CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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INTRODUCTION

Andrea McArdle†

City University of New York School of Law ("CUNY Law") has long nurtured a tradition of engaged social justice scholarship that has supported its mission to prepare lawyers to practice "law in the service of human needs." CUNY Law's commitment to educating lawyers for public interest practice is anchored by a curriculum that encourages critical doctrinal analysis, innovative approaches to problem solving, and an appreciation of the power of language to engage and focus our attention, and, in inspired moments, to move and persuade us. This socially engaged intellectual practice among CUNY Law faculty, students, and graduates, and the linkage of that practice with writing, is pervasive. It is reflected in the faculty's incorporation of a writing- and writer-centered pedagogy across the curriculum,[1] and in the substantial record of social justice scholarship produced by CUNY Law students.[2] It is manifested in the faculty's contributions to progressive publications,[3] blogs

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1 *Writing at CUNY Law School: A Pervasive Approach*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/legal-writing/everyone/faculty-pedagogy.html (last visited Apr. 10, 2013).

2 *Students as Legal Scholars: Published Works*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/legal-writing/everyone/student-articles.html (last visited Apr. 10, 2013).

3 *See, e.g.*, Michelle Anderson, *Rape Law Reform Based on Negotiation: Beyond the Yes and No Models*, *in* CRIMINAL LAW CONVERSATIONS 295 (Paul H. Robinson et al. eds., 2009); Paula Berg, *Ill/Legal: The Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1 (1999); Beryl S. Blaustone & Carmen Huertas-Noble, *Lawyering at the Intersection of Mediation and Community Economic Development: Interweaving Inclusive Legal Problem Solving Skills in the Training of Effective Lawyers*, 34 WASH. U. J.L. & POL'Y 157 (2010); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Angela Burton, *"They Use it Like Candy": How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453 (2010); Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not its Demise*, 24 N. ILL. U. L. REV. 153 (2004); Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012); C. John Cicero, *The Classroom as Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117 (1995); Douglas Cox, *Archives & Records in Armed Conflict: International Law and the Current Debate over Iraqi Records and Archives*, 59 CATH. U. L. REV. 1001 (2010); Lisa Davis & Julie Mertus, *Citizenship and Location in a World of Torture*, 10 N.Y. CITY L. REV. 411 (2007); Frank Deale & Rita Cant, *Barack Obama and the Public Interest Law Move-*

and commentary,[4] symposia,[5] faculty- and student-drafted amicus briefs[6] to federal courts and international tribunals, the work of

ment: A Preliminary Assessment, 10 CONN. PUB. INT. L. J. 233 (2011); Raquel J. Gabriel, *Minority Groups and Intimate Partner Violence: A Selected Annotated Bibliography*, 19 ST. THOMAS L. REV. 451 (2007); Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297 (2008); Yasmin Sokkar Harker, *"Information is Cheap, But Meaning is Expensive": Building Analytical Skill Into Legal Research Instruction*, 105 LAW LIBR. J. 79 (2013); K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. SOC. CHANGE 271 (2009); Ramzi Kassem, *From Altruists to Outlaws: The Criminalization of Traveling Islamic Volunteers*, 10 UCLA J. ISLAMIC & NEAR E.L. 85 (2011); Dinesh Khosla & Patricia Williams, *Economies of Mind: A Collaborative Reflection*, 10 NOVA L. REV. 619 (1986); Sarah Shik Lamdan, *Protecting the Freedom of Information Act Requestor: Privacy for Information Seekers*, 21 KAN. J. L. & PUB. POL'Y 221 (2012); Donna Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of* Sandin v. Conner, 72 FORDHAM L. REV. 785 (2004); Julie Lim, *Seen it All, Heard it All, Done it All. Is it All Worth it?*, AALL SPECTRUM ONLINE, Feb. 2013, at 20, http://www.aallnet.org/mainmenu/Publications/spectrum/Spectrum-Online/embedment.html (last visited Apr. 10, 2013); Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273 (2009); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing A Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291 (2003); Alex Berrio Matamoros & Mary Ann Neary, *Librarians, Legal Research, and Classroom iPads—A Winning Combination*, AALL SPECTRUM, Sept.–Oct. 2012, at 27; Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How It Matters in Judging*, 9 LEGAL COMM. & RHETORIC: JALWD 173 (2012); Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615 (2011); Ruthann Robson, ed., THE LIBRARY OF ESSAYS ON SEXUALITY AND LAW (Ashgate 2011); Joseph Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 316 (2009); Merrick Rossein, *The Costs of Resolving Employment Disputes Through Arbitration: Are Arbitration Agreements that Require Employees to Share Costs Enforceable?*, *in* ADR & THE LAW 2003 (20th ed. 2003); Jonathan Saxon, *Connecticut Practice Materials: A Selective Annotated Bibliography*, 91 LAW LIBR. J. 139 (1999); Richard Storrow, *The Ethics of Exclusion in Infertility Care*, 2 J. OF CLINICAL RES. & BIOETHICS 114 (2011); Sarah Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation For Queer Youth*, 19 COLUM. J. GENDER & L. 773 (2010); Alan M. White, *Credit and Human Welfare: Lessons from Microcredit in Developing Nations*, 69 WASH. & LEE L. REV. 1093 (2012); Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student as "Other,"* 61 J. LEGAL EDUC. 246 (2011); Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203 (2011).

[4] *See, e.g.*, Ruthann Robson, Co-editor, CONSTITUTIONAL LAW PROFS BLOG, http://lawprofessors.typepad.com/conlaw/ (last visited Apr. 17, 2013); Caitlin E. Borgmann, Editor, REPRODUCTIVE RIGHTS PROF BLOG, http://lawprofessors.typepad.com/reproductive_rights/ (last visited Apr. 10, 2013); Douglas Cox, *The CIA and the Unfinished National Archives Inquiry*, JURIST (Oct. 3, 2012), http://jurist.org/forum/2012/10/douglas-cox-cia-records.php.

[5] *See, e.g.*, Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391 (2012); Julie Goldscheid, *The VAWA Civil Rights Provision: Shaping It, Saving It, Litigating It, Losing It*, 11 GEO. J. GENDER & L. 543, 548–51 (2010); Jeffrey Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403 (2006).

[6] *See, e.g.*, Victor Goode & David M. White, Brief for N.Y. State Black and Puerto

faculty-led law centers,[7] and the distinguished work of CUNY Law's graduates as practitioners,[8] scholars,[9] and members of the bench.[10]

This engaged scholarly tradition within the CUNY Law community is evident in the issue of the *City University of New York* ("*CUNY*") *Law Review* that I am privileged to introduce, an issue that commemorates the Law School's thirtieth anniversary. Typically, the *Law Review* features the work of public interest scholars, practitioners, and students representing a broad swath of institutional and professional affiliations. The current issue, however, is distinguished by the fact that the scholarship it showcases consists almost entirely of the work of CUNY Law faculty, graduates, and students. In terms of subject areas, the range of the articles and published remarks is broad. Yet, in a number of dimensions, the crosscutting nature of this work is particularly notable.

CUNY Law Professor Natalie Gomez-Velez's[11] article on the

Rican Legislative Caucus as Amicus Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554403.

7 CUNY School of Law currently hosts three centers that promote scholarly exchanges and serve as clearinghouses for data and research concerning issues of social justice and equity: *Center for Diversity in the Legal Profession*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/social-justice/cdlp.html (last visited Apr. 10, 2013) (Professor Pamela Edwards, Director) (dedicated to studying diversity within the legal profession as well as the issues faced by people of color who practice or wish to teach law); *Center on Latino and Latina Rights and Equality*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/social-justice/clore.html (last visited Apr. 10, 2013) (Associate Judge Jenny Rivera of the New York Court of Appeals, former Director) (focusing on issues affecting the Latino community in the United States, with the goal of developing progressive strategies for legal reform); *Center for Urban Environmental Reform*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/social-justice/cuer.html (last visited Apr. 10, 2013) (Professor Rebecca Bratspies, Director) (promoting full participation of communities in environmental decisions that affect them).

8 For instance, CUNY School of Law graduate Jonathan Libby succesfully argued before the Supreme Court a challenge on First Amendment grounds to the Stolen Valor Act, which criminalized falsely stating that one is a recipient of a military medal. For additional background on the case, see Nina Totenberg, *Can 'I Earned The Medal Of Honor' Get You Jailed?*, NPR (Feb. 22, 2012, 12:01 AM), http://www.npr.org/2012/02/22/147211850/can-i-won-the-medal-of-honor-get-you-jailed.

9 *See, e.g.*, Joy Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127 (2007).

10 Examples of CUNY School of Law alumni who have become judges include the Hon. Bryanne Hamill, Hon. Rita Mella, and Hon. Edwina Richardson-Mendelson.

11 As a past Associate Dean for Academic Affairs at CUNY Law School, Professor Gomez-Velez has been especially attentive to identifying the connections that exist between the Law School's academic program and post-graduate initiatives that share an emphasis on professional education for excellent social justice lawyering. In memorializing these connections in writing, this article contributes to the dissemination of knowledge about innovative educational practices that CUNY Law School has long participated in.

Law School's LaunchPad for Justice and other approaches to partnering with courts and communities incorporates the concept of the longitudinal law school: it recognizes that a law school dedicated to preparing students for social justice lawyering—even a school such as CUNY Law that has a robust lawyering and clinical education program—must continue its support of students beyond graduation day. Particularly for those graduates who establish law practices and provide legal support to underserved persons and communities, the initial learning curve concerning doctrinal law, an appropriate lawyering model, and law office business practices can be steep, and the process of learning is ongoing.

Thus, the need among recent graduates for mentoring, continuing legal education, practical advice, and opportunities to realize economies of scale through shared access to resources requires a law school to take steps to help sustain a justice-driven legal practice over the long term. Professor Gomez-Velez's article illuminates how CUNY Law's Community Legal Resources Network ("CLRN") has spearheaded such efforts to support experiential education beyond the conferral of the law degree. Its LaunchPad for Justice project combines immersion of recent CUNY Law graduates in New York City Housing Court practice with access-to-justice aims. In addition, CLRN's Incubator project helps novice lawyers develop a business as well as a lawyering model, and connects small firm work with larger justice initiatives.

The article by CUNY Law graduates Karen Gargamelli and Jay Kim contextualizes the idea of the longitudinal law school. It is offered as a Public Interest Practitioner Section ("PIPS") piece, a unique editorial feature of the *CUNY Law Review* that supports development of articles by practitioners engaged in innovative legal work in the tradition of CUNY Law's commitment to social justice lawyering. In it, the authors describe the evolution of Common Law, an organization they founded that provides group legal education and more tailored individualized legal services to support pro se litigants and facilitate community organizing. Their article illustrates the importance of innovative post-law school projects such as CLRN's Incubator program. This initiative offered Common Law's founders the physical and intellectual space to develop a lawyering model supporting foreclosure defense and providing a critical educational perspective that connects clients' individual legal proceedings with systemic abuses in the mortgage and financial services sector.

The community education that Common Law's CUNY-trained

lawyers provide continues a long-established practice in CUNY Law's clinical programs and is a key component of community lawyering. In her Note on wage theft, CUNY Law alumna Lauren Dasse[12] offers a further example of the utility of community education as an instrument of social justice lawyering. Wage theft is a constellation of exploitative practices that disproportionately affect low-income workers. Analyzing the enhanced enforcement provisions of New York's recently adopted Wage Theft Prevention Act, the Note addresses the need for lawyers to supplement judicial and administrative enforcement efforts with educational outreach to other advocates, social services staff, and workers themselves to ensure the efficacy of the new law.

In its focus on enlightened legislation, Lauren Dasse's Note highlights the importance of legislative remedies in the social justice lawyer's toolkit. Bronx Defenders Managing Attorney Justine Olderman's remarks from the *CUNY Law Review*-sponsored panel, "Bail: Incarcerated Until Proven Guilty,"[13] address the work that social justice lawyers must do when legislative protections are not properly enforced. It is particularly apt that the *Law Review* feature Ms. Olderman's participation in this panel: The Bronx Defenders and the CUNY Law School Clinics share a special focus in taking a holistic approach to representing clients, including attention to the collateral social and legal consequences of being arrested.[14] Moreover, CUNY Law graduates currently serve as staff attorneys and/or have interned at The Bronx Defenders, and The Bronx Defenders attorneys have taught as adjunct faculty at CUNY Law. Ms. Olderman's discussion considers legislation that was adopted in New York decades ago to ensure that bail determinations would not become a mechanism through which a person who is charged with a crime remains incarcerated during the pendency of a case, with all the attendant consequences that incarceration can visit upon an accused, simply because he is without resources. Olderman observes that although the criteria for bail determinations in the current law appropriately focus on the likelihood that

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12 Editor-in-Chief, 2011–2012 *CUNY Law Review*.

13 Justine Olderman, Managing Attorney of Criminal Practice, The Bronx Defenders, Remarks at the *CUNY Law Review* Panel: Incarcerated Until Proven Guilty (Feb. 23, 2012).

14 *Compare Holistic Defense*, THE BRONX DEFENDERS, http://www.bronxdefenders.org/our-work/holistic-defense (last visited Apr. 10, 2013), *with Criminal Defense Clinic*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/clinics/criminal-defense.html (last visited Apr. 10, 2013), *and Immigrant and Non-Citizen Rights Clinic*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/clinics/immigration.html (last visited Apr. 10, 2013).

an accused would return to court, not the risk of re-offending or of being a danger to the community, courts routinely fail to apply these criteria. Thus, she emphasizes the need for advocacy and education to ensure that the bail statute is enforced according to its letter.

