prohibition has correlated with a substantial drop from the already-low rates of litigation under the AWPA and FLSA.[262] In states that do not have non-LSC legal aid offices dedicated to migrant farmworker legal aid, the door to the justice system has almost completely closed. Nonetheless, a complete repeal of this provision seems unlikely in the current political climate.[263] Judges should continue to be willing to certify class action suits involving migrant farmworkers, and bar associations and private foundations should dedicate funds to ensuring each state has attorneys who can undertake these claims. These small steps would contribute greatly to ensuring migrant workers and their families have true access to the justice system.

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262. *See supra* notes 208-40 and accompanying text.

263. *See, e.g.*, *Indiana Lawmakers Pass Immigration Curbs Like Arizona*, REUTERS (Feb. 23, 2011), http://www.reuters.com/article/2011/02/23/us-immigration-indiana-idUSTRE71M5HN20110223. Moreover, proponents of immigration reform are not focused on improving conditions for migrant workers. Their focus has been on legitimizing the status of undocumented immigrants or providing a pathway to citizenship for young immigrants. *See* Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. (2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4321ih/pdf/BILLS-111hr4321ih.pdf; *Basic Information about the DREAM Act Legislation*, DREAM ACT PORTAL (Jul. 16, 2010) http://dreamact.info/students.

772 W. 26th St., Indianapolis, Indiana. Photo by Kory T. Bell

ONE NAIL AT A TIME: BUILDING DECONSTRUCTION LAW AS A TOOL TO DEMOLISH ABANDONED HOUSING PROBLEMS

KORY T. BELL*

INTRODUCTION

In 2003, the City of Indianapolis declared war.[1] No shots were ever fired, as this battle was not a war in the conventional sense. Instead, the declaration was meant to be a powerful metaphor for a crisis Indianapolis was facing;

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1. *See* ABANDONED HOUSES WORK GRP., RECLAIMING ABANDONED PROPERTY IN INDIANAPOLIS 2 (Sept. 2004) [hereinafter RECLAIMING ABANDONED PROPERTY], *available at* http://www.indy.gov/eGov/City/DMD/Planning/ Docs/Housing/abandonedhousingreport0904.pdf (noting initial observations and recommendations for the problem of residential property abandonment in Indianapolis).

unfortunately, the enemy was indeed real, and not merely at the gates—it was already within the city limits. In fact, the enemy was entrenched and forcing new and important policy questions upon city leaders. The enemy was a powerful one: abandoned properties.[2]

Spurred to act by 2003 survey estimates which showed 7,913 abandoned properties in Indianapolis,[3] Mayor Bart Peterson proclaimed the "war" on abandoned houses in Indianapolis and the Marion County metropolitan area.[4] But long since Mayor Peterson's declaration in 2003, the war in Indianapolis rages on today.

Unfortunately, Indianapolis is not alone. In many other Rust Belt cities, local leaders have long struggled to rid city blocks of abandoned houses that plague housing stocks by the thousands.[5] While the wars in these cities have not yet been lost, the enemy seems to be winning on many fronts—today, forced by the sheer size and cost of the problem in extreme cases, some Midwest cities have contemplated mass demolition, in order to literally "shrink" in size as critical volumes of abandoned homes drain city resources.[6]

Indeed, the scope of this problem is immense.[7] It has been said that, because the causes of housing abandonment are numerous and not fully known, there can be no "silver bullet" to cure the problem, and it must be attacked on many fronts through a wide range of efforts.[8] Yet, victories remain elusive despite waging wars in this type of fashion; in Indianapolis, for example, city agencies estimate there are presently more than 9,000 abandoned properties within the city.[9] And the number of abandoned houses is expected to increase.[10]

In other words, despite many cities' best efforts, little headway has been

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2. *See* CITY OF INDIANAPOLIS, ABANDONED PROPERTIES: OUR ACTION PLAN 4 (2009) [hereinafter ACTION PLAN], *available at* http://www.indy.gov/eGov/City/DMD/Abandoned/Pages/home.aspx (follow "Abandoned Housing Initiative Action Plan" hyperlink) ("Establish[ing] a formalized plan and implementation strategy designed to reduce the number of abandoned and vacant houses in the Indianapolis Metropolitan Area").

3. *See* RECLAIMING ABANDONED PROPERTY, *supra* note 1, at 4.

4. *See id.* at 5.

5. *See, e.g.*, David Streitfeld, *An Effort to Save Flint, Mich., by Shrinking It*, N.Y. TIMES, Apr. 22, 2009, at A12, *available at* http://www.nytimes.com/2009/04/22/business/22flint.html (discussing the long struggle against abandoned housing in Flint, Michigan and a policy of "planned shrinkage").

6. *See id.*; Monica Davey, *Detroit Mayor's Tough Love Poses Risks in Election*, N.Y. TIMES, Sept. 26, 2009, at A11, *available at* http://www.nytimes.com/2009/09/26/us/26detroit.html?ref=davebing (discussing Detroit Mayor, Dave Bing, and his plans to "shrink" Detroit).

7. *See* ACTION PLAN, *supra* note 2, at 31.

8. *See id.* at 9.

9. *See id.* at 12.

10. *See, e.g.*, Jeff Swiatek, *Mortgage Delinquencies on the Rise Again in Indiana*, INDIANAPOLIS STAR, Aug. 27, 2010, at A8 [hereinafter *Mortgage Delinquencies*] (ranking Indiana twelfth among all states by mortgage delinquency rate after increases during the second quarter of 2010).

made even though there has been ample time for policy experimentation.[11] In fact, still today, even the initial step of quantifying the scope of an abandonment problem remains guesswork because cities like Indianapolis have no real-time way to count abandoned houses.[12] Unfortunately for cities, the statistic is extremely difficult to discover or track because it is constantly in flux and hard to characterize.[13]

To make matters worse, current economic conditions have "exacerbated" abandoned housing accumulation in a way not seen in previous decades.[14] Coupled with weakness in the housing markets, high levels of foreclosure, and an oversupply of housing, present trends of housing abandonment strain local government budgets perhaps more than ever.[15] Cities and towns are finding that taxpayers ultimately must bear the external costs of maintaining abandoned properties, but also must contend with less of a property tax base to do so as the city deteriorates.[16] Put another way,

> [a]n issue that has yet to be explicitly addressed in the still young life of American cities is, who is responsible for redevelopment of obsolete, bottom-of-the-market, fully depreciated real estate? Thus far the answer has been the host jurisdiction—with some assistance from the federal government, and possibly some from the state government.[17]

Accordingly, current local leadership often expresses an increasing sense of urgency and seeks to be "relentless" in taking on this issue, promising to seek innovative solutions.[18] This is not surprising, especially considering that after decades of instituting governmental policies and programs, most of which achieved mixed or little results, abandoned houses continue to vex several of

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11. *See* RECLAIMING ABANDONED PROPERTY, *supra* note 1, at 5 (outlining numerous policy goals in Indianapolis); *see generally* EUGENE LAUSCH ET AL., ABANDONED PROPERTY IN INDIANA: LEGAL, PRACTICAL, AND POLICY EFFECTS OF 2006 STATUTORY AMENDMENTS 1 (Sept. 2006) (attempting to "explain what Public Law No. 169-2006 (HEA 1102) means, in practice, for county executives and redevelopment commissions" after Indiana enacted statutory changes aimed at addressing abandoned properties).

12. *See* RECLAIMING ABANDONED PROPERTY, *supra* note 1, at 3.

13. *See* Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 196 (2008) (pointing to the difficulty in obtaining abandoned housing statistics).

14. *See* ACTION PLAN, *supra* note 2, at 5.

15. *See* Samsa, *supra* note 13, at 191; Edward G. Goetz et al., *Pay Now or Pay More Later: St. Paul's Experience in Rehabilitating Vacant Housing*, CURA REP., Apr. 1998, at 12, 12-13 (concluding that local governments must subsidize attempts to rehabilitate abandoned buildings before seeing a return on public investment).

16. *See* Goetz et al., *supra* note 15, at 12-13.

17. THOMAS BIER & CHARLIE POST, THE BROOKINGS INST., VACATING THE CITY: AN ANALYSIS OF NEW HOMES VS. HOUSEHOLD GROWTH 9 (Dec. 2003), *available at* http://www.brookings.edu/es/urban/publications/20031205_bier.pdf.

18. *See, e.g.*, ACTION PLAN, *supra* note 2, at 9.

America's foremost cities: Baltimore,[19] Chicago,[20] and Detroit,[21] among dozens of others.[22]

At this point, the effects of abandoned housing are well documented, and it is now known that abandonment renders much more than sporadic eyesores in the form of an empty structure. In truth, abandonment increases municipal costs of services and maintenance, aggravates neighborhood decay, decreases property values, increases crime, and creates hazards to health and safety.[23] Together, it "make[s] already struggling neighborhoods less appealing to prospective homebuyers who can choose where they live. Of all the physical factors blighting the lives of inner-city residents, abandoned properties may be the single most destructive, because they affect so many other conditions. . . ."[24] On the way to these realizations, a patchwork of policy suggestions has been applied by local governments.[25] Yet abandoned houses persist on a "massive" scale.[26]

The issue presented is this: How can cities most efficiently remove existing

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19. *See generally* James R. Cohen, *Abandoned Housing: Exploring Lessons From Baltimore*, 12 HOUSING POL'Y DEBATE 415 (2001), *available at* http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_1203_cohen.pdf.

20. *See generally* James O'Shea, *Problem of Vacant Houses Resists Easy Solution*, N.Y. TIMES, Apr. 4, 2010, at A25A, *available at* http://www.nytimes.com/2010/04/04/us/04cncbulldoze.html.

21. *See* Alex P. Kellogg, *Detroit Shrinks Itself, Historic Homes and All*, WALL ST. J., May 14, 2010, http://online.wsj.com/article/SB10001424052748703950804575242433435338728.html.

22. *See generally* U.S. CONFERENCE OF MAYORS, COMBATING PROBLEMS OF VACANT AND ABANDONED PROPERTIES: BEST PRACTICES IN 27 CITIES (June 2006), *available at* http://www.usmayors.org/uscm/best_practices/vacantproperties06.pdf (discussing various results found in U.S. cities after addressing abandoned houses).

23. *See* WILLIAM C. APGAR ET AL., HOME OWNERSHIP PRES. FOUND., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 2 (Feb. 2005), *available at* http://www.995hope.org/wp-content/uploads/2011/07/Apgar_Duda_Study_Full_Version.pdf.

> Accounting for both the foreclosure costs paid for by [c]ity and [c]ounty agencies, and the impact of foreclosures on area property values, a foreclosure . . . could impose direct costs on local government agencies totaling more than $34,000 and indirect effects on nearby property owners (in the form of reduced property values and home equity) of as much as an additional $220,000.

Id. *See also* Samsa, *supra* note 13, at 193-96 (giving a general overview of the negative effects of abandoned houses).

24. Alan Mallach, *From Eyesores to Assets: CDC Abandoned Property Strategies*, 146 SHELTERFORCE ONLINE (2006), *available at* http://www.nhi.org/online/issues/146/researchupdate.html.

25. *See, e.g.*, David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1161 (1999) (proposing a Vacant Building Transfer program for properties with substantial code violations).

26. *See, e.g.*, Jonathan Oosting, *Massive Detroit House Auction 'Flops' as Most Foreclosed, Abandoned Properties Go Unsold*, MLIVE (Oct. 26, 2009), http://www.mlive.com/news/detroit/index.ssf/2009/10/detroit_house_auction_flops_as.html.

levels of abandoned houses while deterring abandonment in the future? This Note proposes a simple, creative policy as an answer to this question. The new ideas provide a legal framework creating economic incentives to propel the use of an existing, but under-utilized, demolition industry practice: building deconstruction.

The rationale of this Note is simple: If state and local governments coordinate incentives for property owners to "recycle" (i.e. "deconstruct") obsolete or deteriorating houses, abandoned structures are less likely to persist, or become abandoned in the first place. Most importantly, the incentives advocated in this Note will induce building deconstruction as the preferred method to eliminate both present and future abandoned structures, which exploits an opportunity that is currently being wasted: creating value from the blight removal process itself. The use of building deconstruction aims to turn abandoned assets into a myriad of community benefits: living wage employment, blight elimination, waste reduction and recycling, building material reuse, among numerous other benefits.[27]

At heart, time has shown that local government is limited in its capacity to efficiently handle the task, or cost, of managing thousands of properties being thrust upon local streets, the brunt of which is ultimately borne by the local taxpayers.[28] In the end, if abandoned housing spirals out of control beyond a critical mass of properties, it becomes unsustainable.[29] Traditional strategies targeting the problem—code enforcement, tax foreclosure, land banks, and receivership[30]—are mostly reactive by definition, only implicated after a law has been violated.

While cities should not do away with current strategies, state and local governments are in need of a practical, preemptive approach. A statutory framework encouraging deconstruction can be such an approach. To do so, the framework should have both present and future aims. In the present, statutes should provide incentives to deconstruct *existing* abandoned structures. Prospectively, statutes should deter *future* abandonment by providing incentives to deconstruct houses near the end of functionality—instead of the current trend of leaving houses to rot the heart of a city.

To begin, Part I looks at Indianapolis, Indiana, and its struggle with abandoned property. Indianapolis provides a representative lens to view this Note's proposals, though broader application is appropriate. Part II discusses the demolition technique called deconstruction—its definition; why it is underutilized; its challenges; and the economic, environmental, and social benefits it could bring to a city. Using Indiana once again, Part III presents a novel idea for state and local governments to turn abandoned housing into an opportunity using a three-pronged approach of 1) local housing deposits, 2) a

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27. *See Deconstruction: Economic Benefits*, WASTE TO WEALTH, http://www.ilsr.org/recycling/decon/economicbenefits.html (last visited Mar. 5, 2012).

28. *See* Samsa, *supra* note 13, at 191.

29. *See, e.g.*, Streitfeld, *supra* note 5.

30. *See* Samsa, *supra* note 13, at 191-92.

state tax credit, and 3) local ordinances. The three-part approach will provide a powerfully supportive environment for deconstruction, known as the "very viable and under-utilized alternative to demolition."[31] While the conclusions presented are bold, they are worth considering over the alternative of "planned shrinkage"[32] or a "downward spiral" of decay.[33]

In tackling the difficult issue of abandoned housing, this Note will not address the question of how Indianapolis and America's cities got into this mess, simply because that question is beyond the scope of these pages. Analysts suggest various theories why American cities are littered with abandoned homes, ranging from demographic shifts combined with faltering regional economies,[34] to a "great misallocation of resources" as a result of bad federal housing policies; or perhaps the problem lies in cheap loans and lax lending standards, leading to a national oversupply of houses.[35] The potential causes are too numerous to be discussed here; the purpose of this Note is to suggest a framework for building deconstruction incentives, which will provide a socially beneficial local weapon against the causes, whatever they may be.

After all, the next door neighbor to an abandoned house merely wants the problem solved immediately, and long range national policy discussions do not help those who have no time to wait.[36] What remains left behind after housing abandonment is all that is relevant: thousands upon thousands of decaying structures, abandoned by people who had incentives to do so, which forces the general public to pick up the tab, usually at the local government level.[37]

Deconstruction will not be a "silver bullet,"[38] but even a minor change in abandonment behavior repeated many times over could have a profound social impact on a problem of this magnitude,[39] and deconstruction incentives could provide this shift. But ultimately, this Note will show that implementing these suggestions is worthy without a seismic shift, because even if a local government benefits simply through blight clearance; fewer government-owned properties; waste reduction; more raw land for development; sustainable municipal service

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31. *Construction & Demolition Wastes*, *in* CLARK COUNTY COMPREHENSIVE SOLID WASTE MANAGEMENT PLAN 12-1, 12-5 (2008), *available at* http://www.clark.wa.gov/recycle/documents/11.08%20Chapter%2012.pdf.

32. *See* Streitfeld, *supra* note 5.

33. *See* Ryan Mills, *Collier Sherriff's Office Working with Residents to Clean Up Abandoned Homes*, NAPLES NEWS, Apr. 30, 2008, http://www.naplesnews.com/news/2008/apr/30/collier-sheriffs-office-working-residents-clean-ab/.

34. *See* Samsa, *supra* note 13, at 195.

35. Michael Milken, *Toward a New American Century*, WALL ST. J., Oct. 7, 2010, at A23.

36. *See* Shari Rudavsky, *Neighborhood Call to Action*, INDIANAPOLIS STAR, Sept. 24, 2010, at B1.

37. *See* Samsa, *supra* note 13, at 191-93.

38. ACTION PLAN, *supra* note 2, at 9.

39. *See* WES JANZ, DECONSTRUCTING FLINT 6 (June 2007), *available at* http://issuu.com/onesmallproject/docs/deconstructing_flint (concluding that a small idea repeated thousands of times within the context of deconstruction can significantly reduce waste).

and maintenance costs; reduced crime; or the return of the property to the tax rolls, then the effort may have been worth it. It is certainly time to get creative.

I. THE ABANDONED HOUSING PROBLEM IN INDIANAPOLIS

A. The Current State of the Problem

Indianapolis does not want to be the next Flint, Michigan—but it could be. While the cities are different in many respects, the two share a common bond, as do many Midwest cities: both have vast landscapes littered with abandoned housing.[40] The difference is that the two are at separate stages in terms of dealing with abandonment problems. The story of a city like Flint has advanced to the point of climax: The city is now considering proposals to cut off city services entirely and relocate large numbers of people from sparsely populated areas, in order to demolish whole blocks of abandoned housing.[41] This policy of "planned shrinkage" is a reflection of just how bad things can become if an abandoned housing problem is left unchecked and then meets with external demographic shifts; it literally becomes necessary to resort to "shutting down quadrants of the city."[42] In other words, Flint is removing those parts of the city that have died.[43]

Indianapolis is not at this point, though it cannot likely be known what level of abandonment will lead to a municipal emergency like the one in Flint. The current level of abandoned housing in Indianapolis is now estimated to be in excess of 9,000 properties, which is a comparable number in cities that face crisis levels and emergency decisions.[44] Yet, mortgage delinquencies continue to be on the rise in Indiana,[45] so abandoned housing levels could increase even further in Indianapolis in the coming months and years. It seems certain that any further declines in the local housing market or demographic shifts could only worsen the situation. No matter what the future may hold, a quick drive through Indianapolis is all that is needed for a powerful reminder of the current scope of the city's level of abandonment.[46]

The abandoned housing problem in Indianapolis has not gone unnoticed, and current efforts to manage the problem have largely been in place since 2003.[47] Still, the number of properties has consistently increased since the 2003 survey

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40. *See* Streitfeld, *supra* note 5.

41. *Id.*

42. *Id.*

43. *See* Kristin Longley, *Flint Ranks No. 2 on 'America's Ten Dead Cities' List*, MLIVE (Aug. 26, 2010), http://www.mlive.com/news/flint/index.ssf/2010/08/flint_ranks_no_2_on_americas_t.html.

44. *See* ACTION PLAN, *supra* note 2, at 12; JANZ, *supra* note 39, at 3 (declaring the scale of abandonment in Indianapolis as "significant" and worthy of comparison with Flint, Michigan).

45. *See Mortgage Delinquencies*, *supra* note 10.

46. *See* ACTION PLAN, *supra* note 2, at 12; JANZ, *supra* note 39, at 3.

47. *See generally* ACTION PLAN, *supra* note 2 (outlining Indianapolis's multi-faceted plan to address abandoned properties in the city).

that triggered such concern.[48] Arguably, this is because the city has employed common, defensive strategies like code enforcement and tax sales for dealing with the issue,[49] all of which allow the city to function neatly within the statutory construction of Indiana law, but are not well suited to mitigate abandonment because those systems were not designed for this purpose.[50] As an example, the Mayor of Indianapolis, Greg Ballard, sought to demolish 1,500 properties in 2011 as part of a campaign of code enforcement lawsuits against slumlords.[51] Yet, each one of these targeted properties will almost certainly go through an administrative procedure requiring significant due process and can be delayed at the owner's request or extended for "good cause," and in some cases, challenged by the owner through judicial review.[52] While the Mayor's goal is ambitious, it could be considered needlessly aggressive and adversarial, pitting government against property owners. Moreover, underlying this strategy, city action cannot be taken until a code provision is violated and, even then, vast enforcement depends upon a code rooted in government's police power, originally designed to merely enforce "maintenance and repair standards appropriate for the community" on a case by case basis.[53]

B. Preemptive Strategies to "Abandoned" Houses Are Elusive

Simple solutions to large scale abandonment seem to be as elusive as a single definition of abandonment itself.[54] The City of Indianapolis exemplifies the struggle to simply define the term "abandoned." The City defines an "abandoned property" as "a chronically vacant and uninhabitable unit whose owner is taking no meaningful steps to bring it back into the housing market."[55] The definition is best explained in the City's words:

> Abandonment is different than vacancy, which simply refers to whether a property is occupied or not. Vacancy can be the result of normal

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48. *See id.* at 12.

49. *See* Samsa, *supra* note 13, at 197-201.

50. *See id.*

51. *See* John Tuohy, *City Begins Suing Landlords over Health, Zoning Issues*, INDIANAPOLIS STAR, Jan. 11, 2011, at B2. The goal for 2011 was not reached; rather, by September, 2011, Mayor Ballard now "aim[ed] to have over 600 unsafe buildings under contract for removal by the end of 2011." Press Release, Dep't of Pub. Works, Mayor Ballard Launches Abandoned Structures Initiative to Remove Hundreds of Unsafe, Unsalvageable Houses, Buildings (Aug. 27, 2011), *available at* http://www.indy.gov/eGov/City/DPW/RebuildIndy/Projects/Documents/8%2027%2011%20MAMAY%20BALLARD%20LAUNCHES%20ABANDONED%20STRUCTURES%20INITIATIVI%20TO%20REMOVE%20HUNDREDS%20OF%20UNSAFE%20UNSALVAGEABLE%20HOUSES%20BUILDINGS.pdf. The shortfall of 2011 was pushed forward to the next year by raising the goal for 2012 to 2,000 homes. *See id.*

52. *See* IND. CODE §§ 36-7-9-7 to -8 (2011).

53. *See id.* § 36-7-9-4.5.

54. *See* Samsa, *supra* note 13, at 194.

55. ACTION PLAN, *supra* note 2, at 9.

> turnover and can be temporary or permanent. In contrast, abandonment is characterized by long term or permanent vacancy and by the poor physical condition of a property. To abandon a house is to neglect the responsibilities of ownership related to minimal functional, financial, and physical maintenance of the property.[56]

Difficulties are immediately apparent in defining abandonment in this way. For example, according to this definition, a house never arousing code enforcement authorities can be indefinitely "abandoned" yet remain under private though "neglect[ful]" ownership.[57] Second, potentially, a house can be *permanently* "vacant" without being "abandoned."[58] Moreover, how minimal is "minimal"? What physical condition is "poor"? With such ambiguities, it is extremely difficult to distinguish vacancy from abandonment, or what type of neglected responsibilities separates the two. Most evident in this ambiguity seems to be that there is an unknown threshold crossed in time when an empty house reaches a state of decay such that external costs begin to accrue on the surrounding community. Beyond the threshold, cities are at some point made aware of abandonment chiefly by code violations or unpaid taxes.[59] But because the distinction is so blurry, there is the possibility of a significant period of harm to the community before the government even knows a property is "abandoned" according to the definition, and an additional, potentially long, period of time before something is done about it.