The ameliorative potential of reform legislation for social justice lawyers is examined as well in Amy Robinson-Oost's[15] analysis of New York State's proposed SAFE Parole Act. Arguing that the state's Parole Board currently operates with too much discretion, this Note demonstrates why proposed amendments that would remove as factors for parole consideration the severity of a parole applicant's offense and the applicant's prior convictions are more reflective of the goals of a parole system: to evaluate one's rehabilitation and readiness for re-entry into society.

The work featured in this issue demonstrates the range of scholarship that engages the public interest. CUNY Law Adjunct Professor Michael Macchiarola's assessment of the Security and Exchange Commission's practice of entering into consent judgments certainly falls within that purview. Although recognizing that courts typically give deference to the determinations of administrative agencies, Professor Macchiarola argues that courts that are asked to oversee a consent judgment must have sufficient access to the underlying facts of cases proposed for settlement to enable these courts to evaluate whether the settlement is fair, reasonable, adequate, and in the "public interest." Thus, a more robust level of judicial review than simple deference is appropriate.

As this brief summary indicates, the articles published in this issue exemplify engaged scholarship in a social justice tradition. Social justice scholarship is in part concerned with empowering communities, and for this endeavor education and outreach are crucial lawyering tools. Social justice lawyering is also proactive with respect to the workings of public institutions—courts, legislatures, and administrative agencies—in the effort to support clients and client communities effectively. That the CUNY Law community is so well represented among the authors of articles examining the role of both public institutions and civil society is telling; it reflects the extent to which this engaged community values scholarly writing as a crucial component of its social justice work. That valuing, I would suggest, is linked to the very sustainability of social justice lawyering, which over time needs the intellectual space that justice-driven scholarship affords for both advocacy and reflection.

[15] Managing Editor, 2012–2013 *CUNY Law Review*.

The scholars, teachers, students, and practitioners from CUNY Law are committed to engaged social justice work over the long term and have claimed that intellectual space, as the scholarship in this issue makes abundantly clear.

FIXING NEW YORK'S BROKEN BAIL SYSTEM[1]

Justine Olderman†

I. The Problem of Bail

New York City jails are currently filled with people who are serving time but haven't been convicted of anything at all. They are there for one reason. They cannot afford the price of their bail. Bail is the single most important decision made in a criminal case. Bail is what determines whether someone will plead guilty or fight a case and whether he or she will receive a jail sentence or be given an alternative to incarceration. Spend a week or two representing people who are held "in"[2] on bail and it will be obvious that the effect of bail on the outcome of a person's case is only part of the problem. People sit in jail for days, weeks, months, and sometimes years waiting for their trial date.[3] The effect on their lives and the lives of their families is nothing short of devastating.

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1 The following remarks were prepared in conjunction with a panel discussion hosted by the *City University of New York Law Review* on February 23, 2012 titled "Bail: Incarcerated Until Proven Guilty."

† Justine Olderman graduated magna cum laude and Order of the Coif from New York University School of Law. While at NYU, Justine was the Managing Editor of the Review of Law and Social Change and was awarded the George P. Faulk Memorial Award for Distinguished Scholarship; Justine spent two years clerking for Judge Robert J. Ward in the Southern District of New York before joining The Bronx Defenders in 2000. After working for a number of years as a staff attorney, Justine became a training team supervisor for new lawyers, then a team leader for experienced practitioners, and is currently the Managing Attorney of the entire Criminal Defense Practice. As Managing Attorney, Justine helped lead a city-wide bail initiative bringing together public defenders across the city to address the problem of bail in New York. In addition to participating as a panelist at CUNY School of Law's forum on bail, "Bail: Incarcerated Until Proven Guilty," she also spoke at John Jay's Guggenheim Symposium panel "Jailed Without Conviction: Rethinking Pretrial Detention During the 50th Anniversary of *Gideon v. Wainright*." She has taught Bail Advocacy at the Judicial Institute, the New York State Defender's Association's annual conference, and public defender offices around the city. In addition to her work at The Bronx Defenders, Justine was an adjunct professor of Legal Writing at Fordham Law School and of Persuasion and Advocacy at Seton Hall Law School. She has also taught CLE courses on Persuading through Storytelling.

2 People held "in" on bail are detained in jail as a result of not paying the amount of bail set for them by a judge. Those who are "out" have either posted bail, or have been released on their own recognizance.

3 *See* William Glaberson, *Justice Denied: Inside the Bronx's Dysfunctional Court System: Faltering Courts, Mired in Delays*, N.Y. Times, Apr. 13, 2013, http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html (reporting that the Bronx "was responsible for more than half of the cases in New York City's criminal courts that were over two years old, and for two-thirds of the defendants waiting for their trials in jail for more than five years").

For too long, the problem of bail has gone ignored—not just by people working outside of the criminal justice system, but also by those of us who work within it. Judges, prosecutors, and even defense attorneys have been complacent about the routine incarceration of people too poor to post bail. But thanks to the Human Rights Watch report on bail and panels like this, all that is changing.[4]

The vast majority of the people coming through New York City's criminal justice system are poor people of color from marginalized and under-resourced communities.[5] And the vast majority of them cannot afford the price of their bail even when the bail may seem relatively low. For example, according to one study, 88.7% of people who had bail set at $1,000 could not raise the money to pay that bail at their first court appearance and so, instead of being released, were sent to Riker's Island.[6] In 2009, at least half of the people sitting in New York City jails were there simply because they could not afford the price of their freedom.[7]

People who cannot afford to post bail will remain in jail until they plead guilty, the case goes to trial, or the case is dismissed. I had a client a few years ago who was charged with attempted murder. He was held in on bail that was too high for him to post. It took two-and-a-half years for his case to go to trial and it took the jury twenty-eight minutes to acquit him. In the end, he served two-and-a-half years for nothing. Unfortunately, his story is all too common. In the Bronx, it takes up to two years for a felony to go to trial—and if you're charged with murder it can be three years or more.

Misdemeanor cases go to trial faster than felonies, anywhere from three to nine months. But even that length of time is unacceptable, especially given studies that show that in almost 25% of

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4 *See* HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010), *available at* http://www.hrw.org/node/94581. Since these remarks were delivered, the call to fix New York's broken bail system has been taken up by others, including Chief Judge Jonathan Lippman, who, in his State of the Judiciary address, made bail reform a top priority for 2013. CHIEF JUDGE JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., THE STATE OF THE JUDICIARY 2013: "LET JUSTICE BE DONE, THOUGH THE HEAVENS FALL" 3–6 (2013) [hereinafter THE STATE OF THE JUDICIARY 2013]. For an analysis of the State of the Judiciary, see Joel Stashenko, *Lippman Proposes Bail System Fix, Expansion of Supervised Release*, N.Y.L.J., Feb. 6, 2013, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202587085501&Lippman_Proposes_Bail_System_Fix_Expansion_of_Supervised_Release&slreturn=20130312124546.

5 *See* HUMAN RIGHTS WATCH, *supra* note 4, at 1, 48, 61, 68.

6 *Id.* at 21.

7 *Id.*

non-felony cases where the accused is held in on bail, the charges are ultimately dismissed.[8] In another 25% of the same type of cases, even when the person is convicted, he or she receives a non-incarceratory sentence.[9] In the end, half of all non-felony clients are incarcerated not because they have been convicted of a crime and sentenced to jail but because they are poor.

Lucy G.[10] is one of those people. She has been held in jail for seven months on $500 bail with no trial in sight. She was stopped on the street for being a "known drug user." The police claim they saw her drop a crack pipe with cocaine residue. Lucy was arrested and charged with misdemeanor possession of a controlled substance. The prosecution has offered Lucy a conditional discharge if she pleads guilty. A conditional discharge is a non-incarceratory sentence that simply requires that the person commit no new crimes for a period of one year. But pleading guilty to the charge will make Lucy, who is a legal permanent resident, deportable. And so, she sits in jail and she waits. Her next court date is still two months away.

Given how long it takes to have a judge or jury hear a criminal case, it is not hard to imagine what effect a robust plea bargaining system, like the one in Bronx County, has on the right to trial. If someone is offered a plea to less time than he or she will serve waiting for trial, that person will never see the inside of a trial courtroom. In fact, in my twelve years as a criminal defense lawyer, I can count on one hand the number of clients who exercised their right to trial when doing so meant that they would stay in jail longer than if they accepted a plea bargain. People will accept almost any plea to get out of jail, to be with their loved ones, and to move on with their lives. People like Howard A.

Howard A. had been divorced for a number of years when he met a young woman who lived in his building. She was outgoing and vibrant, interesting and attractive. It didn't take long before the two started dating. But soon afterwards, he got a knock on his door from the young woman's father. It turns out that she had lied about her age and was just seventeen. Although she was legally an adult, Howard told her that he could not be with her anymore. She begged and pleaded with him and eventually became hysterical and angry. Two days later, after Howard ignored her calls and

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8 *Id.* at 29.

9 *Id.*

10 All names used in this piece have been changed to protect the anonymity of the subjects.

knocks at the door, she went to the police and accused him of assault. There were no injuries or medical records to support her allegations. There were no witnesses who would back up what she said. There was no evidence except her word. But in our criminal justice system, the word of one person is enough. And so, Howard A. was arrested, taken to Central Booking, and charged.

Before I met him, Howard A.'s only contact with the criminal justice system had been an arrest for driving with a suspended license. Nevertheless, the judge at his arraignment set bail in the amount of $2,500 cash or insurance company bond. Howard was self-employed and work had been slow recently. He was barely getting by and could not afford the price of his bail. Like so many others, Howard was sent to Riker's Island where he sat for six days until his next court date. In that time, he missed out on several jobs, a rent and child support payment, and a visit with his four year-old daughter. On his next court date, the prosecution made Howard an offer. If he pleaded guilty, he could receive a sentence of time served which would mean that he could go home that very day. If he didn't, he would have to wait months on Riker's Island for a trial date. He accepted the plea, but Howard A., a forty-two year-old man, wept openly as he did.

The decision to release someone on his or her own recognizance or to set bail gets made at the very beginning of a criminal case but that decision alone can, and often does, wipe out the most sacred bedrock of our criminal justice system—the right to trial.[11] Indeed, because so many people who are held in on bail feel forced to plead guilty, people are almost twice as likely to end up with a conviction if they are held in on bail than if they are out.[12] While statistically hard to quantify, being held in on bail may also increase the chance that a person will be convicted at trial.[13] If the accused is locked up, that person can't track down witnesses, look for other evidence, or prepare for trial with his or her lawyer as easily as someone who is at liberty. On the most basic level, the bail decision significantly limits a person's ability to assist in his or her own defense.

Not only does the bail decision have an impact on the likelihood of conviction, but it also affects sentencing. There is a saying among criminal defense attorneys: "Once you are out, you stay

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11 U.S. CONST. amend. VI; N.Y. CONST. art 1, § 2.

12 HUMAN RIGHTS WATCH, *supra* note 4, at 33.

13 Mary T. Phillips, *Bail Detention & Felony Case Outcomes*, N.Y.C. CRIM. JUSTICE AGENCY RES. BRIEF, Sept. 2008, at 5.

out." Every defense attorney knows that if someone is out, that person is likely to receive a non-incarceratory sentence even if he or she is convicted of a crime. However, if the same person is in on bail when convicted, he or she is likely to receive a jail or prison sentence.

The differences in sentences for those who are in and those who are out are stark. If someone is in because she can't afford the bail, that person is almost three times more likely to receive a jail sentence if convicted than if she is out on bail.[14] Even when people who are out receive jail sentences, their sentences will invariably be shorter than their counterparts who are held in on bail.[15]

These statistics are supported by a report issued by The Bronx Freedom Fund, a bail fund that was created by The Bronx Defenders.[16] For over two years, the Fund posted bail for 186 people who did not have the financial resources to secure their own freedom. Fifty percent of those cases were dismissed on motion of the prosecution; in cases where there was a conviction, the prosecution did not seek a jail sentence in a single case.[17]

The effect of bail on case outcomes is unconscionable and a perversion of everything the criminal justice system is supposed to stand for. But the impact that it has on people's lives is nothing short of devastating.

II. Enmeshed Penalties of Incarceration

One of the most devastating consequences of being held in on bail is that hard working people lose their jobs. For most people, missing one, two, five, ten days of work while they are locked up trying to get bail money together—or trying to work out a plea to something they didn't do so they can get out of jail—is not an option. I can't tell you how many clients I have represented who have been fired from their jobs—not because they were convicted of a crime but because they were accused of one, had bail set, and

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14 *Id.*

15 *Id.* at 6.

16 The Bronx Freedom Fund closed temporarily when questions arose over whether the Fund had to be regulated, by the New York State Department of Financial Services, just as commercial bondmen do. As a result of the Fund's closing, The Bronx Defenders pushed to have a bill passed that would allow charities to post bail up to $2,000 for people charged with misdemeanors without being subject to the same oversight as for-profit companies. In July 2012, Governor Andrew M. Cuomo signed the Charitable Bail Bill, A. 10640-B, 235th Sess. (N.Y. 2012), into law allowing the Fund to re-open. *See* N.Y. Ins. Law § 6805 (Westlaw, West 2012).