Thus, when trying to prevent a large accumulation of abandoned properties, it would seem that a broad solution that targets properties *before* abandonment occurs is appropriate. This is especially true in light of the historically mixed results from current efforts, which are mostly post-abandonment tactics. Such a desired remedy could logically come in the form of today's "urban renewal" statutes using eminent domain as an exercise of the government's police power.[60]

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56. *Id.* Compare *id.*, with IND. CODE § 36-7-36-1, providing the State of Indiana's lengthy definition of "abandoned structure" in part, as:

> (2) Real property that has not been used for a legal purpose for at least six (6) consecutive months and: (A) in the judgment of an enforcement authority, is in need of completion, rehabilitation, or repair, and completion, rehabilitation, or repair work has not taken place on the property for at least six (6) consecutive months; (B) on which at least one (1) installment of property taxes is delinquent; or (C) that has been declared a public nuisance by a hearing authority. (3) Real property that has been declared in writing to be abandoned by the owner, including an estate or a trust that possesses the property. (4) Vacant real property on which a municipal lien has remained unpaid for at least one (1) year.

IND. CODE § 36-7-36-1. One can safely conclude that abandonment is a difficult concept to define and remedy when presented with such elaborate and subjective definitions.

57. *See* ACTION PLAN, *supra* note 2, at 9.

58. *See id.*

59. *See* Samsa, *supra* note 13, at 197-200.

60. *See, e.g.*, IND. CODE § 36-7-14-30; *see also* Berman v. Parker, 348 U.S. 26, 32 (1954)

In fact, Indiana has a statute allowing for just this type of redevelopment. It provides that a redevelopment commission may exercise eminent domain to "plan and undertake urban renewal projects . . . [including a]cquisition of real property and demolition, removal, or rehabilitation of buildings and improvements on the property . . . [to e]liminate uses that are obsolete or otherwise detrimental to the public welfare" or to cure a very broad range of detrimental property conditions, including the expansive term, "blight."[61] Problems exist with this remedy, however. An Indiana redevelopment commission must first find that an "area in the territory under its jurisdiction is an area needing redevelopment."[62] Considering every major territory of urban Indianapolis has significant levels of abandoned properties, the "area needing redevelopment"[63] will need to be a large one: Indianapolis itself.[64] Accordingly, this type of statutory solution does not seem practical or probable now that abandonment has metastasized into nearly every neighborhood on some level.[65]

Still, the use of eminent domain under the police power is very versatile. Perhaps it is conceivable to try and stop abandonment in its tracks with a pre-abandonment eminent domain strategy that takes specific parcels from property owners who simply *may* abandon their property sometime down the road. Turning again to Indiana law, courts have held that so long as the "state's exercise of eminent domain power is 'rationally related to a *conceivable* public purpose, the [United States Supreme] Court has never held a compensated taking to be proscribed by the [Fifth Amendment's] Public Use Clause.'"[66] In fact, "the Court has held that the public use requirement is thus coterminous with the scope of a sovereign's police powers."[67] It is certainly *conceivable* to target property owners who pose a high risk of abandonment. And it is fair to assume that the "public use" for such a strategy would be economically related, with the ultimate goal of transferring the property to a private owner who is non-neglectful of ownership responsibilities such as paying taxes or preventing municipal service cost burdens.

("An attempt to define [the police power's] reach or trace its outer limits is fruitless. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.").

61. IND. CODE § 36-7-14-30.

62. *Id.* § 36-7-14-15.

63. *Id.* § 36-7-1-3.

64. *See Indianapolis General Data Viewer*, INDYGOV, http://imaps.indygov.org/prod/GeneralViewer/viewer.htm (select "vacant houses" in drop down menu; then click "Switch Map Set") (last visited Mar. 5, 2012) (providing a sobering look at the scale of the housing issue in Indianapolis).

65. *See id.*

66. Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445, 460 (7th Cir. 2002) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (citing Berman v. Parker, 348 U.S. 26) (1954) (emphasis added)).

67. *Id.* (quoting *Midkiff*, 467 U.S. at 241 (internal quotation marks omitted)).

In *Kelo v. City of New London*,[68] such economic justifications of the police power were addressed. The United States Supreme Court held that a local government's taking of an individual's private residence did not violate the Fifth Amendment's Takings Clause when a home was transferred to another private party with the intended "public use" of "economic development," defined under a Connecticut statute as a legitimate public purpose.[69] However, this expanded reading of public use did not sit well in many jurisdictions, including Indiana, and soon after, many state legislators reacted to this decision by limiting their state's definition of public use.[70] The Indiana legislature enacted statutory changes virtually eliminating "economic development" from the state's definition of a public use, along with similar justifications that include an increase in the tax base, tax revenues, or general economic health.[71] Consequently, this move effectively prevents future Indiana local governments from being able to take and transfer pre-abandoned housing to another private owner in Indiana in cases where the justification is rationally related to "economic development."[72] Summarily, the police power in Indiana is not coterminous with "public use" any longer, as is the case in similarly reacting jurisdictions. This fact leaves virtually no legal opening for legislators to craft high-volume property-specific police power remedies that address housing abandonment before it occurs.

As one can see, it is difficult to wage a war against abandoned property when even the point of what constitutes abandonment is elusive. Strategies that seek to head off abandonment before it happens are difficult to articulate, likely to run afoul of state laws, or simply be impractically large uses of the police power because of the invasiveness of abandonment. The difficulties often require cities to wait until the point of abandonment is clear. As a result, Indianapolis and other jurisdictions have traditionally focused on the post-abandonment period and employed two smaller scale police power tactics targeting parcels individually.

C. Post Abandonment Approach Number One: Enhanced Enforcement of Indiana's Unsafe Building Law

In the course of upholding a city's demolition order, Judge Carson Prime, in *Combs v. New Albany*,[73] eloquently explained the rationale for building code enforcement:

> It has never been denied that in the exercise of the police power, property rights may be sacrificed and privileges curtailed. Since public peace and

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68. 545 U.S. 469 (2005).

69. *Id.* at 485-86.

70. Erin Elena Smith, State Reaction to Kelo v. City of New London 3 (Apr. 2007) (unpublished senior honors thesis, Texas A&M University) (on file with the Texas A&M Office of Honors Programs & Academic Scholarships), *available at* http://repository.tamu.edu/bitstream/handle/1969.1/5694/ErinESmithThesis.pdf?sequence=3.

71. *See* 2006 Ind. Stat. Ann. Adv. Legis. Serv. 163 (LexisNexis).

72. *See id.*

73. 218 N.E.2d 349 (Ind. App. 1966).

> well being are the object of government, any legislation which furthers these aims will not be defeated on the ground that it interferes with the rights of some of its citizens. . . . [Therefore,] "[c]ities and towns have power to establish reasonable regulations for the protection of the lives, health, and property of their citizens, and to enforce compliance with such regulations by fixing penalities [sic] to be imposed upon violators of the regulations. . . . Reasonable regulations are not unconstitutional merely because they affect the uses to which private property may be put. This is not a taking of private property. It is an exercise of the police power."[74]

Along this line of reasoning, local public officials use regulations as a way of addressing abandoned structures while staying within the confines of state and federal law. The public safety dangers presented by abandoned and neglected buildings provide an easy target. The Indiana Unsafe Building Law authorizes local governments to require the owner of an unsafe building to take corrective action to deal with unsafe building conditions.[75] Unsafe buildings are expansively defined as those which are a "hazard to the public health; . . . a public nuisance; . . . dangerous to a person or property because of a violation of a statute or ordinance concerning building condition or maintenance; or . . . vacant and not maintained in a manner that would allow human habitation. . . ."[76] This statute has been publicly declared in Indianapolis as a primary weapon post-abandonment, and it is implemented through the use of orders issued by an administrative enforcement authority.[77] This tactic of targeting the individual parcel level is the opposite of condemning large swaths of a city using eminent domain and, contrary to requiring compensation to the owner, mandates payment, through lawsuits, *from* the owner for any costs required by any repair or demolition order.[78] Not coincidentally, it can achieve the same end result of eminent domain blight removal or begin the process of property transference to private hands. Reaching time and again for this arrow in the statutory quiver is exactly what Indianapolis does to principally address abandoned housing.[79]

Through enhanced code enforcement, Indianapolis has stepped up the use of monetary penalties and quickened judicial remedies in an effort to force owners to deal with the abandoned and dangerous structures—or even face the forced

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74. *Id.* at 350-51 (quoting Spitler v. Munster, 14 N.E.2d 579 (Ind. 1937)).

75. IND. CODE § 36-7-9-5 (2011).

76. *Id.* § 36-7-9-4.

77. *See id.* § 36-7-9-5; ACTION PLAN, *supra* note 2, at 15.

78. *See* IND. CODE § 36-7-9-13.

79. Indianapolis has also announced a desire to transfer property to another party through a process known as receivership, where the city can appoint and transfer the property to a party in order to fix up the premises without requiring the owner's presence in court. *See* ACTION PLAN, *supra* note 2, at 17-18. For purposes of this Note, receivership will be included under the broad category of code enforcement.

demolition of property.[80] Supportive Indianapolis residents have become aware of this greater tone of enforcement, and the primary local print news outlet has even encouraged residents to publicly report code violations in an effort to fix problems.[81] In some cases, residents have resorted to neighborhood initiatives requesting further code enforcement upon the numerous abandoned houses surrounding the neighborhood.[82] These responses are some indication that the Unsafe Building Law is a helpful vehicle for initiating action against a house matching Indianapolis's definition of "abandoned." In theory, an even stricter level of code enforcement than at present could provide a needed sidestep to the reaction to *Kelo* and create a needed single-parcel preemptive tool. The use of fines for even arguable violations could operate as a predictor of abandonment by separating those owners willing to repair or pay, from those owners whose "neglect" is more severe and poses a high abandonment risk. In effect, there is achievement of the goal of "economic development"—property flow to responsible private owners—under the guise of public safety and welfare or code enforcement.

But while code provisions are in fact being increasingly enforced in Indianapolis,[83] it also could be considered counterintuitive to do so, let alone increase it from present levels as a predictor of abandonment. This is because each fine, demolition order, or forced board-up raises the carrying costs of property ownership, which could further contribute to the economic forces of abandonment.[84] After all, a property's unsafe condition, needed repairs, or decayed state may be present due to the very fact that its owner has no money to improve the property.[85] Further, it is conceivable that any prospective real estate owners who may desire to purchase and bring the properties back to good standing may have less economic incentive to take on properties that have accumulated unpaid city fines, which are a lien on the real estate.[86] Future purchasers of any government-owned real estate will most likely be deterred by any delinquent penalties and unpaid costs, plus interest, which are added as special assessments on the property's tax bill.[87] Additionally, it is plausible that investors—or all homeowners for that matter—may be discouraged from ownership or renovation in fear of falling victim to enhanced code enforcement.

In sum, the legal tool of code enforcement is an appropriate way to address extremely unsafe conditions of a property, but it may not be a good way to keep

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80. *See* ACTION PLAN, *supra* note 2, at 15-16.

81. *See Star Watch*, INDIANAPOLIS STAR, http://www.indystar.com/data/starwatch/ (last visited Mar. 5, 2012).

82. *See* Rudavsky, *supra* note 36.

83. ACTION PLAN, *supra* note 2, at 16.

84. *See id.* at 17.

85. *See* Samsa, *supra* note 13, at 198.

86. *See* IND. CODE § 36-7-9-13 (2011) (showing an example of a lien that can be imposed for an unsafe premises).