17 *The Bail Fund*, The Bronx Freedom Fund, http://www.thebronxfreedomfund.org/our-model.html (last visited Mar. 1, 2013).

missed work as a result. Many clients who are released after an arrest similarly lose their jobs. However, if a person who is out loses his or her job because of an arrest and the case is ultimately dismissed, that person can receive back pay for the entire period he or she was out of work.[18] In contrast, a person held in on bail is ineligible for back pay even if the case is dismissed.[19]

Eviction is another common consequence of a judge's decision to set bail. Being held in jail for even a short period of time can result in the loss of a Section 8 apartment, a bed at a shelter, as well as supportive AIDS/HIV housing.[20] Having bail set can cause people to miss making rent payments and housing appointments. That single decision can result in homelessness not just for the person arrested and held in on bail, but also for his or her entire family.

Jose F. lived in public housing but was looking to move into a building with social support services on-site to help him with his mental illness. While he was looking, he was accused of violating a Family Court order of protection, arrested, and held in jail on $5,000 bail. Because he was incarcerated, Jose's Social Security benefits were suspended, the treatment providers who were helping him move closed his case and he was ultimately evicted from public housing. When his family was finally able to scrape up enough money to hire a bondsman to bail him out, he had no place to go. To this day, Jose continues to be homeless without the supportive mental health housing he so desperately needs.

Nowhere is the distressing effect of bail more obvious than with our undocumented clients. Even twelve hours at one of the city jails is sufficient for Immigration and Customs Enforcement officers to find people held in on bail, determine that they are deportable, and place a hold on them so that they cannot be released even if they prevail in their criminal case. People who are arrested and held in on bail are routinely rounded up because of minor misdemeanor convictions and deported to countries that many of them have not seen since they were children.

Unemployment, homelessness, and deportation are not the only consequences of a judge's decision to set bail. There are many more. Being held in on bail can cause people to lose their benefits, which can take months to get back even after they are released

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18 *See* N.Y. EXEC LAW § 296(15) (McKinney 2012); N.Y. CORRECT. LAW § 752 (McKinney 2012).

19 *See* statutes cited *supra* note 18.

20 *See, e.g.*, 42 U.S.C. § 13661(c) (2006).

from jail. It can cause the Administration for Children's Services to start a neglect proceeding against a parent who has nobody to look after his or her child while in on bail. And on the most basic level, being held in on bail destabilizes families, separating parents from children—and husbands from wives—for days, weeks, months, even years waiting for a resolution to their case.

III. The Way It Is Meant to Be

It doesn't have to be this way. This is one of those rare instances when the legislature is actually on our side. Or at least it was back in 1970. In 1970, long before anyone was thinking about collateral consequences of incarceration, the legislature was troubled by the notion that setting bail in amounts that people could not make was causing them to serve time, even though presumed innocent.[21] And so, the legislature created a new bail statute with five provisions that were drafted to make sure that exactly what is happening today didn't happen. That statute is still in place. It is still the law. The problem is that nobody follows it.

The first provision is the clear statement in New York's bail statute that the "only purpose of bail is to ensure someone's return to court."[22] In New York, a judge cannot set bail because he or she is worried that the accused is going to go out and commit another crime or because the judge thinks the person is a danger to the community. The decision to limit the purpose of bail to ensuring someone's return to court was not accidental. Many people who were involved in drafting the 1970 bail statute wanted judges to have the power to set bail based on the likelihood that the accused would reoffend or the belief that the person charged was a danger to the community.[23] And in fact, many states[24] as well as the federal government[25] allow judges to set bail based on those considerations. But New York explicitly rejected those approaches.[26] The de-

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[21] N.Y. Crim. Proc. Law § 510.30 cmt. (McKinney 2012) (Preiser Practice Commentary).

[22] N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2012).

[23] N.Y. Crim. Proc. Law § 510.30 cmt. (McKinney 2012) (Preiser Practice Commentary).

[24] *See generally* 8A Am. Jur. 2d *Bail and Recognizance* § 28 (2013) (providing overview of approaches to bail across states).

[25] *See* 18 U.S.C. § 3142 (2006).

[26] Since these remarks were delivered, Chief Judge Jonathan Lippman has reignited the debate over the purpose of bail by calling for changes in the bail statute that would allow judges to consider public safety when setting bail. The State of the Judiciary 2013, *supra* note 4, at 3–4. In response to that call, a bill has been introduced in the State Senate seeking to amend the Criminal Procedure Law to allow

cision to reject risk of reoffending and danger to the community as bases for bail was a monumental one not only because it departed from the mainstream approach but also because setting bail to ensure someone's return to court, at least objectively, is not loaded with the same historical race and class biases as dangerousness.[27]

The second important aspect of New York's bail statute is the provision creating nine forms of bail.[28] Prior to the enactment of the 1970 statute, there were limited forms of bail that a judge could set and all of them were difficult for poor people to make. As part of the new bail statute, the legislature included bail bonds that allowed someone to put down just 10% of the bail with a simple promise to pay the remainder if the accused did not return to court.[29] The law also provided for bail bonds that do not require any money to be put down at all.[30] Instead, the accused, his family, or friends could simply sign a bond and an affidavit promising to pay the full amount in the event the accused failed to return.

Third, the statute requires a bail-setting court to select not one, but two forms of bail from the list of nine to make it easier for a person accused to be released on bail,[31] and allows the court to set bail in any amount it chooses so that judges can tailor the price of bail to what the accused can afford.[32]

Fourth, the statute lists eight factors for the court to consider when deciding whether to set bail, what forms to set, and what the amount should be. Most importantly, the statute requires judges to

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judges to consider both what is necessary to secure someone's appearance in court as well as safety to the community. An Act to Amend the Criminal Procedure Law, in Relation to the Issuance of Securing Orders, S. ___/ A. ___ (Feb. 14, 2013).

27 While "dangerousness" and "risk of re-offending" are objective on their face, these criteria may still lead to discrimination in bail setting practices. If judges stereotype people of color as more prone to criminal behavior, as they historically have, then they will be more inclined to use "dangerousness" and "risk of re-offending" as a proxy for race-based decision-making.

28 N.Y. CRIM PROC. LAW § 520.10(1) (McKinney 2012).

29 *See id.* § 520.10.

30 *Id.*

31 *Id.* § 520.10(2)(b).

32 *See generally* People *ex rel.* McManus v. Horn, 18 N.Y.3d 660, 665 (2012). While the plain language of the statute requires judges to set two forms of bail, some judges have read the statute as simply giving them the option of setting bail in more than a single form. In 2010, after a judge set cash only bail, The Bronx Defenders filed a writ of habeas corpus challenged the judge's reading of the statute. The writ was denied, as was the appeal to New York's Appellate Division. However, armed with legislative history and buttressed by legislative intent, Marika Meis, the Legal Director of The Bronx Defenders took the case all the way to the Court of Appeals. In reversing the lower courts, the Court of Appeals noted: "[p]roviding flexible bail alternatives to pretrial detainees—who are presumptively innocent until proven guilty beyond a reasonable doubt—is consistent with the underlying purpose of Article 520." *Id.* at 665.

consider the accused's financial resources,[33] to prevent judges from making generic decisions based solely on the type of case or someone's criminal history.

Finally, the legislature created different ways of challenging a judge's bail determination or for making renewed bail applications. For example, when bail is set by a lower Criminal Court judge, the lawyer can make a *de novo*, or new, bail application before a higher court.[34] Even when the bail is set by a Supreme Court judge, a lawyer can file a bail writ and argue that the bail was excessive or otherwise violates the bail statute.[35] A lawyer may also make renewed bail applications as the lawyer learns new information that bears on the statutory bail factors.[36]

The legislative intent is there. The law is there. And yet, here we are. Our jails are filled with people who haven't been found guilty of anything and yet are locked up simply because they cannot afford the price of their freedom. Something isn't working.

For those of us who work in the criminal justice system, the reasons are clear.

IV. The Bail Disconnect

First, the bail statute isn't working the way it was intended because, despite the statutory purpose of bail, judges are not setting bail based solely on what is necessary to secure someone's return to court. Instead, they routinely set bail based on the two factors that New York explicitly rejected when it passed the bail statute—risk of re-offending and danger to the community.[37] Judges are on the front lines, making difficult decisions based on little information in a short period of time, and they are human. No judge wants his or her name to be on the front page of the New York *Post* or *Daily News* because he or she released someone who went out to commit a headline-grabbing crime. And so judges err on the side of caution, setting higher bail in more cases not because high bail is what is necessary to ensure the person's return to court, but rather because if this person goes out and kills his romantic partner or

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33 N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2012).

34 *See id.* § 530.30.

35 *Id.* § 530.40.

36 *See id.* § 510.20 cmt. (Preiser Practice Commentary). A New York State Superior Court may review denial of bail by the Criminal Court if constitutional standards inhibiting excessive bail or arbitrary denial of bail are violated. *See, e.g.*, People *ex rel.* Klein v. Krueger, 25 N.Y.2d 497 (1969).

37 *See* N.Y. Crim. Proc. Law § 510.30(2)(a).

drives drunk and hits someone, it will appear that the judge did his or her part to protect society.

Second, judges are not making individualized bail decisions. It is impossible to figure out how much bail is enough to bring someone back to court but not too much to keep the person in jail without looking at the accused as an individual. Also, it is hard to figure out what is necessary to secure someone's return to court without asking about the person's financial resources. But only a handful of times has a judge asked me anything about a client's finances before setting bail. Instead, bail is set in exactly the way that the legislature feared. It is set based on someone's criminal record, his or her history of not coming back to court, and the nature of the charges. For example, if the case alleges a sexual assault, chances are that bail is getting set regardless of the statutory factors and it is going to be high—in the low thousands if you are lucky and as much as in the hundreds of thousands if you are not.

Third, judges are also setting bail in generic amounts. If you sat in arraignments and listened to bail being set you would think that the law required judges to set bail in increments of $250 when setting bail under $1,000 and in $500 increments for anything over $1,000. You will hear over and over again, "$1,000 bail." "$1,500." "$2,000." You will never hear a judge set bail in the amount of $674, even though that amount for a particular person may strike the perfect balance of what will enable someone to be released and yet ensure that they will return to court.

Finally, judges are not using the nine different forms of bail created by the legislature.[38] Those bonds that require a small amount of cash down or require nothing but a promise to pay the full amount if the person doesn't return to court are rarely, if ever, used. Instead, judges set bail in only two of the nine forms: cash and insurance company bail bond. These are the two forms of bail that existed before the 1970 bail statute. Forty years later, nothing has changed. Judges are still using the two forms of bail that are the hardest for poor people to make. Cash requires that you pay the full amount of bond upfront. Most of the people caught up in the criminal justice system do not have a lot of money just sitting in a bank account waiting to be taken out. And insurance company bondsmen will not even sign a bond for low amounts of bail.[39]

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[38] *See id.* § 520.10.

[39] Mary T. Phillips, *Making Bail in New York City*, N.Y.C. CRIM. JUSTICE AGENCY RES. BRIEF, May 2010, at 2 (reporting that commercial bond agents will not sign a bond for

When they do agree to sign a bond, they often require as much as 30% down and take up to an 8% fee for their business.[40]

V. An End to Complacency

So the natural question is, "What can we do about it?" While there is much that judges and prosecutors can and should do about the problem of bail in New York, what I can speak to best is what we, as defense attorneys, can and need to do ourselves. The answer is more. A lot more. The truth is that we have become complacent about bail. We work day in and day out in a system that is so filled with injustices that sometimes it is hard to know where to look, what to focus on, or how to bring about change. And, unfortunately, over time we simply stop seeing the injustices that are right in front of us. I am the first to admit that until a few years ago, I had never really looked at the bail statute. I certainly never asked a judge to set a form of bail other than cash or insurance company bond. I knew there were other options but, honestly, I didn't understand them. The other forms of bail have names like "partially secured surety bond." I didn't know what any of those words meant let alone how to advocate for them. But I've now been working on this issue with other people from my office and with public defenders around the city and I have found that something really amazing is happening. We are slowly, very slowly, changing the practice. We have created comprehensive teaching materials, conducted trainings for lawyers across the city as well as upstate, and have even instructed judges at the Judicial Institute on the intent of the legislature, key statutory provisions, and alternative forms of bail. We have started to put all that we have learned into practice. Over the last few months, we have been pushing the issue by asking judges for some of these other forms of bail, and guess what? Judges are doing it. Not all of them. Not in every case. But they are doing it. And over the last few months we have been challenging judges when they set bail in violation of the statute by taking appeals and filing writs of habeas corpus, and guess what? We are winning. Not all of the time. Not in every case. But we are winning. As defense attorneys we have already come a long way, but we have a much longer way to go. We cannot allow ourselves to become complacent again. The injustice brought about by bail is too big to ignore. We have to fight and keep fighting.

$1000 or less because they will not make enough money on such a relatively low amount).

[40] *Id.*

As defense attorneys, we need to demand that what is on the books is followed by judges. We need to demand adherence to the letter of the law, because what is going on with bail right now is lawless and results in sheer devastation to individuals, families, and communities. A person's freedom should never be decided based on the size of his or her wallet. It shouldn't be and it doesn't have to be. We have the tools right here in the law to make bail individualized, reasonable and even, I dare say, just.