87. *See id.* § 36-7-9-13.5 (exhibiting Indiana's statute regarding unpaid costs for unsafe premises).

a property from becoming abandoned by its owner or to predict abandonment. Separately, addressing abandoned homes through enhanced code enforcement, "at best, results in a series of haphazard citations, certainly outside the gambit of a systematic approach."[88] If anything, excess code enforcement fines may present a "[t]ipping point," at which the owner of a house abandons it because the fines presented by code enforcement are the last straw.[89] While demolition orders through the Unsafe Building Law can remove a problem property, it is also important to note that the locality probably contracts to do so using traditional demolition techniques, the focus of which is not salvaging maximum benefit to the community.

D. Post Abandonment Approach Number Two: Tax Sale

As in many jurisdictions, the other prominent tool that Indianapolis uses to fight abandoned housing is the power to tax. Indiana uses the tax sale process for the seizure and sale of chronically delinquent tax paying, "vacant . . . or abandoned" properties.[90] Essentially, this process leads to tax liens being placed on properties by the state at the time of assessment, which inure to a respective taxing authority in Indiana.[91] When a property owner becomes delinquent in tax payments, a county publicly auctions off the parcels to willing bidders in an effort to collect unpaid taxes.[92] High bidders receive tax certificates of sale that are subject to an interest-bearing redemption period.[93] The bidding begins at the value of the unpaid tax bill, and the successful bidder receives a tax deed if the tax certificate is not paid off, plus interest, within the redemption period.[94] From this point, the purchaser may initiate a quiet title action.[95] Bidding that does not reach the level of unpaid taxes results in the county receiving the certificate of sale, becoming the owner of the property at the end of the redemption period.[96]

While the tax sale has traditionally been a staple in Indianapolis as a means to return abandoned property to the tax base, ever since the increase in abandoned housing reached current levels, county government has struggled to get bidders to purchase these tax certificates—multitudes of parcels at these sales now remain

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88. Samsa, *supra* note 13, at 198.

89. *See* Kraut, *supra* note 25, at 1146; *see generally* MALCOM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2002) (arguing that "little things" contribute significantly to major changes in various aspects of society).

90. *See generally* IND. CODE §§ 6-1.1-22 to -25 (outlining the statutory framework for the collection of property tax, delinquent property tax sale, and property redemption processes in Indiana).

91. *See id.* § 6-1.1-24.

92. *See id.* § 6-1.1-22-13.

93. *See id.* §§ 6-1.1-24-9; 6-1.1-25-2.

94. *See id.* §§ 6-1.1-24-5; 6-1.1-25-1.

95. *See id.* § 6-1.1-25-14.

96. *See id.* § 6-1.1-24-6.

unsold.[97] Huge levels of back taxes, along with the poor condition of many houses, leave little economic incentive for private parties to purchase these parcels when the total costs of purchase, rehabilitation, and maintenance far exceed the market value of the property.[98] These recent failures of the tax sale process due to the abundance of abandoned homes in Indianapolis may very well be a canary in the coal mine for the severity of Indianapolis's problem. This process also suffers from inherent time delays caused by the length of the property tax cycle. A property is not placed on a list for sale until it is tax delinquent and only then "after January 1 of each calendar year in which a tax sale will be held in a county and not later than fifty-one (51) days after the first tax payment due date in that calendar year."[99]

While the tax sale process may work well for collecting property taxes from owners of properties in good condition, or in times when supply of neglected property does not dwarf demand, the tax sale is not well suited to fight abandonment. It, like Indiana's Unsafe Building Law, was not designed for preempting a tide of dilapidated abandoned housing or removing thousands of properties from county ownership.[100]

E. A Supplemental Approach: The Indy Land Bank

The Indy Land Bank was created by statute for the purpose of serving as a virtual repository for abandoned houses and empty lots obtained by Indianapolis through the tax sale process, or in conjunction with code enforcement.[101] This "bank," which is essentially a website, temporarily "holds" property with the ultimate goal of rehabilitating houses and collecting taxes as soon as possible, with a secondary goal of "strategically" assembling parcels to achieve redevelopment objectives.[102]

The Indy Land Bank does have some productive uses, such as serving as a one-stop shop for an inventory of all property that Indianapolis would like to return to private hands.[103] Another may be that aggregated location information regarding Indianapolis-owned abandoned housing is preferable to spreading it across multiple agencies. Indeed, Indianapolis believes consolidated information

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97. *See* Jeff Swiatek, *Center Township Properties Excite Few Bidders at Tax Sale*, INDIANAPOLIS STAR, Oct. 8, 2010, at A8 [hereinafter *Township Properties*].

98. *See* Francesca Jarosz, *In the Bad Economy, Thousands of Homes Have Become Empty Shells Relegated to Tax Sales, Leaving the County with an . . . Unwanted Surplus*, INDIANAPOLIS STAR, Aug. 31, 2010, at A1.

99. IND. CODE § 6-1.1-24-1.

100. *See* Samsa, *supra* note 13, at 197.

101. *See* ACTION PLAN, *supra* note 2, at 24; *see generally About the Land Bank*, INDY LAND BANK, http://www.indylandbank.com/about.shtml (last visited Mar. 5, 2012).

102. ACTION PLAN, *supra* note 2, at 24.

103. *See* Samsa, *supra* note 13, at 213-29 (providing an in depth discussion of the various forms of land banks, and stating that, generally, "[a] land bank is an agency that oversees the acquisition, management and disposal of problem properties for the purpose of strategic re-use").

could be valuable for potential property developers.[104] The Indy Land Bank also can efficiently identify willing adjacent-landowner purchasers to sell property to them for a nominal fee,[105] which is indeed another way to return a property back to a tax paying status.[106]

But any land bank approach begins long after abandonment and only works at the speed of the code enforcement and tax sale process that "banks" the properties.[107] This means the property likely must first clear either the administrative process of code enforcement or the annual tax cycle, or both. This hardly seems fast enough to tackle thousands of dilapidated properties at once, some of which may not meet the definition of abandonment—meaning some may be out of reach of the tax sale process because they are, in fact, dilapidated and decaying structures unknown to code enforcers, but current on their property taxes. Or, perhaps a property cycles in and out of tax delinquency, but persists as a vacant, boarded-up eyesore whose owner obeys the building code.

Additionally, when the city holds property in the Indy Land Bank, it incurs costs of property maintenance according to Indiana's own Unsafe Building Law standards, let alone any costs of rehabilitation incurred by the land bank.[108] Thus, Indianapolis probably wants to avoid a very high number of properties in the land bank, because it means avoiding a high maintenance cost to the city in a time of tight budgets.[109] Yet, placing a high number of properties in the land bank is what is needed to tackle large amounts of abandoned property. Essentially, Indianapolis becomes a victim of its own stepped up code enforcement costs as soon as it places a property in the land bank. Indianapolis has publicly acknowledged this heightened cost of adherence to the Unsafe Building Law when property is placed in the land bank.[110] This striking acknowledgement seems to verify the earlier conclusion that enhanced code enforcement aggravates the economic forces of abandonment, not the other way around.

Finally, the Indy Land Bank's existence arguably rests on the assumption that there will be future demand for the properties that are acquired by and held within it, along with future desire from private or non-profit owners to develop the properties.[111] This may not be a sound assumption in an environment where Indianapolis real estate markets are weak, where there is an oversupply of houses, or where there is regional economic difficulty.[112] The recent failures of tax sale

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104. *See* INDY LAND BANK, http://www.indylandbank.com/ (last visited Mar. 5, 2012).

105. *See id.*

106. *See Policies and Procedures*, INDY LAND BANK, http://indylandbank.com/policies.shtml (last visited Mar. 5, 2012).

107. *See id.* (describing the Indy Land Bank's acquisition process as primarily beginning after tax delinquency, tax sale, and statutory redemption periods, unless land is donated or purchased from Marion County Surplus).

108. *See* ACTION PLAN, *supra* note 2, at 24.

109. *See id.*

110. *See id.*

111. *See Policies and Procedures, supra* note 106.

112. *See supra* notes 14-15, 98 and accompanying text.

auctions provide little hope that people will purchase a large volume of properties located in the Indy Land Bank.[113] Thus, the land bank may well be a valuable informational and organizational tool for policymakers, as well as an efficient way to transfer clear titled property to non-profits, adjacent landowners, or law enforcement officers,[114] but may accomplish little else. At its current level of use, the Indy Land Bank does not operate as a high volume remedy for reducing large quantities of housing.[115] Confronted with thousands of houses, the land bank stands to be a virtual repository for thousands of government-owned abandoned properties if there is no future demand for its supply.

F. The Missing Approach: Deconstruction

In 2009, Indianapolis published an "Action Plan" for tackling the problem of abandoned houses, yet nowhere in the plan did the city mention the possible benefits of building deconstruction or any effort to study or use it as a tool to stem the tide of property abandonment.[116] A slightly more encouraging consideration of deconstruction was given by the city in response to a public comment as part of a 2009 proposal for federal Community Development Block Grant funds. There, Indianapolis claimed that "[c]urrently the [c]ity is researching environmentally friendly deconstruction. If employed, this strategy will encourage green deconstruction on all future demolition projects. There is no precedent . . . within community and economic development in the City of Indianapolis" for using deconstruction to address abandoned properties.[117]

While the use of deconstruction in Indianapolis is unprecedented, this cannot be said for other cities or Indiana in general. For example, Cleveland has conducted pilot studies to examine deconstruction of abandoned housing,[118] and several cities across the country have model statutes requiring levels of deconstruction to be performed at demolitions within their municipalities.[119] Far from having nothing to build on, Indianapolis could certainly learn from this

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113. *See Township Properties*, *supra* note 97.

114. *See Policies and Procedures*, *supra* note 106.

115. At the time of this writing, the Indy Land Bank listed only forty-two properties on its website available for acquisition. *See Available Property*, INDY LAND BANK, http://www.indylandbank.com/ (select "Available Property" hyperlink in top toolbar) (last visited Mar. 5, 2012).

116. *See generally* ACTION PLAN, *supra* note 2 (omitting the topic of deconstruction entirely from the city's comprehensive plan to address abandoned property in Indianapolis).

117. CITY OF INDIANAPOLIS, CDBG-R SUBSTANTIAL AMENDMENT 4 (2009) [hereinafter CDBG-R AMENDMENT], *available at* http://indy.gov/eGov/City/DMD/Community/Grants/Documents/CDBG-R%20Amendment% 20070909.pdf.

118. *See generally* Jon Mooallem, *This Old Recyclable House*, N.Y. TIMES, Sept. 28, 2008, at MM58, *available at* http://www.nytimes.com/2008/09/28/magazine/28house-t.html.

119. *See, e.g.*, RECYCLE WORKS: A PROGRAM OF SAN MATEO CNTY., UNDERSTANDING C & D RECYCLING REQUIREMENTS, *available at* http://www.recycleworks.org/pdf/CD_office_guide_pg_4_5.pdf (last visited Mar. 5, 2012).

information or adopt best practices for the use of deconstruction as a tool. While most model deconstruction ordinances were created out of necessity because of diminishing landfill space,[120] they could also be potentially useful to Indianapolis as a way to explore the removal of city-owned abandoned structures.

Perhaps most glaring is the fact that the state of Indiana has already successfully experimented with deconstruction in the industrial context through the Indiana Department of Environmental Management's Brownfields Program.[121] In Ligonier, Indiana, funds partially provided by the state were paid to deconstruct a three-story former wire assembly plant structure.[122] The national and state award-winning project sold one hundred tons of reusable material per week during the project and sold and reused 1.6 million bricks at a historic church, a lighthouse on the Great Lakes, and multi-million dollar homes in six states.[123] The project recycled three hundred tons of steel, copper, aluminum, and brass.[124] The deconstruction experiment in Ligonier is best summed up in the Indiana Finance Authority's own words: "[b]y recycling valuable construction and demolition materials, only an estimated [five to ten] percent of the building materials will go to a landfill. This is a great example of how thinking 'green' can bring cost savings, new jobs, and community enhancement."[125] Despite such precedent, deconstruction has not thus far been given serious consideration or support in Indianapolis.

II. WHAT IS DECONSTRUCTION?

A. The Process: Systematic Disassembly

So what is deconstruction, precisely? Deconstruction is a "new term to describe an old process—the selective dismantling or removal of materials from buildings before or instead of some elements of traditional demolition."[126] Put differently, deconstruction is "construction in reverse," involving the "selective and systematic disassembling of buildings with the specific goal of generating a supply of materials suitable for reuse."[127] Basically, in deconstruction, a group

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120. *See, e.g.*, ALAMEDA CNTY. WASTE MGMT. AUTH. & ALAMEDA CNTY. SOURCE REDUCTION & RECYCLING BD., INNOVATION, LEADERSHIP, STEWARDSHIP 1 (2002), *available at* http://www.stopwaste.org/docs/1635221022005ar90-00.pdf.

121. *See Brownfields Program*, INDIANA FIN. AUTH., http://www.in.gov/ifa/brownfields/ (last visited Mar. 5, 2012).

122. *See Green Redevelopment in Ligonier: Former Essex Wire Site*, INDIANA FIN. AUTH., http://www.in.gov/ifa/brownfields/2576.htm (last visited Mar. 5, 2012).

123. *Id.*

124. *Id.*

125. *Id.*

126. U.S. DEP'T OF HOUS. & URBAN DEV., A GUIDE TO DECONSTRUCTION iii (Feb. 2000) [hereinafter DECONSTRUCTION GUIDE], *available at* http://www.huduser.org/Publications/PDF/decon.pdf.

127. John S. Manuel, *Unbuilding for the Environment*, 111 ENVTL. HEALTH PERSP. A880,

of people take apart a structure by hand so carefully that nails are often taken from every board one nail at a time, or walls are taken down brick by brick.[128] Taking apart buildings, by hand, for reuse and recycling is in contrast to traditional demolition techniques, where buildings are knocked down with large construction equipment and the resulting debris is dumped in a landfill.[129]

Instead of traditional demolition's focus on saving time or labor costs, the primary goal in building deconstruction is the reuse of materials, so buildings are carefully taken apart in a methodical fashion to maximize the recapture of building materials and construction components.[130] Some case studies have shown that deconstruction can divert ninety percent of waste away from a landfill that would ordinarily result from traditional demolition.[131] Because deconstruction roughly follows the construction process in reverse order, those items that were installed first in construction will be removed last in deconstruction.[132] Doing things in this manner enables efficient sorting and separation of materials for reuse, recycling, and disposal at the time of removal.[133]

B. Learning From History: The Principle of Embodied Energy

Dismantling a structure with a mind toward salvage and reuse is well rooted in human history as an economical and environmentally sound practice that leads to numerous economic and social benefits: it can be seen as early as Egyptian building material reuse,[134] Roman Empire road construction,[135] or as recent as pre-World War II American wood-framed building deconstruction.[136] The fact that deconstruction is found so prevalently in human history seems to suggest what our ancestors knew about the technique, but we have forgotten as people have become more affluent and building materials have become cheaper and more

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A881 (2003), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241780/pdf/ehp0111-a00880.pdf.

128. *See* Mooallem, *supra* note 118.

129. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1.

130. *See id.*

131. *See* Spenser Villwock, *Integrity and Bliss Through Deconstruction*, CONSERVATION MAG., Fall 2008, at 12, 12, *available at* http://conservationcenter.org/assets/docs/articles-waste/integrity-and-bliss-through-deconstruction.pdf.

132. BRADLEY GUY & SEAN MCLENDON, CTR. FOR CONSTR. AND ENV'T, UNIV. OF FLA., BUILDING DECONSTRUCTION: REUSE AND RECYCLING OF BUILDING MATERIALS 4 (2000), *available at* http://www.recyclecddebris.com/rCDd/Resources/Documents/CSGReuseRecycling.pdf.

133. *Id.*

134. *See* Elaine Sullivan, *Construction Methods*, DIGITAL KARNAK 1, 11-12 (2008), *available at* http://dlib.etc.ucla.edu/projects/Karnak/assets/media/resources/ConstructionMethodsAndBuildingMaterials/guide.pdf.

135. *See* Manuel, *supra* note 127, at A881.

136. *See* Bob Falk, *Wood-Framed Building Deconstruction: A Source of Lumber for Construction?*, 52 FOREST PRODUCTS J. 8, 10 (2002), *available at* http://www.fpl.fs.fed.us/documnts/pdf2002/falk02a.pdf.

disposable[137]: when a building is no longer fit for use, it does not mean that all of its parts and components are useless.[138]

In fact, the contents of a building may consist of numerous components that still have useful lives.[139] For example, wood can be reused in new construction framing, hardwood flooring, siding, or ground up for mulch or fuel.[140] Scrap metal can easily be taken to processors to be melted down and returned to fabrication.[141] Concrete and asphalt are readily ground into rubble for reuse as fill, road base, or road patch.[142] Beyond this, many structures contain architecturally significant components, antique fixtures, or other high quality furnishings that can be marketed or reused upon recovery.[143]

In addition, deconstruction is arguably preferable over traditional demolition because a more fundamental principle is seemingly rejected when a building is demolished without an eye toward salvage and reuse maximization. This principle is that the construction materials originally used to create the structure contain embodied energy—which is "defined as the total energy required in the creation of a building, including the direct energy used in the construction and assembly process, and the indirect energy that is required to manufacture the materials and components of the building."[144] In other words, reusing and recycling existing materials the structure is made from is much more energy-efficient than manufacturing and producing new, virgin materials to reconstruct another building.[145] While most agree that buildings are not meant to be permanent structures, by demolishing and landfilling construction debris, society fails to recognize that some of the materials the structures consist of may have life spans well beyond that of the building as a whole.[146] By not recognizing the principle of embodied energy, demolition waste is arguably generated in an extravagant and decadent fashion by today's society. Every time a structure is knocked down and landfilled, we waste resources by burying them.[147]

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137. *See* Mooallem, *supra* note 118.

138. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1 (indicating that indeed "[m]ost old buildings have some systems and materials with useful lives").

139. *See* Manuel, *supra* note 127, at A883 (identifying multiple reuse strategies for C & D materials).

140. *See id.*

141. *Id.*

142. *See id.*

143. *See id.*

144. PHILIP CROWTHER, DESIGN FOR DISASSEMBLY TO RECOVER EMBODIED ENERGY 2 (1999), *available at* http://eprints.qut.edu.au/2846/1/Crowther-PLEA1999.PDF.

145. *See id.* at 2-5.

146. *See id.* at 4-5.

147. *See* U.S. ENVTL. PROT. AGENCY, FY2002 OSWER INNOVATION PILOT RESULTS FACT SHEET 1 (July 2010), *available at* http://www.epa.gov/oswer/docs/iwg/building_decon_reuse.pdf (stating that "continued disposal of building materials uses landfill space and buries potential resources rather than extracting their value for productive reuse").

C. Environmental and Social Benefits of Deconstruction

Perhaps the most intriguing aspect of deconstruction is what it can bring to a community and society as a whole simply through the basic techniques that it employs. As discussed, deconstruction leads to a reduction in waste generation and a conservation of local landfill space, because building materials are reused rather than discarded.[148] To drive the point home, however, it is worth mentioning that estimates of building-related waste generated each year in the United States reach 136 million tons.[149] Demolition waste is said to account for fifty-four percent of this waste stream, and it is estimated that only .2 percent is currently being recaptured.[150]

Equally important, because of its labor-intensive process, deconstruction implicitly supports dual community objectives of alleviating unemployment in conjunction with reducing local blight.[151] Deconstruction projects employ scores of workers, such as workers to disassemble structures, recover materials, sort, salvage, and haul; these jobs provide direct, living wage employment and worker job training, especially in the area of construction trades.[152] Thus, in an environment that is conducive to multiple deconstruction projects, small business creation takes place, not only in deconstruction trades, but also in secondary level materials reuse, resale, and salvage industries.[153]

Several other societal benefits, albeit less measurable, can also be used to support deconstruction as the desired option for addressing abandoned housing on a broad scale. First, there are reduced costs to the local population, such as costs not incurred for new landfills.[154] This is a significant point, given that Flint, Michigan was estimated to generate 260,000 cubic yards per year of demolished housing waste—this is "equivalent to a standard city block in Manhattan covered with a block of house debris the height of a 3-story building. . . . [e]very year."[155] Without deconstruction, nearly all of that waste goes in the ground.

Second, on its face, deconstruction's focus on materials reuse reduces local energy consumption, because fewer new materials need to be manufactured

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148. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1.

149. *See* Manuel, *supra* note 127, at A881.

150. Stephani L. Miller, *Mind the Waste: Deconstruction vs. Demolition*, CUSTOM HOME, May 2008, *available at* http://www.remodeling.hw.net/reuse/mind-the-waste-deconstruction-vs-demolition.aspx.

151. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 2 (indicating that "[d]econstruction can be a way of keeping resources in the community and a way of developing job and small business opportunities").

152. *See id.* at 1.

153. *See id.* at 12 (providing links to several secondary building material industry websites that benefit from deconstruction).

154. *See* GUY & MCLENDON, *supra* note 132, at 20 (concluding that "[t]here are future costs which accrue to the municipality or to the owner of the landfill that are not included in the costs of disposal").

155. JANZ, *supra* note 39, at 6.

within or transported to the locality.[156] This conserves natural resources used by the local construction industry because virgin materials do not need to be harvested for manufacture or purchased by local builders.[157] Third, and even more localized, there is less destructive site impact at deconstruction project sites versus traditional demolition sites due to the absence of the use of heavy wrecking equipment.[158] Basically, the lack of bulldozers, wrecking balls, backhoes, and heavy equipment leaves ground cover, trees, and vegetation in place at the site of the abandoned structure.[159] This minimizes environmental and vegetative degradation, and also eliminates health hazards by not spreading lead paint dust to surrounding streets and blocks.[160] Fourth, materials that are salvaged on deconstruction projects are often donated as tax deductible donations to local non-profit organizations, much to the benefit of the community whose citizens may repurchase reusable building materials at often less than half of their retail value.[161]

Finally, public housing authorities benefit from readily available opportunities to train laborers in the construction trades, as well as having an abundance of second-hand building materials for the cost efficient repair of existing public housing.[162] Surely this is why federal policy has long encouraged incorporating technologies such as deconstruction in notices of federal funding availability for the revitalization of public housing.[163]

Taken together, the possible benefits that accrue from the use of deconstruction seem to be immense, and it is not hard to see how these benefits could strengthen a local economy. Few would argue against keeping reused and recycled building material resources in the community and out of landfills, and it is difficult to dispute creation of jobs providing valuable skills training and paying living wages, a portion of which is likely returned to the community

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156. *See* CROWTHER, *supra* note 144, 2-3.

157. *See id.* at 5 (concluding that designing buildings for disassembly will have the added benefit of reducing the depletion of natural resources); Manuel, *supra* note 127, at A886 (adding that "[d]econstruction and subsequent reuse of materials also benefits the environment by reducing the demand for raw materials such as wood and iron ore").

158. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1 (advising that deconstruction "can reduce site impacts in terms of dust, soil compaction, and loss of vegetation or ground cover").

159. *See id.*

160. *See* Mark R. Farfel et al., *A Study of Urban Housing Demolition as a Source of Lead in Ambient Dust on Sidewalks, Streets, and Alleys*, 99 ENVTL. RES. 204, 213 (2005), *available at* http://www.mapleleafcommunity.org/files/waldo/2005-10_Farfel_Lead-dustfall.pdf.

161. *See* GUY & MCLENDON, *supra* note 132, at 5.

162. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 11.