STRUCTURED DISCRETE TASK REPRESENTATION TO BRIDGE THE JUSTICE GAP: CUNY LAW SCHOOL'S LAUNCHPAD FOR JUSTICE IN PARTNERSHIP WITH COURTS AND COMMUNITIES

Natalie Gomez-Velez†

INTRODUCTION

The Great Recession[1] and shrinking availability of low-income legal assistance[2] have accelerated the need for innovative and effective approaches to providing legal representation to under-resourced and under-represented individuals and communities. The deep and protracted recession has made more visible the long-standing need for legal services to address the urgent needs of low- and moderate-income litigants.[3] The financial crisis created by the subprime and mortgage-backed securities meltdown[4] resulted in

† Professor of Law, City University of New York School of Law. The Author would like to thank Justice Fern Fisher, Fred Rooney, Enedina Pilar Sanchez, and Ben Flavin for their work with the Community Legal Resource Network and the LaunchPad, as well as their assistance in the preparation of this Article. Many thanks to Janet Calvo for helpful comments on drafts and to Meagan Chen for excellent research assistance. The views expressed here and any errors or omissions are the Author's alone.

1 *See, e.g.,* Marsha Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context,* 56 N.Y.L. SCH. L. REV. 367, 384 (2011–2012); Nathan Coppel, *Bar Raised for Law Grad Jobs*, WALL ST. J., May 6, 2010, at A3.

2 *See generally* NEETA PATEL, BRENNAN CTR. FOR JUSTICE, CUT OFF AND CUT OUT, FUNDING SHORTFALLS FORCE MORE LOW-INCOME FAMILIES TO FACE CRITICAL LEGAL NEEDS ALONE (2011), *available at* http://www.brennancenter.org/page/-/New%20needs%20update%20FINAL%20as%20of%205-19-11.pdf.

3 For examples of myriad reports that document the severity of the justice gap over many years, see AM. BAR ASS'N [ABA] CONSORTIUM ON LEGAL SERVS. AND THE PUB., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), *available at* http://www.abanet.org/legalservices/downloads/selaid/legalneedstudy.pdf; ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE vii (1996). The current recession is raising an alarm in that legal needs are exploding and the societal costs of denying equal access to justice are becoming more apparent and immediate. *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET LEGAL NEEDS OF LOW INCOME AMERICANS (2009), *available at* http://www.lsc.gov/pdfs/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

4 Lisa van der Pool, *Lawyer Builds Case Against Law Schools*, BOSTON BUS. J. Mar. 30, 2012, http://www.bizjournals.com/boston/print-edition/2012/03/30/lawyer-builds-case-against-law-schools.html (stating that "[o]verall, the legal sector lost 45,000 jobs during the 'Great Recession,' according to the National Association for Law Place-

record home foreclosures,[5] job losses, and evictions.[6] These effects have prompted a need to devise new ways to address significant legal needs with limited and diminishing resources.[7]

At the same time, law schools are experiencing a combined reality check and identity crisis.[8] The myth of abundant, high-paying legal jobs has been dispelled for the vast majority of law graduates.[9] The complaint that there are too many lawyers is meeting the crisis of too little access to legal representation for all but the wealthy. These combined realities highlight the need for law schools to take an active role in addressing the "justice gap"[10] while preparing law students for new, nimble, and effective approaches to practice.

The City University of New York School of Law ("CUNY Law"), long at the vanguard of public interest legal education and social justice lawyering,[11] is engaged in several initiatives designed to address the justice gap, some of which use structured discrete task representation.

This Article will consider the state of the justice gap and briefly review the national conversation about the use of "unbun-

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ment ("NALP") in Washington, D.C. Law school graduates from the class of 2010 faced the worst job market since the mid-1990s, with an employment rate of 87.6, a drop from 91.9 in 2007, which had been a 20-year high, per NALP.").

5 *See, e.g.*, *Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices, and Foreclosures, Hearing Before the Committee on Oversight and Government Reform*, 112th Cong. 132–44 (2012) (testimony of Meghan Faux, Deputy Director, South Brooklyn Legal Services).

6 *See generally* NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT 408–10 (2011), *available at* http://www.fcic.gov/report/.

7 *See generally* N.Y. STATE COURTS, ACCESS TO JUSTICE 2 (2010), *available at* www.courts.state.ny.us/ip/nya2j/.

8 *See* Mansfield & Trubek, *supra* note 1; *see also* Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake*, 10 SEATTLE J. FOR SOC. JUST. 49 (2011).

9 Ameet Sachdev, *Joblessness, Debt Mount for Recent Law School Grads*, CHICAGO TRIBUNE, June 22, 2012, http://articles.chicagotribune.com/2012-06-22/business/ct-biz-0622-chicago-law-20120622_1_law-school-law-placement-job-market (explaining that "[s]lightly more than half of the Class of 2011—55 percent—had found full-time, permanent jobs as lawyers nine months after graduation. It was the worst job market in more than 30 years, according to the National Association for Law Placement.").

10 The "justice gap" refers to the gap between the aspirational goals of equal justice and legal representation for all, and the reality that the vast majority of low- and moderate-income individuals in need of legal assistance are unable to obtain a lawyer either on their own or through legal services providers who are oversubscribed and underfunded. *See generally* Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 621–30 (2011).

11 Michelle Weyenberg, *The Best Law Schools for Public Interest*, PRELAW MAG., Winter 2011, at 26.

dled legal services,"[12] noting the tension between the ideal of full scope legal representation for low-income litigants facing serious legal challenges—like the loss of a home or the loss of parental rights—and the practical, fiscal, and structural realities impeding full scope representation. It will then note the role of the legal academy, generally, in addressing the justice gap. The Article will describe several innovative efforts to address the justice gap through law school post-graduate programs that provide continuing support for pro bono representation, with a focus on CUNY Law's programs.

Most notably, the Article will describe the LaunchPad for Justice ("LaunchPad"), a project of CUNY Law's Community Legal Resource Network ("CLRN"). In partnership with the New York State Unified Court System's Access to Justice efforts, CUNY Law's CLRN created a structure to support the provision of supervised, limited scope representation to low-income, self-represented litigants in housing court and elsewhere. Working with the courts, local lawyers, communities, and elected officials, LaunchPad is a first-of-its-kind program designed to position CUNY Law's public-interest-minded graduates to provide urgently needed legal services in a program of training and supervision that will help them launch their own solo and small firm practices. The LaunchPad focuses on two persistent urgent needs exacerbated by the current economic crisis: the need for lawyers to represent low-income people facing eviction, foreclosure, or other legal crises, and the need to provide training and meaningful work for recent law graduates and to lay the foundation for solo and small firm practice in a lean and unforgiving job market.

Finally, the Article will note the ways in which these promising, practical approaches to discrete task representation—providing structure, supervision, and community context—can serve as models that are responsive to concerns about unbundling. For example, it will note ways in which the LaunchPad addresses the promise and challenge of providing quality unbundled legal services to communities in need. The Article will close by briefly noting lessons learned, opportunities for replication, and work yet to

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12 In this Article, I use the terms "unbundled legal services," "discrete task representation," and "limited scope representation" interchangeably. For purposes of the LaunchPad discussion that follows, the focus is on discrete task representation in limited court appearances and settlement conferences. *See* William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 433–35 (2011).

be done regarding efforts to respond appropriately to the legal needs of unrepresented litigants.

I. Addressing the Justice Gap

The urgent need to increase and improve the availability of legal services to low-income litigants unable to secure legal representation is beyond debate.[13] Ongoing debate exists, however, about how best to address the "justice gap" in effective, fair, and sustainable ways.[14] Discrete task representation has emerged as one among several approaches to address the justice gap.

Some proposals focus on the need to increase the funding for and availability of full scope civil legal services programs, including proposals for "Civil *Gideon*"—establishment of a right to counsel in civil matters involving important interests.[15] Others focus on eliminating restrictions on legal services that prohibit engagement in certain classes of impact cases that could foster substantive change more effectively than individual representation alone.[16] Some advocates and scholars support pro se court reform measures such as simplifying the litigation process and providing mechanisms such as user-friendly forms, manuals, and web sites to help self-represented litigants navigate relatively routine matters more simply and quickly.[17] A few favor deregulation and a loosening of unauthorized practice restrictions so that paralegals and other non-lawyers may represent litigants in certain routine matters in particular areas of specialization.[18] Some propose tapping particular communities of lawyers to increase available pro bono legal assistance, such

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13 *See, e.g.,* Legal Servs. Corp., *supra* note 3, at 5–6 (noting the continued and increased need for legal services for low-income litigants and the decline in available resources to serve them); Task Force to Expand Access to Civil Legal Servs. in N.Y., Report to the Chief Judge of the State of New York (2011), *available at* www.nycourts.gov/ip/access-civil-legal-services [herinafter Task Force Report].

14 *See generally* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 Cornell J.L. & Pub. Pol'y 571 (2011).

15 The Civil *Gideon* movement is the most prominent among these proposals. As set forth in a 2006 ABA Resolution, Civil *Gideon* proponents encouraged legislatures to "provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake." Mark C. Brown, *Establishing Rights Without Remedies? Achieving an Effective Civil* Gideon *by Avoiding a Civil* Strickland, 159 U. Pa. L. Rev. 893, 894 (2011); *see also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37, 43–44 (2010).

16 Deborah Rhode, Access to Justice 66–68 (2011).

17 *See* Forrest S. Mosten, *Unbundled Legal Services Today—and Predictions for the Future*, Family Advocate, Fall 2012, at 14.

18 *See, e.g.,* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. Prof. Law, at 79 (arguing in favor of establishing classes of non-

as retired and emeritus attorneys[19] and recent law graduates.[20]

A growing number argue that all of these approaches and more are needed to address the current situation in which eighty percent of income-eligible persons in need of legal assistance are unable to retain a lawyer.[21] Indeed, there is increasing recognition that a range of approaches is needed to address the justice gap:

> Despite the best and continuing efforts of the civil Gideon and access to justice movements, and the need for greater funding for legal services provision, it may be time to face the fact that there will never be enough funding to provide a full attorney-client relationship with a competent lawyer to all low-income persons interacting with, or contemplating interaction with, the legal system. This is probably true even in areas of so-called "basic human needs."[22]

Given this recognition, attention has focused on providing immediate, limited scope representation where appropriate while simultaneously continuing efforts to secure full scope representation for poor and low-income litigants in important civil matters.

A. Discrete Task Representation

Discrete task representation takes a variety of forms. Indeed, the fairly exhaustive *ABA Handbook on Limited Scope Legal Assistance*[23] identifies thirteen types of limited scope representation. These include: centers that provide information, self-help resources, and advice; hotlines; online information, self-help resources, and limited advice; stand-alone interviews and advice; mediation coaching; "collaborative lawyering"; preparing or reviewing documents and pleadings; coaching throughout litigation; representation, including coaching, in litigation with limited dis-

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lawyer service providers to provide certain classes of legal services at lower cost); RHODE, *supra* note 16, at 87–91.

19 *See generally* Kelly S. Terry, *Do Not Go Gentle: Using Emeritus Pro Bono Attorneys to Achieve the Promise of Justice*, 19 GEO. J. ON POVERTY L. & POL'Y 75 (2012).

20 *See Chief Judge Jonathan Lippman's Law Day 2012 Remarks*, N.Y.L.J. (online) May 1, 2012 (announcing the initiation of a requirement that recent law graduates provide at least fifty hours of pro bono service as a prerequisite to bar admission).

21 *See, e.g.*, Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS L. REV. 472 (2010).

22 James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2209–10 (2012).

23 ABA, SEC. OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: REPORT OF THE MODEST MEANS TASK FORCE (2003), *available at* http://apps.americanbar.org/litigation/taskforces/modest/report.pdf [hereinafter HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE].

putes; representation in an initial case or proceeding that affects the result in a subsequent case or proceeding in which the litigant appears pro se; hybrids; lawyer of the day programs; and group representation.[24]

Clients often seek "segmented" services from lawyers—"different lawyers may conduct 'due diligence', [sic] give a legal opinion, provide tax advice, and prepare legal documents in a single, major transaction."[25] Segmented representation also may occur in the litigation context, with in-house counsel working as a team with outside counsel. Solo and small firm lawyers also provide limited scope representation through client consultation, advising, or document preparation assistance without entering an appearance in the case.[26] In the context of unrepresented low-income litigants, legal services and pro bono counsel also provide limited scope assistance.

All forms of pro bono and limited scope representation require careful thought and planning to ensure that the assistance offered is thorough, effective, and accessible and that it improves the position of self-represented litigants in handling important legal matters. There is also concern that institutional pro bono efforts in "bottom-line" driven law firms provide appropriate and necessary legal services and do no harm.[27] A related concern has to do with cultural competence and the need to ensure that lawyers understand the cultural and structural contexts surrounding the representation.[28]

Much discussion about how best to address the justice gap and about the benefits and drawbacks of various forms of discrete task representation takes place in the legal services community, courts, and bar associations. The conversation includes problem-solving

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[24] *Id.* at 18–40.

[25] *Id.* at 5.

[26] *Id.* at 6.