163. *See, e.g.*, *HOPE* VI Main Street Grants Notice of Funding Availability, 73 Fed. Reg. 36,380, 36,386 (June 26, 2008) ("HUD encourages the applicant to design programs that incorporate sustainable construction and demolition practices, such as the dismantling or 'deconstruction' of housing units, recycling of demolition debris, and reusing of salvage materials in new construction.").

through consumption and taxes.[164] Perhaps most crucially, abandoned buildings get removed along the way.

E. The Perceived Drawbacks of Deconstruction

Deconstruction has numerous and often unique challenges. For example, animal feces combined with lead dust can make for a challenging work environment.[165] These odd variables are representative of just a couple of the many unique challenges that are present when old, abandoned, poor quality homes in some of America's worst neighborhoods are taken apart by hand. These types of obstacles can often be traced to the fact that "following WWI and WWII, 'small poorly constructed housing was quickly erected on narrow lots, close to the factories that provided employment.' These never were high quality houses. It can be argued that these buildings, long ago, fulfilled their original mission"[166] and what is left is not always salvageable. What may be left is often stolen by "scrappers"—people who enter buildings to illicitly harvest valuable materials—meaning "[w]hat remains is a carcass that was once a home, but today is less than a house."[167]

Said another way, despite the laundry list of benefits, deconstruction is not without plenty of hurdles. Beginning with the technique itself, because deconstruction literally takes a building apart piece-by-piece, it takes more time than traditional demolition, making deconstruction less desirable for developers who may be under time-sensitive conditions.[168] Second, deconstruction is labor intensive, so labor costs are greater to pay ten or twelve workers to work for two weeks, versus "what a piece of hydraulic machinery accomplishes before lunch."[169]

While it would be relatively easy to dismiss deconstruction on these premises, thinking in these terms alone fails to account for other variables that work the total equation toward a closer economic balance than may be imagined. In actuality, deconstruction has already historically been cost competitive with traditional demolition by utilizing a combination of tax deductible donations, on and off-site material salvage and resale, and large savings from landfill disposal costs, all of which work to counter the higher labor costs inherent in deconstruction.[170] Test cases comparing demolition with deconstruction have shown that landfill disposal costs often represent over fifty percent of the total cost of demolition, compared with approximately ten percent of total costs for

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164. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1-2 (noting the ability of deconstruction to keep resources in the community and develop jobs and businesses).

165. S*ee* GUY & MCLENDON, *supra* note 132, at 13 (providing an interesting look at a deconstruction case study of an aging home with biohazards at 711 NW 7th Avenue).

166. JANZ, *supra* note 39, at 5 (internal citation omitted).

167. *Id.* at 6.

168. *See* Falk, *supra* note 136, at 11.

169. Mooallem, *supra* note 118; *see also* DECONSTRUCTION GUIDE, *supra* note 126, at 13.

170. *See* GUY & MCLENDON, *supra* note 132, at 24.

deconstruction.[171] Looking at the numbers in this fashion, the economics show that even a small increase for the cost to dispose demolition waste into a landfill quickly makes deconstruction a more profitable alternative to demolition. Even when considering conservative estimates of salvageable material, deconstruction has indeed been shown to be thirty percent cheaper in some cases over traditional demolition on a per-square-foot basis because of the ability to reclaim materials.[172]

Sometimes, however, finding salvageable materials can be a challenge in a severely dilapidated housing stock, and many tax-favorable charities that accept building materials do not accept contaminated, degraded, or poor quality materials comprising some abandoned houses.[173] But this element should not deter serious consideration of supporting deconstruction, because only now in the shadow of today's increasing need for a solution to abandoned housing are modern economic models of profit-based deconstruction being created.[174] While deconstruction has a rich history, it is not yet a widespread profit-based activity.[175] It is reasonable to envision that innovative solutions for recycling and reuse of even the most decayed building materials could evolve along with new markets for second-hand materials if the cost to dispose inside a landfill rises significantly.

Another challenge to employing deconstruction exists in the fact that very little thought has been given to how society would take apart its buildings long after construction. This means that building materials are often presently secured with engineered materials, chemical adhesives, or other methods that lead to damage upon component removal, loss in salvage value, and increased disassembly time.[176] Yet in the same way that regulations have guided the elimination of asbestos and lead paint in construction, one could easily imagine regulations that seek to mandate a balance of efficiency in construction with efficiency in future disassembly. Already, ideas for "design for disassembly" are taking shape in the building material and construction industry so that maximum economic value can be achieved through future construction materials recovery and structure disassembly.[177]

Since older pre-regulation residential housing is often filled with health hazards such as lead-based paint and asbestos, deconstruction's hands-on approach to disassembly brings humans in close contact with these hazards,

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171. *See id.* at 18.

172. *See id.*

173. *See* JANZ, *supra* note 39, at 5.

174. *See* Falk, *supra* note 136, at 14 (finding that "[b]ecause deconstruction is not yet a widespread activity, economic models are only now being developed").

175. *See id.*

176. *See id.* at 11.

177. *See generally* BRAD GUY & NICHOLAS CIARIMBOLI, DESIGN FOR DISASSEMBLY IN THE BUILT ENVIRONMENT: A GUIDE TO CLOSED-LOOP DESIGN AND BUILDING, *available at* http://www.lifecyclebuilding.org/files/DfDseattle.pdf ("DfD is intended to create buildings to reduce new materials consumption and waste in their construction, renovation and demolition. . . .").

presenting safety, regulatory, and cost hurdles.[178] But regulations and costs for removal and disposal of these hazardous materials govern both deconstruction and demolition evenly, leaving both on equal footing in this respect.[179]

Rather than viewing deconstruction as having a fatal flaw presented by preventatively higher labor costs, it is more appropriate to view the technique as presenting a complex, but surmountable, web of technical issues that must be balanced to make a project efficient, timely, and cost effective.[180] Thus, while deconstruction requires tremendous organization, trained supervision, and coordination to maximize reuse and recycling of materials during the process, all of these aspects present opportunities for extensive worker job training and employment.[181]

Alternatively, it is arguable that a process offering so many benefits outside of the realm of economics should not be considered solely on those terms. Plainly, exploring deconstruction is worthwhile because many returns may be only measurable in "sustainable solutions that create social value."[182] This theory is consistent with a "social entrepreneurship model [that works] to find a double bottom line," both economically and socially valuable, when examining large social problems.[183]

In summary, the challenges facing deconstruction are many but not prohibitive, and it seems reasonable to conclude that deconstruction could benefit from legal or economic incentives in order to make the process more profitable and preferable than traditional demolition.

III. INCENTIVES MATTER: MAKING EYESORES WORTH MONEY

A. What Sea Captains and Abandoned Houses Have in Common: A Need for Incentives

With all the challenges involved, why would anyone deconstruct a house? The answer: incentives. To illustrate, consider a tale of eighteenth century sea captains.

In the 1700's the British government hired sea captains to ship convicted

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178. *See* GUY & MCLENDON, *supra* note 132, at 6-8; Falk, *supra* note 136, at 12.

179. *See* GUY & MCLENDON, *supra* note 132, at 18, tbl.10 (showing a summary of equal hazardous materials disposal costs for both demolition and deconstruction).

180. *See id.* at 5-10 (laying out an explanation of a multitude of detailed protocols and technical issues necessary for a successful deconstruction project).

181. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 10-11 (indicating that "[t]aking a building apart can be one of the best ways to develop skills in the construction trades").

182. *See The New Heroes: What is Social Entrepreneurship?*, PBS, http://www.pbs.org/opb/thenewheroes/whatis/ (last visited Mar. 5, 2012).

183. Chad Blair, *Social Entrepreneurship Key to Grove Farm's Bottom Line*, PAC. BUS. NEWS, Nov. 15, 2009, http://www.bizjournals.com/pacific/stories/2009/11/16/focus14.html (internal citation omitted).

felons to Australia.[184] After some time, it was clear that the sea captains were not good caretakers of the convicts on board, as many would arrive in Australia other than the way they boarded—that is, they were arriving dead.[185] On one especially terrible trip, approximately one third of the inmates died, with the rest beaten, malnourished, or ill.[186] It was quickly apparent the onboard conditions during these voyages were horrible.[187] News of these voyages began to spread in England, and it became a public scandal.[188] The British government tried to cure the problem, and despite repeated efforts, could not.[189] They tried everything: requiring a physician onboard, citrus for scurvy, among other remedies.[190] Even the clergy reached out to the sea captains, appealing to their humanity.[191] But nothing seemed to work—that is until an economist came along.[192] The economist suggested a simple remedy: Instead of paying the captains for each prisoner that walked onto their ships, try paying them for the prisoners who walked *off* the ship at their destination.[193] Immediately, the survival rate increased ninety-nine percent.[194] By simply rewarding the sea captains to keep their prisoners alive, incentives were realigned to achieve the desired result.[195] The captains had good incentives before, but those were the wrong incentives to achieve an undesired result, which ultimately was starving the prisoners in order to sell their intended food in Australia.[196] And so it goes toward understanding "the first lesson in economics: incentives matter."[197] Get the incentives right and you can cure a host of social ills.[198]

In the same way that the sea captains changed their behavior to reach the desired result, an alignment of incentives to reward the use of deconstruction can help cities like Indianapolis achieve the desired result of eliminating abandoned housing. Instead of leaving all of the wrong incentives in place—which, in the past, have led to persistent abandonment—if a city and state work together to implement a comprehensive deconstruction policy that rewards property owners for removing structures at the end of a house's life cycle, the desired removal of abandoned housing can be achieved, while simultaneously accruing benefits of

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184. *See Morning Edition*, National Public Radio (Sept. 10, 2010) (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=129757852).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

local building deconstruction.

More clearly, what if abandoned houses could be "redeemed" for the amount of a deposit plus the value of salvageable materials? And what if the manner in which they were taken down helped to benefit and diminish burdens to the community? If it seems a bit of a stretch, consider that similar ideas are already in place—and working—in our society today. An example already exists to solve problems of waste generation. One need only look in an unexpected place—on a soda or beer bottle.

B. The Bottle Bill Analogy[199]

Across the country laws have been passed, appropriately named "bottle bills" or "container deposit laws,"[200] which seek to discourage consumers from discarding packaging containers as waste and instead to encourage them to redeem the containers for a return of a monetary deposit.[201] Since their inception, bottle bills have been enacted in many jurisdictions and have demonstrated a number of positive attributes, both economic and environmental.[202] Simply put, a bottle bill "create[s] a privately-funded collection infrastructure for beverage containers and make[s] producers and consumers (rather than taxpayers) responsible for their packaging waste."[203]

It is easy to see how replacing a few words in that definition could apply to houses. The idea has three parts, and the goal of the idea will be to stimulate private parties within the general public to view an abandoned structure as an opportunity instead of an eyesore—an asset whose removal is financially rewarded.

C. The Three-Tiered Incentive System: Deposits, Credit, and Local Laws

1. Tier One: The Local Abandoned Housing Deposit.—The first and most crucial aspect in a framework using deconstruction to address abandoned housing revolves around what could be called an "abandoned housing deposit." Local governments, using ordinances, should establish a mandatory deposit program that requires a monetary deposit to own property in that jurisdiction, much in the same fashion that bottle bills collect a deposit for packaging from producers and consumers of that packaging.[204] The basic purpose is to shift the cost of

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199. *See* GUY & MCLENDON, *supra* note 132, at 6 (describing the C & D deposit in San Jose, CA).

200. *See What is a Bottle Bill?*, BOTTLE BILL RESOURCE GUIDE, http://www.bottlebill.org/about/whatis.htm (last visited Mar. 5, 2012).

201. *See, e.g.*, OR. REV. STAT. ANN. § 459A.705 (West 2011).

202. *See Benefits of Bottle Bills*, BOTTLE BILL RESOURCE GUIDE, http://www.bottlebill.org/about/benefits.htm (last visited Mar. 5, 2012).

203. *What is a Bottle Bill?*, *supra* note 200.