[27] *See* Lenore F. Carpenter, *"We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L.J. 37, 56 (2010–2011) (citing Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008)).

[28] *See, e.g.,* Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Community Through Case Supervision in a Client Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37, 54–56 (2008) (describing the importance of cultural competence and providing an example of cultural issues in representation that involved Navajo blankets); ABA, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID § 2.4 (2006) *available at* http://apps.americanbar.org/domviol/trainings/Interpreter/CD-Materials/civillegalaidstds2006.pdf; *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

approaches designed to meet urgent needs as well as significant concerns about effective and ethical representation.[29]

B. Discrete Task Representation to Bridge the Justice Gap: The National Conversation

The provision of unbundled or limited scope legal services as a response to the plight of low-income unrepresented litigants faces a number of concerns and critiques. Indeed, the ongoing national conversation about how to address the justice gap has long included discussions about the pros and cons of limited scope representation.[30] One of the main issues is how to ensure that the representation is competent, ethical, and valuable.[31] Competent representation requires that an attorney have a fairly sophisticated understanding of the area of law and of the procedures, operations, and customs of the court.[32] This can be understood to mean that only attorneys familiar with the particular area of law and the procedures and customs of the relevant courts should serve as limited scope volunteers in that legal subject and those courts. More pragmatically, it means that volunteer attorneys must obtain sufficient education, training, and supervision before they provide discrete task representation in an area of law that is new to them.[33] This then raises concerns about how to organize a limited scope volunteer attorney program that is efficient, ethical, cost-effective, and sustainable.

Another frequently raised concern is informed consent—the requirement that litigants understand clearly the scope and limits of the representation and affirmatively consent to being represented for the discrete task only. This requires careful attention to how litigants are counseled about the nature and scope of the rep-

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29 *See, e.g.*, Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 455–56 (2011) (noting ethical and efficacy concerns about unbundling); Kaitlyn Aitken, *Unbundled Legal Services: Disclosure Is Not the Answer*, 25 GEO. J. LEGAL ETHICS 365 (2012).

30 *See* Laura K. Abel, *The Role of Speech Regarding Constraints on Attorney Performance: An Institutional Design Analysis*, 19 GEO. J. ON POVERTY L. & POL'Y 181, 224–28 (2012); *see also* Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481 (1996).

31 *See, e.g.*, Steinberg, *supra* note 29.

32 *See* MODEL RULES OF PROF'L CONDUCT, R 1.1 (2012) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").

33 HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 23, at 64 (advising attorneys of the requirement of competence in limited scope representation and advising that lawyers stay within their field of practice).

resentation. It calls for drafting careful, tailored retainer agreements defining the nature of the attorney-client relationship, along with its scope, purposes, and limits. Informed consent also requires consideration of the range of issues that may arise in representation, including potential conflicts, and, as noted above, the lawyer's degree of competency to handle the matter. These concerns relate to core notions of lawyer ethics, professionalism, and client protection. Indeed, the ethical implications of discrete task representation have gained significant attention over the last several years.[34]

A related issue has to do with the role of the court and the degree to which the court is made aware that the lawyer and client appearing before it have a limited scope engagement.[35] This concern relates to the court's role vis-à-vis self-represented litigants and the risk that limited scope representation, if poorly done, could place the litigant, her adversary, or the court in a worse position than if the litigant appeared entirely pro se. For example, some judges have expressed concern about documents written by attorneys and presented by pro se clients because they create questions of candor and attorney accountability. Others have expressed concerns about attorney accountability for poor drafting, or for failure to uncover important issues related to the particular tasks for which lawyer assistance is provided.[36]

Another, broader concern about the promotion of unbundled legal services to help address the justice gap relates to whether such an approach is in tension with and might serve to thwart efforts to gain traction in supporting Civil *Gideon*—public funding for full scope representation of the indigent in essential civil legal matters like eviction.

Some observers, particularly those concerned with gaining greater support for full scope representation for low-income litigants in important civil matters, raise the concern that providing structured limited scope representation will be viewed as a panacea. They argue that an approach that begins as a much-needed quick fix may come to be viewed as having solved all or enough of the problem of unequal access to justice, establishing a two- or multi-tiered system of justice with the unintended consequence of placing an imprimatur on unequal access to justice.[37] Some of these concerns became more pronounced as unbundling garnered

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[34] *See id.* at 82–115.

[35] *See, e.g.,* Aitken, *supra* note 29.

[36] *See id.*; *see also* Abel, *supra* note 30, at 226–27.

[37] *See, e.g.*, Abel *supra* note 30, at 227–28.

support among court systems, advocates, and bar associations as a mechanism for addressing, even partially, tremendous unmet legal need.[38]

Over time, there has been an increased realization of the fiscal limits of Civil *Gideon* as well as the reality that even with robust funding, significant unmet legal need will remain. Setbacks in efforts to attain Civil *Gideon* requirements have caused some observers to focus more squarely on discrete task representation and various forms of unbundled and court-sponsored assistance as more attainable and more feasible ways to assist self-represented civil litigants.[39] These concerns also may be heightened in response to arguments explicitly advocating for stratification of the legal profession and for greater leniency with respect to unauthorized practice restrictions on paralegals and other lay providers of legal and quasi-legal assistance.[40] While there clearly is a need to expand the options available to those in dire need of legal assistance, attention also must be given to applying standards to support client protection and effective representation.[41]

One response to concerns about the increased use of alternative forms of pro bono assistance to litigants in the wake of the current economic crisis is the realization that neither discrete task representation nor Civil *Gideon* will come close to meeting extant civil legal needs. The economic crisis has drawn back the curtain to reveal the immensity of the need for civil legal services for people facing life-altering legal problems who cannot afford a lawyer.[42] Now more than ever, there is widespread realization that equal access to justice is virtually unattainable under the current structure.[43] Given the scope and seriousness of immediate needs, every available mechanism should be utilized to improve access to justice.

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38 HANDBOOK ON LIMITED SCOPE LEGAL REPRESENTATION, *supra* note 23, at 4 (noting the belief that limited scope representation may help provide legal services where unavailable).

39 *See* Russel Engler, *Reflections on a Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel and When Might Less Assistance Suffice*, 9 SEATTLE J. SOC. JUST. 97, 99 (2010).

40 Rigertas, *supra* note 18, at 128–36 (delineating several proposals to support lay advocacy).

41 *See, e.g.*, Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156 (2011); Carpenter, *supra* note 27, at 37; RHODE, *supra* note 16, at 81–91.

42 LEGAL SERVS. CORP., *supra* note 3, at 5.

43 *See, e.g.*, Helaine Barnett, *"Justice for All,"* 40 STETSON L. REV. 861 (2011) (discussing the impact of the recession on legal services for the poor, as well as needs and challenges of providing such services).

C. Effective Approaches to Discrete Task Representation

At the same time, attention must be paid to the quality of the services provided and to evaluating various programs to determine their efficacy. Providers of unbundled legal services must consider the appropriateness of the classes of cases that are included, the manner in which clients are informed about the scope and limits of representation, and how best to manage cases in which clients are represented in certain components only.

Consideration also must be given to the kinds of legal services that lend themselves to limited scope representation. Structural, funding, and ethical issues must be taken up before a program is implemented. Capacity also must be considered with respect to judges, court staff, program administrators, and volunteer attorneys. The volume of cases and limitations of time, attention, and resources all require careful consideration of various issues if the provision of unbundled legal services is to operate effectively.

To the extent that law school clinics and programs engage in poverty law, law faculty and administrators have added important perspectives to the discussion of how best to provide both full and limited scope services and have implemented a variety of clinical models.[44] There is a growing acknowledgement that the legal academy as a whole has much to contribute to efforts to close the justice gap. Law schools also have a central role in training future lawyers and inculcating the importance of service to the poor and underrepresented as a component of professional responsibility and a broad commitment to justice.[45]

II. The Legal Academy's Role in Supporting Pro Bono Efforts and Discrete Task Representation to Address the Justice Gap

Recognition of the legal academy's important role in supporting the profession's commitment to public interest practice and to pro bono service is growing.[46] For example, in recent reports and amendments to its accreditation standards, the ABA has expressed

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44 *See, e.g.*, Task Force Report, *supra* note 13, at app. 17 (listing examples of law school programs that address the "essentials of life").

45 *See, e.g.*, Linda F. Smith, *Fostering Justice Throughout the Curriculum*, 18 Geo. J. on Poverty L. & Pol'y 427, 446 (2011).

46 *See, e.g.,* Task Force Report, *supra* note 13; Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 Clinical L. Rev. 563 (2011); Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. Sch. L. Rev. 517, 523 (2011) (discussing the social justice roots of clinical legal education); Antoinette Sedillo Lopez,

an increased commitment to pro bono and public service requirements by law schools.[47] In addition, in New York State, Chief Judge Jonathan Lippman recently imposed a pro bono requirement on all law graduates and others seeking admission to the bar. The increase in pro bono service requirements must be supported by the development of structured training, monitoring, and evaluation to ensure that the services provided add value and succeed in creating a more level playing field for otherwise unrepresented litigants. Support structures should be efficient and sustainable, making the best use of attorney time and providing effective mechanisms for training, supervision, consultation, evaluation, and continuing education. The legal academy is an important source of models and an important partner in improving the provision of legal services for the poor and unrepresented.

Law school clinics often provide opportunities for students and faculty to serve communities in need.[48] Indeed, many note that law school clinics provide an excellent model for addressing public service and pro bono requirements among law students. However, pedagogical requirements and limited time and supervisory capacity can make it difficult to expand the scope of services and methods of teaching, preparation, and supervision to serve a broad number of students and litigants. Because clinics are necessarily limited by time and number of students and litigants served, their focus generally is, and should be, on ensuring that clinical experiences give students the solid, deep, and transferable legal skills that prepare them to represent litigants effectively in practice and through pro bono lawyering.[49]

As noted below, there is much that clinics can do to lay a foundation for thoughtful, structured pro bono efforts that provide meaningful legal assistance to support individuals and communities in need. However, whether or not students have engaged in a

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Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 CLINICAL L. REV. 307 (2001).

47 *See generally* ABA DIV. FOR LEGAL SERVS., MODEL RULE 6.1, http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html (last updated Nov. 29, 2006) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year . . .").

48 *See, e.g.*, *Clinics & Concentrations*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/clinics.html (last visited Mar. 13, 2013); Karin & Runge, *supra* note 46, at 567.

49 *See generally* Victor M. Goode, *There Is a Method(ology) to this Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223 (2000) (detailing the importance and depth of the clinical feedback process).

clinic that models effective limited scope representation, there is a need to support law school graduates not only in fulfilling pro bono requirements, but in helping them to do so in a manner that is meaningful, professional, and effective. It is also important to instill in law students a sense of professional obligation to help narrow the justice gap by providing legal services to poor and unrepresented litigants. In addition to its well-known clinical programs, CUNY Law offers pro bono post-graduate models to assist in this endeavor.

A. CUNY Law's Public Interest Initiatives: Efforts to Close the Justice Gap

CUNY Law's mission[50] is to train students to become excellent public interest and public service lawyers.[51] The law school's motto, "law in the service of human needs," describes its mandate to be responsive to the urgent legal needs of under-resourced and under represented communities in New York City and State, around the nation, and indeed globally.[52] To realize its mission, CUNY Law develops innovative approaches to legal education designed to support public interest practice. These approaches include establishing partnerships with communities,[53] governmental entities,[54] legal services organizations,[55] non-profits,[56] and the private bar to find

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50 *See, e.g., Trustees*, CUNY SCHOOL OF LAW, http://www.cuny.edu/about/trustees/hearings/queens/law.html (last visited Mar. 13, 2013) ("[CUNY School of Law] trains lawyers to serve the underprivileged and disempowered and to make a difference in their communities.").

51 *See, e.g., Employment Data for the J.D. Class of 2011 (as of 9 months after graduation)*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/career/employment-statistics.html (last visited Mar. 13, 2013) (showing approximately 41% of CUNY Law graduates in public interest jobs and 12% in public service, such as government work and judicial clerkships).

52 *See* N.Y. EDUC. LAW § 6201 (McKinney 2012) (setting forth the purpose of the City University of New York).

53 *See, e.g.*, Press Release, First In Nation Collaboration: NY State Courts and CUNY Law School Pilot "LaunchPad For Justice" (Nov. 13, 2009), *available at* http://www1.cuny.edu/mu/law/2009/11/13/first-in-nation-collaboration-ny-state-courts-and-cuny-law-school-pilot-launchpad-for-justice/; Bill Egbert, *Tenants Win Free Year of Rent*, N.Y. DAILY NEWS, Mar. 22, 2009, http://www.nydailynews.com/new-york/tenants-win-free-year-rent-article-1.371381.

54 *See Mediation: A Conversation with Beryl Blaustone*, CUNY LAW MAG., Spring 2010, at 17.

55 *Economic Justice Project*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/academics/clinics/ejp.html (last visited Mar. 13, 2013) (recognizing these efforts, the New York State Bar Association selected the Project for the President's Pro Bono Service Law Student Group Award in 2002, and the Clinical Legal Education Association gave the Project its Award for Excellence in 2004).

56 *See Mediation: A Conversation with Beryl Blaustone*, *supra* note 54, at 17.

ways to better serve legal needs related to fundamental life issues like economic viability, shelter, and family relations, among others.