204. *See id.*, describing a container deposit system as follows:

> When a retailer buys beverages from a distributor, a deposit is paid to the distributor for each can or bottle purchased. The consumer pays the deposit to the retailer when buying

managing abandoned housing away from the taxpayers and local government and instead set up a collection infrastructure that takes deposits from the users of housing that, in turn, will be forfeited or refunded upon certain behaviors.

In simple terms, if an owner abandons a property in the future, the deposit itself is also abandoned. While exactly who *pays* the deposit will most likely remain negotiable in property transfers, the buyer obtains credit for the deposit. For preexisting houses in a jurisdiction, incremental portions could be specially assessed to gradually fund those properties' deposits over time. In all cases, the money continues to belong to the homeowner and is to be refunded should that owner sell the property interest, with the subsequent owner becoming responsible for replenishing the deposit on the property.

Deposited funds will flow in and out with real estate transfers, but will gradually accumulate and be held in a general fund by the local government. The amount of the required deposit should reflect some or all of the removal costs of the particular structure, should it be deconstructed. To properly reflect the direct relationship of increased deconstruction labor costs and size of dwellings, the deposit value will likely be dependent upon the square footage of a structure. Since each successive property transfer will be at a future point in time, the current cost of deconstruction can be continuously updated to protect against any rising costs of deconstruction. In essence, this system of fund accumulation is what could be considered the funding, or "front-end," of the deposit program. Like when purchasing beverages, one must pay a deposit to buy a house.

At the other end of the program, a deposit refund system would be put in place that pays the costs for deconstruction of local residential structures that a property owner chooses to demolish. By using deposits to cover the cost of deconstruction, the system effectively operates as completely subsidizing the entire cost of residential structure removal for property owners. This is what would be considered the payment, or "back-end," of the deposit program.

Importantly, a property need not have a deposit registered for it to have deconstruction paid for, as perfect overlap of properties with deposits, compared with those needing to be deconstructed, is not likely to be achieved immediately. For example, government-owned properties at tax sales may not yet have a deposit on the property, yet the local government's willingness to cover the cost of property removal may significantly encourage interest in purchasing those houses now that demolishing the structure is essentially free.[205]

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the beverage. When the consumer returns the empty beverage container to the retail store, to a redemption center, or to a reverse vending machine, the deposit is refunded. The retailer recoups the deposit from the distributor, plus an additional handling fee in most U.S. states. The handling fee, which generally ranges from 1-3 cents, helps cover the cost of handling the containers.

205. *Id.* For added incentives, an exception to the deposit funding requirement would be appropriate for house purchasers who intend to deconstruct properties immediately, in addition to a consideration of the forgiveness of unpaid taxes for immediate deconstruction of government-owned properties. However, these owners would still receive funds from the "back-end" portion of the program, truly "redeeming" a house for cash payments akin to recycling bottles or cans.

In all, present housing transfers within the local market will generate deposits to fund the deconstruction demolitions of older ones. The idea has merit for several reasons, any of which make the proposal worth consideration. Arguably, building material waste should be treated no differently than beverage packaging waste. Left unchecked, they both end up in the landfill and most arguments in favor of bottle bill type programs are applicable to housing deposits as well. First, the cash payments of deconstruction refunds are paid by the collection of a deposit—not a tax. This should be self-evident in that the deposit is fully refundable, unlike a tax. This fact makes the system probably more politically acceptable in many jurisdictions where tax increases are not on the political or economic horizon. Only negligent property owners that abandon structures are "taxed" in this system, for it is only those owners' deposit that is forfeited.[206] Second, in the same fashion as bottle bills, the system shifts the costs of abandonment away from the community and onto those who abandon housing. Correspondingly, this means the externalities of an abandoned house are no longer borne by the entire local community, but shifted to the negligent producers and consumers of housing.[207] Third, the success of bottle bills makes it plausible and pragmatic to implement a deposit program shown to be effective in other areas of society.

Any use of traditional demolition or, of course, abandonment does not merit a deposit refund, because the heart of a locality's deposit policy should seek to shift preference toward deconstruction as a demolition technique. To analogize this with bottle bills, you do not get a refund of the deposit if you bury the bottle in a landfill or throw it out the car window. Only when a "consumer returns the empty beverage container to the retail store, to a redemption center, or to a reverse vending machine, the deposit is refunded."[208] So it will go with houses. You get paid to deconstruct, nothing else will do. While some may argue that this may face resistance in the demolition industry, "[i]t's not as if demolition contractors have anything against [deconstruction,] recycling or reuse . . . [i]t's largely a question of economics."[209] This ordinance helps shift those economics. Moreover, there are sufficient levels of recorded real estate transfers[210] in many

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This Note assumes a deposit system for market-based real estate transactions only. Therefore, also potentially excepted from the deposit requirement should be certain non-"arms-length," non-market transfers, such as intra-family transfers or inheritance.

206. *See* BLACK'S LAW DICTIONARY 1594 (9th ed. 2009) ("[Tax: a] charge, . . . [usually] monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue.").

207. *See Externalities*, ENVTL. LITERACY COUNCIL, http://www.enviroliteracy.org/article.php/1289.html (last visited Mar. 5, 2012) ("Externalities are unintentional side effects of an activity affecting people other than those directly involved in the activity.").

208. *What is a Bottle Bill?*, *supra* note 200.

209. *See* Manuel, *supra* note 127, at A887 (internal citation omitted).

210. *See, e.g.*, *Market Data*, MIBOR HOME, http://www.mibor.com/media/monthly_stats.asp (last visited Mar. 6, 2012) (showing, for example, 455 and 630 closed real estate sales for the off-peak months of January 2011 and 2012, respectively, in Marion County, Indiana alone).

jurisdictions to quickly ramp up deconstruction rebate funding.[211]

But in the end, one must also include in the equation the benefits to the community of blight removal itself. Aside from simply eliminating abandoned housing, surely revenues will be recaptured from currently lost property tax revenue; after all, levels of tax delinquent, abandoned parcels may decrease due to the fact that owners can cheaply remove blighted structures and remain current with lower property taxes on the now raw land with accordingly lower assessed values.[212] There are also savings that will be realized in local government budgets from the current drag of maintenance costs for government-owned abandoned property.[213] Also, after deconstruction is stepped up, depressed tax assessments are likely to be less frequent, due to removal of blighted structures "next door" that diminish neighboring property values.[214] It is possible that local tax revenues may actually increase, as sales tax and taxable income rise from the creation of deconstruction jobs and small businesses operating in resale, recycling, and salvage.[215] Also, common hidden costs of abandoned structures or traditional demolition will no longer be thrust upon the community, such as crime or new landfill space expenses.[216] Finally, like in many deposit programs, some deposits

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211. The system must be a "closed loop" funded by real estate sales and cannot function with deficit spending beyond the pace of real estate sales. For example, A buys Blackacre and pays a deposit to the city; C "redeems" a house and is paid by the city to deconstruct an abandoned house with A's funds; A then sells Blackacre to B and is thus owed a deposit refund; A's deposit funds are now refunded with B's new deposit on Blackacre required by the purchase.

212. *See* Jarosz, *supra* note 98 (reporting an initial $39 million loss in tax revenue from unsold, tax-delinquent properties, while "the public cost to care for those houses, the majority of which likely are abandoned or vacant, is millions higher").

213. *See* ACTION PLAN, *supra* note 2, at 24.

214. *See* BRIAN A. MIKELBANK, SPATIAL ANALYSIS OF THE IMPACT OF VACANT, ABANDONED AND FORECLOSED PROPERTIES 16 (2008), *available at* http://www.clevelandfed.org/Community_Development/publications/Spatial_Analysis_Impact_Vacant_Abandoned_Foreclosed_Properties.pdf.

> When vacancy and abandonment does occur . . . the city could curb value loss by demolishing . . . abandoned properties as quickly as possible. . . . An abandoned house that is allowed to remain so for two or three years would negatively impact every sale in its vicinity over that time period. Swift action to remove the blight would limit the negative impact, and potentially even turn its impact to a neighborhood gain through increased green space, reinvestment, or both.

Id.

215. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1 (explaining that "[d]ue to its labor intensive nature, deconstruction can also lead to the creation of new jobs and businesses. Reduced unemployment strengthens the local economy directly as well as indirectly in areas such as retail sales and housing").

216. *See* Manuel, *supra* note 127, at A883 (commenting on how stricter regulations and land scarcity are increasing cost of future landfill space); Samsa, *supra* note 13, at 196 (claiming that abandoned houses "perpetuate an image of the neighborhood which promotes criminal behavior and discourages redevelopment").

may not ever be redeemed, helping to build a possible surplus of funds to deal with the problem in the future.

The deposit system can be best summed up in this way: If an abandoned house is redeemable for cash like aluminum cans and glass bottles, redeemability of vacant and abandoned structures will reduce and prevent the accumulation of abandoned structures within a city. A private owner will be less likely to abandon a property when that means forfeiting one's deposit, and less likely to forgo an opportunity for a cash payment that offsets the cost of "recycling" the structure.

2. Tier Two: The Indiana State Donated Building Material Tax Credit.— Standing alone, the refund of a cash deposit from local government will likely deter some of the economic forces of abandonment, but an added boost to incentives is deliverable through a state tax credit for building materials donated to charitable organizations. This is where the state of Indiana comes in.

In conjunction with local housing deposit programs, the state of Indiana should authorize a state tax credit for the fair market value of donated building materials. When used with the refund of a deposit, this state tax credit complements the value of local deposit programs and helps make deconstruction the preferred local method of demolition.

In essence, if the state provides a tax credit for the value of recovered building materials, it creates incentives for demolition contractors to use the most cost efficient, yet greatest amount of care, in disassembling a structure. In effect, every salvageable building component or material will represent cash back into the pocket of a homeowner. Thus, contractors may seek to drive down the cost of deconstruction, because an efficient deconstruction operation will mean providing the greatest tax credit to customers, and lowering costs will mean more successful bids against competitors for deconstruction projects.

This proposed credit should be a hundred-percent, non-refundable state tax credit for materials donated to 501(c)[217] organizations with core housing missions, such as Habitat for Humanity.[218] A dollar-for-dollar non-refundable credit could vitally increase economic preference for deconstruction. At present, the economics of deconstruction are already competitive with traditional demolition using only federal income tax deductions and salvage resale as ways of offsetting higher labor costs. This is true in spite of the fact that federal law currently only allows a portion of in kind[219] charitable contributions to be deducted[220] and currently does not allow for the deduction of demolition expenses.[221] Note that

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217. *See* I.R.C. § 501(c)(3) (2006).

218. *See Learn About Us*, HABITAT FOR HUMANITY OF GREATER INDIANAPOLIS, http://www.indyhabitat.org/learn-about-us/ (last visited Mar. 4, 2012) (providing general information regarding the organization).

219. *See* BLACK'S LAW DICTIONARY 857 (9th ed. 2009) (defining in kind as "[i]n goods or services rather than money").

220. *See* I.R.C. § 170(a)(1) ("There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year.").

221. *See id.* § 280B.

charitable donations of building materials[222] have been limited to a federal tax *deduction*,[223] and not a credit, which is a much more valuable economic incentive.[224] A state credit will unlock the typically landfilled value of many building materials. In effect, a credit for any salvageable materials that are donated for resale to a charity allows the property owner to "sell" the materials to the state of Indiana. The state of Indiana "buys" them in the form of this tax credit in recognition of the value gained from not having thousands of abandoned properties in the state, or a gigantic stream of demolition waste in its soil. It also recognizes the market value of the embodied energy in those building materials.

While this credit may not seem significant at first, the salvage value of building materials is potentially very valuable as a way of reducing tax liability.[225] Case studies have shown that even homes as small as 500 square feet can have salvage values of over $9,000,[226] while one deconstruction company reported appraised values of materials at $38,302 for an 800 square foot house.[227] Used in combination with a deposit refund covering the cost of property removal, one can begin to see how a credit rewarding a property owner for donating these materials in a dollar for dollar fashion suddenly makes an abandoned house look very valuable—despite its presence as an eyesore.

Though a credit could possibly reduce state tax revenue, the underlying policy of this credit aligns with the express intentions of state legislatures and thus may be worth some expense, especially considering taxpayers already pay for the costs of abandonment. In Indiana for example, this new policy focusing on building material recovery aligns with state statutes that seek remedies which are "preferred over incineration and landfill disposal as [a] solid waste management method[]"[228] and provide a way of curing the avowed "substantial problem"[229] of abandoned housing. In addition, a state policy of charitable donation has implications for stimulating the state and local economy because it will keep affordable housing materials, jobs, and resources in the state and its communities.[230] While the proposal may not be without a cost, Indiana recently reported a state general fund surplus of $677 million with which to enact a new tax credit.[231] Indiana could also place a ceiling on the amount claimable by any

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222. *See Support Habitat*, HABITAT FOR HUMANITY OF GREATER INDIANAPOLIS, http://www.indyhabitat.org/support-habitat/ (last visited Mar. 5, 2012).

223. *See* I.R.C § 170(a)(1).

224. *See* Kimberly Lankford, *Tax Credit v. Deduction*, KIPLINGER, Mar. 19, 2007, http://www.kiplinger.com/columns/ask/archive/2007/q0319.htm (explaining the difference between a tax credit and tax deduction).

225. *See Deconstruction*, REUSE PEOPLE, http://thereusepeople.org/Deconstruction (last visited Mar. 5, 2012) (showing actual appraised values of donations made from deconstructed properties).

226. *See* GUY & MCLENDON, *supra* note 132, at 11-12.

227. *See Deconstruction*, *supra* note 225.

228. IND. CODE § 13-19-1-1 (2011).

229. *Id.* § 36-7-9-4.5.

230. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 1-2.

231. STATE BUDGET COMM., STATE OF INDIANA BUDGET REPORT 3 (2011), *available at*

taxpayer as in, for example, Indiana's credit for contributions to the state's "college choice 529 education savings plan."[232]

Perhaps another way of funding of this tax credit would be to continue Governor Mitch Daniels's suspensions and cuts to Indiana's recycling grants and loan programs.[233] Yet another avenue would be to increase Indiana's "tipping fees" that are charged to dispose of waste in landfills.[234] Following the lead of other states, this could be accomplished through a dramatic increase in solid waste management fees that the state requires to fund the Solid Waste Management Fund; as of 2010 these rates were set at only fifty cents per ton.[235] Given that total "tipping fees" in some urban areas reach well over $100 per ton,[236] Indiana has a lot of room to expand charges in this area. However, funding proposals for a building material tax credit are beyond the scope of this Note. In any event, should any of the ideas presented here be considered inappropriate, those closest to state budget decisionmaking could undoubtedly propose alternate funding sources.

Another problem with the state tax credit may exist for extremely dilapidated structures with minimal salvage tax credit value. While they would receive the local deposit refund, they would not benefit greatly from the donation of salvageable building materials. It is a fact that not every property is a good candidate for traditional deconstruction because materials may be of poor quality or contain elevated levels of hazards such as lead or asbestos.[237] It is also possible that the structure is mainly comprised of deteriorated elements that charities will not accept.[238]

However, this fact could be addressed by setting a minimum base level of a credit that provides a reasonable rate of return for the deconstructing property owner in this type of case. In order to ensure incentives for the worst properties, there should be a minimum level of credit claimable over and above the local deposit so that tax liability can still be reduced. This minimum level would reflect the reality that many properties have nominal salvage value that would not benefit from the tax credit, however, an owner still is rewarded for ridding the state of an extremely blighted structure while maintaining property tax-paying

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http://www.in.gov/sba/files/as_2011_whole.pdf.

232. *See* IND. CODE § 6-3-3-12.

233. *See* IND. DEP'T OF ENVTL. MGMT., IND. RECYCLING GRANT PROGRAM FY2010 ANNUAL REPORT 1 (2010) [hereinafter RECYCLING GRANT PROGRAM], *available at* http://www.in.gov/recycle/files/recycling_grants_2010_annual_report.pdf.

234. *See* Manuel, *supra* note 127, at A882.

235. *See* RECYCLING GRANT PROGRAM, *supra* note 233, at 1; *see also* Paul Snyder, *Homebuilders Fear Landfill Fee Increase*, DAILY REPORTER, May 28, 2009, http://dailyreporter.com/blog/2009/05/28/homebuilders-fear-landfill-fee-increase/ ("Under the finance committee's proposal, Wisconsin's tipping fee, which is a state charge for dumping garbage in landfills, would increase from $5.89 per ton to $13 per ton.").

236. *See* Manuel, *supra* note 127, at A882.

237. *See* JANZ, *supra* note 39, at 5.

238. *See id*.

ownership of the land.

By allowing taxpayers to reduce tax liability through donation of building materials reclaimed by deconstruction, the state of Indiana helps coordinate the policy of repositioning blight into opportunity. In some cases, between the federal deduction, the local deposit refund, and the new state credit, a buyer purchasing tax delinquent property may get land underneath the abandoned structure for free, significantly encouraging development.[239] It seems like a small price to pay to fund such a credit if the property remains in private, property tax-paying hands, and the sight or costs of an abandoned house are never thrust onto the people of Indiana or its cities. Most of all, cities like Indianapolis will be less likely to face the hard choices of places like Flint, Michigan.

3. *Tier Three: Local Policies and Ordinances to Support the System*.—There are a few other steps at the local level to fully complete the comprehensive policy incentives for boosting deconstruction statewide. While they are not necessary as part of the deposit/credit approach described above, they will operate as a foundational third level of support for those systems if put in place.

These ideas follow from a sampling of nationwide ordinances that already seek to boost deconstruction or maximize recycling, reuse, and waste diversion. For example, an ordinance simply mandating deconstruction for any government-owned houses or those scheduled for demolition in the land bank would be a simple start for increasing demand of deconstruction services.[240] Perhaps land banks should lessen the focus on rehabilitation of homes altogether and adopt policies of immediate deconstruction of land bank-owned homes to minimize external neighborhood costs.[241] After all, demolition will be one less cost a buyer of land bank property will incur, making it cheaper for time sensitive, financed projects that seek land on which to break ground immediately.[242] Thus, in

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239. Consider a hypothetical case of a tax delinquent, abandoned house sold for $11,000 to an investor who intends to deconstruct the building and deconstruction expenses are $8,000: A local deposit refund of $8,000, combined with a state building material credit of $8,000 and federal deduction benefit of $3,000 could effectively mean that three levels of government contributed toward full payment of the price of the land, building, and building removal. In return, the parcel is now in a raw land state, under private ownership, and returned to the tax base at a new raw-land assessed value. Indeed, it may even be considered profitable to remove the structure with this combination of incentives—this sort of buyer could receive unpaid tax and penalty forgiveness, which directly reduces cash outlay at purchase.

240. *See* CDBG-R AMENDMENT, *supra* note 117, at 4 (proposing approximately $700,000 toward traditional demolition of abandoned structures, and mentioning only that "the City is researching environmentally friendly deconstruction. If employed, this strategy *will encourage* green deconstruction on all future demolition projects. There is no precedent at this time within community and economic development in the City of Indianapolis." (emphasis added)).

241. *See* MIKELBANK, *supra* note 214, at 16 ("When vacancy and abandonment does occur, these results show that the city could curb value loss by demolishing or rehabilitating abandoned properties as quickly as possible.").

242. *See* Falk, *supra* note 136, at 11 ("The time constraints of the new property developer (and their financial backers) often make deconstruction an obstacle.").

Indianapolis, Mayor Ballard's policy of increased demolition could continue, but instead require deconstruction techniques rather than traditional demolition.[243]

Further, ordinances could require deconstruction for *all* demolition or construction contract with local government or incorporate it as a requirement in requests for work proposals, in addition to requiring it during any code enforcement demolition order.[244] Additionally, as is done in some jurisdictions, any private construction or demolition activity within a city could require by ordinance utilization of deconstruction to the greatest extent possible.[245] This requirement is often facilitated by its own mandated deposit program which requires large construction projects to leave a waste diversion deposit with authorities until a required waste diversion ratio is proven for that job site.[246] Finally, permits with shorter waiting times could be granted for projects guaranteeing enhanced waste diversion ratios or only utilizing deconstruction techniques.[247]

These are but a sampling of local ordinance ideas that other jurisdictions have in place and could help nurture the use of deconstruction at a local level. The possibilities for supportive local laws are only limited by the imaginations of those charged with writing local ordinances. Creative input by these people closest to the problem will provide a crucial foundation for the state tax credit and city deposit program to function.

CONCLUSION

Solutions to the immense problem of abandoned housing accumulation in American cities are elusive. Absent creative solutions, a large burden continues to be exacted on society in the form of economic and social costs. The causes of abandonment are varied and largely unknown; accordingly, one "silver bullet"[248] solution is not likely to be found. As a result, various legal mechanisms not originally designed to solve this problem are used at the state and local level to

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243. *See* ACTION PLAN, *supra* note 2, at 19.

244. *See* DECONSTRUCTION GUIDE, *supra* note 126, at 2.

245. *See, e.g.*, IOWA DNR WASTE MGMT., MODEL DECONSTRUCTION ORDINANCE 3, *available at* http://www.iowadnr.gov/portals/idnr/uploads/waste/cndord_constuct.pdf.

> Proper management of construction and demolition waste created by deconstruction of buildings: 1) help the state and [city] [county] achieve solid waste reduction, 2) conserve facility resources, 3) extend the useful life of the facililty, 4) improve site and worker safety, and 5) minimize tonnage fees payable to the State of Iowa, thus reducing the costs of facility operational costs and moderating fees charged for use of the facility.

Id.

246. *See, e.g.*, CITY OF SAN JOSE, CAL., MUN. CODE § 9.10.2410(B) (2011), *available at* http://www.sanjoseca.gov/index.asp (follow "Municipal Code" hyperlink in right hand column) ("[E]ach person who applies for a building permit . . . shall remit a diversion deposit in the amount set forth by resolution of the city council.").

247. *See* GUY & MCLENDON, *supra* note 132, at 6.

248. ACTION PLAN, *supra* note 2, at 9.

address the issue, often to no avail. These mechanisms most often operate after a house has been abandoned by its owner, long after costs to society begin to accrue. Together, these approaches treat symptoms of the disease rather than seeking a preventative vaccine. Most significantly, not only have current approaches done little to preempt and eradicate high levels of abandoned housing in American cities, none simultaneously attempt to turn the problem into an opportunity.

Building deconstruction addresses abandoned housing problems from a different direction than current efforts. Not only will laws encouraging deconstruction seek to eliminate abandonment before it exists, but the practice itself reaps economic and social benefits while seeking to cure the present problem. But deconstruction poses unique challenges as compared to traditional demolition of dilapidated houses. Yet, these challenges are not insurmountable. Economic incentives provided by a building material tax credit, housing deposits, and supportive ordinances help boost deconstruction beyond mere competitiveness against traditional demolition. While not without hurdles or potential costs, this type of policy is analogous to the way government already tackles consumer waste generation, or promotes promising businesses or industries with tax credits for research and development.

Moreover, because of the hidden social costs to the public from abandoned housing, perhaps deconstruction and laws supporting it should not be considered on economic terms alone. An abandoned property imposes measurable costs on the entire taxpaying public and sacrifices estimable levels of revenue, but its costs to society in blighted neighborhoods and dying cities cannot likely be measured. Additionally, constructing and demolishing buildings in a throw-away fashion compounds an environmental toll to the public at an unknown rate. For all of these reasons, a system of laws that use building deconstruction to help fight the war against abandoned houses should be supported.