In carrying out this mission, CUNY Law consistently has developed and implemented approaches to legal education that merge theory and practice in service of its public interest mission.[57] That work includes practical training for all students through required third year clinic and concentration programs that engage every law student in supervised client representation as a prerequisite to graduation.[58]

It also includes the concept of the "longitudinal law school," in which CUNY Law extends the concepts behind its sequenced curriculum, merges theory and practice, and provides structured practical support for social justice lawyering through and beyond law school graduation. Through CLRN and other programs, the law school commits to continued engagement with its graduates and alumni by providing training, continuing legal education, networking, and mentoring. This work has earned CUNY Law's CLRN the ABA 2010 Louis M. Brown Award for Legal Access,[59] among other recognitions.

CUNY Law's curricular work in support of public interest practice and its commitment to continued support for solo, small firm, non-profit, and other social justice practices provides opportunities for graduates to serve communities in need effectively and sustainably. The persistence and immediacy of the need for legal representation in low- and moderate-income communities across New York City and State and across the United States highlights the need for multiple creative efforts to address the justice gap.[60]

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57 For examples of CUNY Law faculty scholarship merging theory and effective practice strategies in clinical and practice contexts addressing social justice issues, see, e.g., Newman, *supra* note 10, at 615; Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255 (2010); Beryl Blaustone & Carmen Huertas-Noble, *Lawyering at the Intersection of Mediation and Community Economic Development: Interweaving Inclusive Legal Problem Solving Skills in the Training of Effective Lawyers*, 34 WASH. U.J. L. & POL'Y 157 (2010); Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315 (2009).

58 CUNY SCHOOL OF LAW, STUDENT HANDBOOK 2012–2013 2–3 (2012).

59 *See* Press Release, CUNY School of Law, CLRN to Receive ABA 2010 Louis M. Brown Award for Legal Access (Jan. 28, 2010), *available at* http://www1.cuny.edu/mu/law/2010/01/28/cuny-laws-community-legal-resource-network-clrn-to-receive-the-american-bar-associations-2010-louis-m-brown-award-for-legal-access/.

60 *See, e.g.*, CHARLES L. OWEN ET AL., ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 3 (2002) (noting the dramatic increase in self-repre-

In addition to traditional clinics and internships, CUNY Law and CLRN's pro bono initiatives can provide models for the broader legal academy and the legal profession. They can also establish and strengthen partnerships among law schools, lawyers, communities, and the courts. CLRN[61] is one of the more robust examples of CUNY Law's significant support for graduates engaged in or seeking to establish solo and small firm community practices.

With a focus on serving individuals and communities often priced out of legal services,[62] CLRN was designed to support the development of "low bono" and community-based practices designed to meet this legal services need. The LaunchPad, discussed more fully below,[63] extends concepts of clinical training, lifelong learning, longitudinal learning, and social justice lawyering by structuring pro bono service through a robust apprenticeship model. In this way, CLRN and the LaunchPad respond to various concerns about using discrete task representation to serve indigent clients.[64]

B. The Community Legal Resource Network ("CLRN")

CUNY Law's CLRN[65] is a lawyer collaborative that supports CUNY Law graduates and alumni as they work to set up and run solo or small-group law practices devoted to serving pressing needs of the low- and moderate-income communities that are underserved by lawyers.[66]

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sented litigants, particularly in courts of limited jurisdiction, many involving essential human needs).

61 *See* discussion *infra* section II.B.

62 *See, e.g.*, Editorial, *Addressing the Justice Gap*, N.Y. TIMES, Aug. 24, 2011, at A22.

63 *See* discussion *infra* section II.C.

64 *See* discussion *infra* section III.

65 *See* Kristen Booth Glen, *To Carry It On: A Decade of Deaning After Haywood Burns*, 10 N.Y. CITY L. REV. 7, 26–38 (2006). CLRN was founded in 1998 as a project conceived by CUNY Law Dean Kristen Booth Glen and Clinic Director Sue Bryant. Fred Rooney was hired to implement CLRN and has served as its Director since fall of 1998, establishing the Incubator for Justice and LaunchPad for Justice, among other initiatives. While serving as CUNY Law's Academic Dean, it was my particular privilege to support the establishment of the LaunchPad, its funding efforts, and program support. Through the addition of a law school course on Access to Justice taught by Justice Fern Fisher, law students had the opportunity to study the legal and structural bases for the justice gap and learned law, procedure, and practice related to representing low-income litigants in housing, family, and consumer matters in New York. The course strengthened court partnerships and expanded participation in the LaunchPad and Volunteer Lawyer for a Day programs.

66 *See Community Legal Resource Network,* CUNY SCHOOL OF LAW, http://www.law.cuny.edu/clrn.html (last visited Feb. 6, 2013) (providing an overview and description of CLRN and its programs).

CLRN is designed to support successful community law practice by providing the networking, infrastructure assistance, business planning, sharing of legal and law practice expertise, and continuing legal education options that are taken for granted in large law firms serving wealthy clients.[67] The goal is to support excellent representation of low- and moderate-income clients through a network of solo and small firm practices committed to providing access to justice. The personal and professional rewards of such practice can be great,[68] and increasing access to justice in underserved communities is an enormously important sector of public interest law—the focus of CUNY Law's mission. Without mentoring support and additional training, it is easy for new attorneys to founder in isolated, economically precarious situations.[69] CLRN, based at CUNY Law, also helps new attorneys find one another for networking opportunities through virtual connections such as e-mail lists, other networking technologies, and opportunities to meet through continuing legal education opportunities and networking events. Individual members thus retain autonomy and the ability to practice in a community of their choice while, at the same time, tapping into a virtual and actual community of more than 200 lawyers.

In late 2007, CLRN established a project, the Incubator for Justice ("Incubator"), in Manhattan. The Incubator trains CLRN members over eighteen months in basic business issues such as billing, record-keeping, technology, bookkeeping, and taxes.[70] At the

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67 *See* Margaret Graham Tebo, *Help for 'Store Front' Lawyers: CUNY's Community Legal Resource Network is Thriving—And Growing. Now, Other Law Schools are Joining to Support Solo and Small-Firm Practitioners*, A.B.A. J., Jan. 2003, at 44, 46–48; *Continuing Legal Education,* CUNY SCHOOL OF LAW, http://www.law.cuny.edu/clrn/cle.html (last visited Feb. 6, 2013) (describing CLRN's continuing legal education program).

68 Indeed, participants in CLRN programs designed to support community-based social justice practice and to support pro bono representation consistently report great satisfaction in this work when it is well structured and supported by training. This information is on file with CLRN. The number of registered attorneys is 250, though any CUNY Law alumnus may become part of the network.

69 *See, e.g.*, Leslie C. Levine, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309 (2004) (noting that generally small firm practitioners face difficulties in obtaining formal advice from colleagues, staying up-to-date on the law, and lack of systems for checking conflicts of interest, among other things); Luz E. Herrera, *Reflections of a Community Lawyer*, 70 MOD. AM. 39 (Special Summer–Fall Issue, Special Insert Commemorating the Tenth Annual Hispanic Law Conference) (2007); Barbara Curran, Comment, *Unavailability of Lawyers' Services for Low Income Persons*, 4 VAL. U. L. REV. 308 (1970) (stating that few small practitioners engage in pro bono or low bono work because of difficulty bearing the financial burden).

70 *Continuing Legal Education,* CUNY SCHOOL OF LAW, http://www.law.cuny.edu/clrn/cle.html (last visited Feb. 6, 2013).

same time, the Incubator facilitates participants' involvement in larger justice initiatives and in subject-based training in immigration law, labor and employment law, and other topics that will arise continually as participating attorneys build their practices. Since its inception, the Incubator has supported the establishment of solo and small firm practices, including community practices designed to provide legal support to address the difficulties brought on by the recession, ongoing economic crisis, and systemic issues requiring creative legal responses.

Through networking, planning, modeling, and providing continuing legal education tailored to members' needs, CLRN's vision is to support each lawyer's success while also supporting collective work to establish effective legal services options to improve access to justice for underserved low- and moderate-income people. CLRN seeks to help CUNY Law alumni engage in work that addresses significant areas of unmet legal need. CLRN's programs, including the LaunchPad, exemplify ways in which law schools can play an important role in supporting pro bono, community-based, and public interest practice by applying the concept of the "longitudinal law school."[71]

C. Development of the LaunchPad for Justice

The LaunchPad is an example of an effort to address the justice gap that draws upon CUNY Law's extensive clinical experience as well as its post-graduate efforts to support the development of excellent community-based legal practices, and its partnership with the court system's access to justice efforts. The LaunchPad is an example of resourcefulness and partnerships that can engage law schools, law graduates, seasoned attorneys, and courts in structured, ongoing access to justice efforts.

The LaunchPad is an innovation developed in response to multiple urgent needs. First, the Great Recession that began in 2008 made access to legal services both more urgent and less availa-

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71 The longitudinal law school concept considers training for law practice as involving the development of skills for lifelong learning and engagement with the social justice goals of the profession. To support this notion, the law school provides continuing support to its alumni engaging in community based and social justice practice. For CUNY law school, the longitudinal law school concept is the logical extension of a sequenced curriculum, that is designed to build students' skills and knowledge on a strong foundation, increasing expertise and responsibility over time through planning, action, critique, and reflection. *See, e.g.*, WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 64–67 (2007).

ble.[72] The already huge proportion of litigants unable to afford legal representation exploded as a result of foreclosures, evictions, debt collections, and bankruptcies incident to the economic meltdown.[73] Second, law school graduates, particularly those interested in pursuing public service practice, were finding that because of funding declines for public interest law practices and overall declines in the job market, legal work was difficult to come by[74] even as legal needs for low-income people were increasing exponentially.[75] In addition, the traditional funding streams to support the provision of free and low-cost legal services were drying up. Funding from Interest On Lawyer Accounts ("IOLA"), which connects legal services to government funding from private sources, has declined.[76]

The LaunchPad was developed as a problem-solving innovation and, in some ways, as a natural extension of CLRN's Incubator program and CUNY Law's clinical Access to Justice efforts. The LaunchPad's focus is on new CUNY Law graduates, extending CLRN's goals and outreach to recent graduates facing a difficult job market and a local New York City community facing urgent legal needs. The LaunchPad is designed to provide these new lawyers training and mentoring that starts while they await formal admission to the bar and, in many cases, continues through the development of their practice.

The LaunchPad prepares and supports recent law graduates in providing limited scope representation or unbundled legal services to meet urgent legal needs within the capacity of the graduates and their attorney supervisors to handle professionally. A key component of the LaunchPad is its partnership with the New York

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72 *See, e.g.*, TASK FORCE REPORT, *supra* note 13, at 15–18 (noting the urgent need for civil legal services for low-income individuals and families and the impact of the recession in worsening the "justice gap").

73 *See Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices, and Foreclosures, Hearing Before the Committee on Oversight and Government Reform*, 112th Cong., 132–44 (2012) (testimony of Meghan Faux, Deputy Director, South Brooklyn Legal Services); *see also* PATEL, *supra* note 2.

74 Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 25, 2009, at B1.

75 *See* LEGAL SERVS. N.Y.C., NEW YORKERS IN CRISIS 4 (2009), *available at* http://www.legalservicesnyc.org/storage/lsny/PDFs/new_yorkers_in_crisis.pdf.

76 TASK FORCE REPORT, *supra* note 13, at 48–52 (noting the precipitous decline in IOLA funds due to the decline in interest rates following the 2008 financial crisis and continuing through today); Chief Judge Jonathan Lippman, *The City University of New York Presents a Conversation with Chief Judge Jonathan Lippman*, 14 CUNY L. REV. 3, 8–12 (2010).

State Unified Court System's Access to Justice Program.[77] In particular, the Volunteer Lawyer for a Day ("VLFD") program provides an excellent mechanism for training and partnering with CUNY Law and recent graduates to assist unrepresented litigants by providing structured, supervised limited scope representation.

VLFD is "the first court-sponsored limited scope representation program in New York City."[78] It is "focused on nonpayment proceedings in the Housing Court, Resolution Part. Housing Court matters, however, are only one of the types of proceedings in which limited scope representation is useful. The court has launched limited scope representation programs in other areas, including areas of consumer debt, foreclosure and family matters.[79] The VLFD program primarily engages experienced practicing attorneys who participate as part of their pro bono service or personal interest in volunteering. Practicing attorneys use their expertise to provide free limited scope representation in high need areas of law without having to commit to full scope representation that likely would not be feasible given the lawyers' practices and other commitments.

The LaunchPad partners with VLFD through a structured apprenticeship model. Through the LaunchPad, CUNY Law graduates are trained in substantive law and procedural practice in areas of particular need such as eviction proceedings in housing court, consumer bankruptcy issues, or family law issues.[80] Participants receive intensive training in the key legal issues in the context of current issues unrepresented litigants are bringing to court.[81] The training includes a review of key areas of law, detailed procedural requirements, court forms, and the interaction of the New York State and City housing laws and rules with federal funding and other requirements and restrictions.

For example, the New York City Housing Court training in-

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77 *See Court-Sponsored Volunteer Attorney Programs,* N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/attorneys/volunteer/vap/index.shtml (last visted Feb. 20, 2013).

78 HON. FERN FISHER, BEST PRACTICES FOR THE ADMINISTRATION OF COURT-SPONSORED VOLUNTEER LAWYER FOR THE DAY PROGRAMS (LIMITED SCOPE/UNBUNDLED LEGAL SERVICE PROGRAMS) 2 (Jan. 2010), http://www.nycourts.gov/ip/nya2j/pdfs/NYSA2J_BestPracticesVLFD.pdf.

79 *Id.*

80 Most recently, the LaunchPad will expand to include a program for uncontested divorces. E-mail from Ben Flavin, Cmty. Legal Res. Network, to author (Jan 11, 2013 10:17 EST) (on file with author).

81 *Id.* For example, the training for Spring 2013 LaunchPad fellows includes training on how to advocate for repairs, conduct traverse hearings, analyze rent breakdowns, and conduct intakes, as well as the fundamentals of landlord-tenant law. LAUNCHPAD FELLOWSHIP TRAINING SCHEDULE SPRING 2013 (on file with author).

cludes courses in handling non-payment,[82] holdover,[83] and Housing Part actions;[84] conducting traverse hearings; and an extensive ethics course on landlord-tenant representation and volunteer lawyering. Course participants are instructed in the legal, procedural, and practical components of such actions. The training is designed to equip the graduates with not only the general law and big picture issues, but also with specific and pressing issues that arise when representing low-income tenants faced with eviction.

The training enhances the general information, guidance, and forms provided to pro se litigants and volunteer attorneys, alerting LaunchPad participants to key issues and concerns that might be more familiar to seasoned volunteer attorneys. For example, attention is given to current issues and practices with respect to the complex maze of public housing regulations. The training also places the representation within the broader social context as it relates to the lack of adequate housing, jobs, and public assistance, as well as issues related to poverty and existing imbalances in access to justice.[85] Finally, the training incorporates issues of cultural competence and the dynamics of particular court practice.[86]

The program then connects participants with a supervising attorney who works in conjunction with the New York State Unified Court System's VLFD or other access to justice initiatives in the

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82 *See Starting a Case,* N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/nyc/housing/startingcase.shtml#requirements (last visited Mar. 20, 2013) (defining a nonpayment case as one brought by the landlord to collect unpaid rent and explaining that a tenant may be evicted for non-payment of rent).

83 *See Starting a Holdover Case,* N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/nyc/housing/startingholdover.shtml (last visited Mar. 20, 2013) (defining a holdover case as one brought to evict a tenant or a person in the apartment who is not a tenant for reasons other than simple nonpayment of rent and explaining that a holdover case is much more complicated than a nonpayment case and can have many variations).

84 *See Starting an HP Proceeding to Obtain Repairs,* N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/nyc/housing/startingcase.shtml#requirements (last visited Mar. 20, 2013) (defining "HP actions" as those involving rent withholding because of a landlord's alleged failure to complete necessary repairs and explaining that such actions generally are brought through an Order to Show Cause Directing the Correction of Violations and that such actions require an inspection by the New York City Department of Housing Preservation and Development's Division of Code Enforcement in support of the Order to Show Cause and accompanying petition).

85 *See Poverty Simulation*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/ip/nya2j//PovertySimulation.shtml (last visited Mar. 20, 2013) (describing the poverty simulation conducted by the New York State Court's Access to Justice Program, in which volunteers play the role of community resource person).

86 The 2013 LaunchPad training includes daily Housing Part observations. LAUNCHPAD FELLOWSHIP TRAINING SCHEDULE SPRING 2013 (on file with author); *see also* Email from Ben Flavin, *supra* note 80.

subject areas of focus in the training. The participants conduct intake, counseling, and sometimes limited scope representation, depending on their degree of training and experience, the nature of the client's case, and the appropriateness of the model of representation to the circumstances. Important components of the success of the LaunchPad program include its well-matched partnership with the New York State courts' robust and active Access to Justice efforts and its establishment through CUNY Law's CLRN.

D. The New York State Unified Court System's Access to Justice Efforts Supporting Discrete Task Representation

The leadership of the New York State Unified Court System has long recognized the need for creative ways to provide legal representation to poor and middle-class litigants in New York State and across the country.[87] Legal services providers and pro bono attorneys providing full scope representation alone do not come close to meeting the vast need for free and low cost legal representation.[88] The provision of limited scope representation—or "discrete task representation" or "unbundled legal services"[89]—is another way to help serve the legal needs of self-represented litigants who cannot afford to retain a lawyer.[90] With limited scope representation "the lawyer and client agree that the lawyer will provide some, but not all of the work involved in traditional full-service representation."[91] Thus, rather than an arrangement in which the lawyer and client agree upon a full scope of representation, both agree on discrete legal tasks to be performed. The delivery of legal services in this way allows the client and the lawyer to identify those tasks best matched to the lawyer's expertise and available time,

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87 N.Y. STATE COURTS, *supra* note 7; *see also* Engler, *supra* note 15, at 40–43 (2010); Rochelle Klempner, *Unbundled Legal Services in Litigated Matters in New York State: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006).

88 *See* TASK FORCE REPORT, *supra* note 13, app. 7 (noting that "99 percent of tenants are unrepresented in eviction cases in New York City and 98 percent are unrepresented outside of the City, 99 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City, 97 percent of parents are unrepresented in child support matters in New York City, and 95 percent are unrepresented in the rest of the state; and 44 percent of homeowners are unrepresented in foreclosure cases throughout [the] State."). Of course, the provision of limited scope representation is meant to address urgent current needs and is not meant to displace efforts to provide full, fair, and equal representation to low-income litigants facing the loss of key needs.

89 FISHER, *supra* note 78, at 4.

90 HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 23, at 4.

91 Klempner, *supra* note 87, at 654.

keeping the client's costs down, while permitting the lawyer flexibility to manage her or his caseload and while serving critical legal needs.[92]

The New York State courts have taken a remarkably active leadership role in establishing and supporting limited scope representation to help address the urgent needs of self-represented litigants.[93] The Access to Justice efforts implemented under Chief Judge Lippman's and Justice Fisher's leadership take a variety of forms, including volunteer attorney programs, do-it-yourself forms for litigants, community outreach to educate the public about the justice system, and assigned counsel projects serving senior citizens in housing court, among others.[94] Indeed, the New York State Access to Justice program includes virtually all of the thirteen kinds of unbundled legal services identified in the *ABA Handbook on Limited Scope Legal Assistance*.[95]

As noted above, discrete task representation is routinely provided outside of the litigation context. Because there are many ways in which lawyers and others might assist individuals facing issues involving legal documents or a court appearance, it should be noted that the limited scope assistance discussed here "involves the exercise of legal judgment and the application of law to facts to help clients resolve legal problems."[96] The VLFD program is unusual in that it involves limited scope representation tailored to in-court appearances in housing, family, and consumer matters.

Recognizing the urgent need to provide legal representation in cases involving fundamental human needs like shelter, financial subsistence, and family composition, the New York State Unified Court System has explored ways in which unbundled legal services can be delivered effectively, ethically, and responsibly in connection with crucial court appearances.[97] Understanding that the

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92 *See, e.g.,* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York*, 29 FORDHAM URB. L. J. 1107 (2002).

93 *See* N.Y. STATE COURTS, *supra* note 7 (describing various Access to Justice initiatives established in the New York State Courts).

94 *Id.*

95 The New York State Courts Access to Justice website contains a number of resources to assist self-represented litigants. *See id.*; *see also* HANDBOOK ON LIMITED SCOPE REPRESENTATION, *supra* note 23, at 18–40.

96 HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 23, at 7 (noting that "lawyers who provide this assistance create attorney-client relationships with the people whom they help. We distinguish this assistance from 'legal information,' which lawyers (and others) can provide without creating an attorney-client relationship.").

97 *See* VOLUNTEER LAWYER FOR A DAY PROJECT REPORT: A TEST OF UNBUNDLED LEGAL SERVICES IN NEW YORK CITY HOUSING COURT, apps. 4–6, at 69–100 (2008) [hereinafter VLFD REPORT], *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/vlf-

court system's ability to provide direct assistance is limited by both its role and its capacity, efforts have been made to establish structures and partnerships with the bar, legal services organizations, and the legal academy to improve access to justice by providing assistance to litigants who cannot afford to hire a lawyer and for whom essential needs hang in the balance.[98]

Among the most promising efforts for purposes of partnering, reaching litigants at pivotal points, and capacity building is the provision of structured discrete task representation for key court appearances on critical matters including shelter, family relations, and basic fiscal well-being. The VLFD program is supported by a structure through which pro bono attorneys can assist unrepresented litigants through limited scope representation at important junctures in their cases.[99] The program provides training, supervision, and a structure that helps both volunteer lawyers and self-represented litigants gain an understanding of the scope and limits of the representation and provide useful and effective assistance during court appearances when litigants tend to be most in need of legal assistance.[100] For example, the housing court program operates in Civil Court on Tuesday and Thursday in Manhattan, and Monday and Wednesday in Brooklyn.[101] During those times, a supervising attorney is present. The volunteer lawyers advise the program coordinator and supervising attorney of the days and times that they will be participating.[102] Some volunteers serve in an intake capacity. They greet self-represented litigants and talk with them to determine whether those interested in seeking limited scope representation are eligible for the program.[103] Those litigants deemed eligible are provided detailed information orally and in writing about the program and the scope and limits of representation. They are provided limited scope retainer agreements and are assigned a volunteer attorney.[104] The volunteer attorney meets with the litigant to go over the case, ask questions, review any docu-

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dreport_0208.pdf (setting forth results of surveys and evaluations of unbundled legal services efforts and volunteer lawyer for a day programs and describing structures and training components).

98 *See* TASK FORCE REPORT, *supra* note 13.

99 VLFD REPORT, *supra* note 97, at 11–16.

100 *Volunteer Lawyer for the Day Program Prospective Volunteers*, N.Y. STATE UNIFIED COURT SYS., http://www.courts.state.ny.us/courts/nyc/housing/vlfd_hsg_prospectiveattys.shtml#overview (last visited Mar. 23, 2013).

101 *Id.*

102 *Id.*

103 VLFD REPORT, *supra* note 97, app. 3 at 11–14.

104 *Id.*

mentation that the litigant has, and prepare with the litigant for the day's court appearance. The volunteer attorney may consult with the supervising attorney, who is very experienced in both the subject area and local practice, to determine whether additional information should be gathered or additional avenues of relief should be considered.[105] The volunteer attorney then appears on behalf of the litigant and may engage in settlement discussions with the opposing counsel.[106]

E. The LaunchPad Partnership With VLFD: Strengthening the Model

The LaunchPad partners with the VLFD program while also serving as an apprenticeship that builds upon graduates' law school and clinical experiences. The LaunchPad adds a process and structure for intensive training, continuing legal education, and mentoring to the law graduates before they represent litigants in a limited scope capacity.[107]

When funding is available, the LaunchPad also provides modest stipends to the graduates who are yet to obtain employment to help carry them through the program period. Funding for the LaunchPad has come from a variety of public and private sources including the City University of New York's Workforce Development Initiative. Given the dearth of available jobs—legal or otherwise—the modest stipends go a long way in enabling recent law graduates to sustain themselves while engaging in this important work and gaining legal skills in high need practice areas.

The program generally begins with an application process in early August, following the bar exam. Fellows are selected and the fellowship begins in early September with orientation, training, and shadowing current attorney volunteers and supervisors.[108] The LaunchPad fellows begin volunteering in late September to early October and commit to a minimum of six months of service.[109] The fellows are required to commit significant time to training and continuing education. They then work with a supervising attorney and more experienced volunteer attorneys to engage in representation in housing court, family court, and small claims court.

While observing the operation of the LaunchPad as it operates

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105 *Id.*

106 *Id.*

107 E-mail from Ben Flavin, *supra* note 80; Fellowship Application Materials, Cmty. Legal Res. Network (2013) (on file with author).

108 *Id.*

109 *Id.*

with the VLFD program, I had the occasion to talk with a few volunteer lawyers and with some of the litigants they represented. Both the litigants and the volunteer lawyers I talked with described significant positive experiences with the program. The litigants I met with were amazed and relieved that they had the opportunity to be represented in housing matters that were so important to them, yet for which they had been unable to find legal assistance. One litigant said that he had been to housing court several times and did not know that had he shared with the court information about the condition of his apartment or his public assistance status, he might have avoided an earlier eviction that wound up costing him and the state more money than necessary.[110] Another litigant told me that when she arrived at court, she had no idea what she was going to tell the judge. She was relieved when the volunteer lawyer not only reviewed her case and represented her in her court appearance, but also helped her to arrange a settlement with the landlord's attorney that would prevent eviction and get necessary repairs done.

Several litigants noted that the involvement of the volunteer lawyer helped them to avoid eviction by gathering necessary facts, bringing pertinent information to the court's attention, and encouraging the landlord's attorney to negotiate a favorable settlement. All of the volunteer law graduates in the LaunchPad with whom I spoke commented on how energized they felt about being able to assist litigants facing imminent eviction and the dire consequences that would follow. They noted that the program provided effective training to support their representation, but that they learned a great deal more each day in the program—about law, procedure, and how to work effectively with litigants, opposing counsel, the courts, and colleagues.[111] The volunteers said that having a supervising attorney on-site at the courthouse and available for consultation helped them feel confident in their representation and accelerated their learning.[112]

Several said that the learning curve while in the program was steep, but the climb was both quick and effective. After a few weeks of representation, their knowledge and understanding of the relevant law, regulations, and court procedures increased significantly as did their level of confidence.[113] All of the volunteers I spoke with

110 TASK FORCE REPORT, *supra* note 13, at app. 10.
111 VLFD REPORT, *supra* note 97, at app. 5.
112 *Id.*
113 *Id.*

said that they would continue to provide pro bono service as an attorney based on the experience with the LaunchPad and the observation of the extent of urgent, unmet legal needs in the courts.[114] Indeed, most of the participants continued to serve as volunteers well after the official program period ended and some continued to volunteer even after obtaining employment.

Important to LaunchPad's success is its emphasis on structured training, supervision, reflection, and feedback. These elements draw upon components of effective clinical pedagogy and practice. In turn, clinical programs are establishing innovative approaches to providing more extensive assistance to communities in need through structured discrete task representation models that incorporate both individual and systemic issues.

III. The LaunchPad: a Model Responsive to Concerns About Discrete Task Representation by Law Graduates and Lawyers

In identifying structures and mechanisms for the delivery of unbundled legal services, planners and providers must be attentive to concerns about efficacy and equity.[115] Segmented services must be delivered in a manner that appropriately serves clients, ensures that lawyers meet their professional and ethical responsibilities, helps rather than hinders the provision of justice, and supports improved outcomes.[116] There has been much discussion among scholars, practitioners, and judges about the benefits and risks of using discrete task representation as a mechanism to improve access to justice for low-income unrepresented litigants.[117]

Over time, the most virulent opposition to the use of limited scope representation in the areas of poverty law has given way to increased realization of the scope of unmet need and the lack of resources to support full representation. Still, many of the concerns voiced by opponents of the use of unbundled legal services as a primary mechanism for addressing unmet civil legal needs de-

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114 *Id.*

115 *See generally* Rhode, *supra* note 16 (citing critiques of discrete task representation and ways to address them).

116 *See generally* Richard Zorza, *Discrete Task Representation Ethics and the Big Picture*, 40 Fam. Ct. Rev. 19 (2002).

117 Mansfield & Trubek, *supra* note 1, at 384 (noting the "resistance and fear" within the legal profession to re-envisioning the lawyer's role and the practice of law. Such fears relate to the use of cooperative efforts, technology, social science research, and other innovations as potentially undermining lawyer professionalism).

serve consideration.[118]

Indeed, a national conversation about how best to address the justice gap and whether and how the provision of unbundled legal services fit as part of that effort has long been underway and has evolved over time.[119] Many of the concerns raised go to the heart of structural injustice embedded in our social and legal systems.[120] Some of the more particular concerns focus on the needs and realities facing litigants and the legal profession.

A. How the LaunchPad Model Responds to Issues and Needs in Providing Unbundled Legal Services

Building on the notion of a social justice lawyering apprenticeship, the LaunchPad provides a structure and support for in-court discrete task representation that goes beyond the court system's capacity to train and prepare recent law school graduates. The LaunchPad design builds on and strengthens lawyering skills—fact gathering, research, legal drafting, advocacy, negotiation, cultural competency, and collaboration—developed through the law school's sequenced curriculum and capstone clinics. It does this in a fast paced, high stakes, and high need environment.

The model also approaches the work in a manner that gives attention to the realities of the particular court environment and to the social and structural backdrop of the legal issues presented. Building on CUNY Law's clinical models and attention to lawyer competencies, LaunchPad training includes reference to the legal, social, cultural, and practical dynamics at work in a particular court. Ethical issues, as well as the roles that judges, court staff, lawyers, and litigants play in the system, are considered as recent law graduates navigate not only the legal landscape of housing or family law, but also the interaction among all of the players in housing court, family court, or other tribunals.

The availability of a supervising attorney together with a cohort of participants helps make the process of unpacking the dynamics of the particular system explicit and likely more quickly and easily mastered. The combined circumstances of training, teamwork, and supervision also help participants identify mechanisms

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118 *See generally* Richard Zorza, *An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue,* 43 FAM. L.Q. 519 (2009).

119 Engler, *supra* note 21, at 68 (detailing the evolution of Civil *Gideon* and discrete task support for self-represented litigants over time).

120 *See generally* RHODE, *supra* note 16; Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008).

for problem-solving that both respect and flex the boundaries outlined by the roles of each of the key players in the process.

The LaunchPad is therefore much more than a one-shot pro bono program. Its goal as a social justice legal apprenticeship is not only to train graduates in the particular legal matters to be addressed. It is also meant to broaden and deepen participants' experience and expertise in the range of lawyer competencies in areas of particular legal need and to create and support a culture of service among new lawyers.

The LaunchPad accomplishes these goals while providing much needed "work" to recent law graduates and helping them to understand that there is no shortage of social justice work to be done, especially, though not exclusively, in times of economic crisis.[121] Viewed as an apprenticeship and as a component of the longitudinal law school concept, the LaunchPad inculcates in recent law graduates the understanding that pro bono and public service are important professional obligations central to the goal of improving justice for all.

New York Chief Judge Jonathan Lippman's recent requirement of at least fifty hours of pro bono service as a prerequisite to bar admission[122] is an explicit and concrete articulation of this professional obligation. The ABA Section on Legal Education's attention to law student pro bono participation demonstrates a national trend to consider robust pro bono participation as part of a lawyer's professional commitment.

The LaunchPad provides a model for effective pro bono apprenticeship in the context of limited scope representation. It identifies important planning and structural considerations which other law schools can reference to support effective student and graduate pro bono efforts.

This model responds to several concerns about the provision of unbundled representation of otherwise self-represented litigants unable to afford a lawyer. For example, the LaunchPad provides a model for training and supervision that, although far more limited than what is provided in a law school clinical setting, draws on practical, structural, and contextual approaches found in clinical legal education. The LaunchPad model gives attention to detailed

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121 The LaunchPad is designed to last beyond the particular exigencies presented by the Great Recession. The legal job market may improve and transform over time. Changes in the economy as well as projected reductions in the number of people applying to law school support this prediction. Less likely to change in the foreseeable future is the constant and continued need to address the justice gap.

122 *See Chief Judge Jonathan Lippman's Law Day 2012 Remarks, supra* note 20.

training in the area of law, as well as to overarching socioeconomic, court-based, and legal policy issues. The model provides on-site supervision by attorneys with expertise, while maintaining high expectations of each LaunchPad participant, emphasizing their responsibility for excellent independent representation in keeping with professional norms and responsibilities.

The LaunchPad also keeps clear the role of the court as a supportive, yet sufficiently neutral partner. While working cooperatively with the court system, LaunchPad organizers ensure that participants work independently on behalf of the clients they represent. Ethical and professional issues, including the scope and limits of the lawyer's role, particular issues that arise in the limited scope context, and the importance of informed consent and of cultural competence, are addressed in the program.

As the LaunchPad begins its fourth year of operation, evaluation and the consideration of options for replication and expansion are paramount concerns. This is particularly important given that the degree of legal need is not likely to abate, and given the New York State courts' efforts to expand pro bono service. Evaluation of the LaunchPad to date has shown positive results from the perspective of litigants served and program participants' experience. Most evaluation focuses on the experiences of all participants in the court setting.

Additional review and evaluation is needed to determine the degree to which the LaunchPad can support more systemic changes in courts and communities. Consideration also should be given to the extent to which the model might be used in other settings, such as mediation and transactional work related to foreclosures, consumer debt cases, and other matters.

Conclusion

The Great Recession has highlighted the need to develop innovative and effective ways to deliver pro bono assistance to address urgent unmet legal needs. The legal academy has an important role in helping to meet those needs by preparing law students for professional practice that includes the professional and ethical commitment to support and improve access to justice for the poor and underserved. CUNY Law, consistent with its mission, has long taken that role seriously, establishing innovative clinics and programs to provide urgent legal services to underserved individuals and communities.

With the announcement of pro bono requirements as a pre-

requisite to bar admission, New York State's Chief Judge has concretized the professional obligation of lawyers to contribute to improving access to justice by engaging in pro bono representation. In establishing models to support pro bono efforts among students and recent graduates, New York law schools and legal organizations have a ready partner in the New York State Unified Court System.

The LaunchPad for Justice provides a model for effective supervised pro bono practice that helps to address legal needs and to respond to concerns about unbundled representation. The LaunchPad's apprenticeship approach and structural supports provide a model and framework that can be replicated and reimagined for other areas of pro bono discrete task representation.

"HALLOWED BY HISTORY, BUT NOT BY REASON": JUDGE RAKOFF'S CRITIQUE OF THE SECURITIES AND EXCHANGE COMMISSION'S CONSENT JUDGMENT PRACTICE

Michael C. Macchiarola†

Introduction

Over the past several years, in a trilogy of opinions,[1] Judge Jed S. Rakoff of the United States District Court of the Southern District of New York has established himself as a minor cult hero for daring to question the wisdom of the long-running consent judgment practice of the Securities and Exchange Commission ("SEC" or "Commission").[2] At its core, each opinion addresses issues of affinity for settlement, judicial deference to the judgments of administrative agencies, and the general theory of damages in cases

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1 *See* Sec. Exch. Comm'n. v. Bank of Am. Corp. (*Bank of America Opinion I*), 653 F. Supp. 2d 507 (S.D.N.Y. 2009); Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011); Sec. Exch. Comm'n. v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

2 *See, e.g.*, Matthew Farrell, Note, *A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America*, 96 Cornell L. Rev. 169, 189 (2010) (describing Judge Rakoff as a "maverick"); Ed Koch, *Judge Jed Rakoff—A Light Unto His Fellow Jurists,* Huffington Post (Dec. 6, 2011, 12:05 PM), http://www.huffingtonpost.com/ed-koch/judge-jed-rakoff-a-light-_b_1130133.html (characterizing the Judge as "a light unto his fellow jurists"); Steven Pearlstein, *What Kind of Judge Stands Up for Truth and Justice?*, Wash. Post, Sept. 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/15/AR2009091503498.html (calling Judge Rakoff "the kind of activist judge we need more of"); John Cassidy, *Why Judge Rakoff Was Right to Block the Citigroup Settlement*, The New Yorker Rational Irrationality Blog (Nov. 29, 2011), http://www.newyorker.com/online/blogs/johncassidy/2011/11/why-judge-rakoff-was-right-to-block-the-citigroup-settlement.html (commenting that Judge Rakoff "did the American public a great service."); Jordan Weissmann, *Why Populist Hero Judge Rakoff Could Help Wall Street Win*, The Atlantic, Dec. 1, 2011, 4:23 PM, http://www.theatlantic.com/business/archive/2011/12/why-populist-hero-judge-rakoff-could-help-wall-street-win/249366/ (observing that the Judge "has the makings of a perfect hero"); Frederick J. Sheehan, *The SEC's Day in Court*, Financial Sense (Dec. 1, 2011), http://www.financialsense.com/contributors/fred-sheehan/2011/12/01/the-sec-day-in-court (describing the judge as "fighting for the common man"); David Bario, *With Latest Ruling, Rakoff Cements Status as Populist Firebrand*, AmLaw Daily (Nov. 28, 2011, 4:12 PM), http://amlawdaily.typepad.com/amlawdaily/2011/11/rakoff-as-populist-firebrand.html (describing the Judge as a "populist firebrand").

of corporate malfeasance.[3] While commentators have focused ample attention on the high-profile nature, appealing facts, or colorful judicial language[4] of each of the controversies, the value of the Judge's opinions is found elsewhere—in the basic issues he dares to confront regarding the proper role of the courts in validating and enforcing the special kind of settlement known as the consent judgment.[5] The Judge's rumblings uncover a practice "hallowed by history, but not by reason"[6] and his work sheds light on a curious corner of the Commission's maneuvering too long unexamined and unquestioned out of deference, convenience, apathy, or some combination thereof. If sunlight indeed remains the best disinfectant, Judge Rakoff's series of opinions offers the industry and its primary regulator a refreshing opportunity for introspection, as each embarks on a proper cleansing.[7] There remains, however, a significant difference between a good wash and a whitewash.[8] And, as Judge Rakoff notes, "in any case . . . that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public

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3 M. Todd Henderson, *Impact of the Rakoff Ruling: Was the Judge's Scuttling of the SEC/BofA Settlement Legally Pointless or Incredibly Important—or Both?*, WALL STREET LAWYER, Nov. 2009, at 4.

4 *See, e.g.*, James F. Haggerty, *Judge Rakoff, Citigroup, and the Upside of Saying 'Sorry'*, CORPORATE COUNSEL (Dec. 7, 2011) (suggesting that "[c]ommentators have focused on the strong language of the opinion"); *see also* Alison Frankel, *Rakoff to SEC: Oh Yes, It is My Job to Consider Public Interest*, REUTERS, Nov. 28, 2011, http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_-_November/Rakoff_to_SEC__Oh_yes,_it_is_my_job_to_consider_public_interest/ (describing the *Citigroup Global Markets, Inc.* opinion as an "eminently quotable exercise in rhetoric").

5 *See Rakoff Rakes the SEC*, WALL ST. J., Sept. 15, 2009, http://online.wsj.com/article/SB10001424052970203917304574413242609077958.html (observing that "Judge Rakoff has done a public service by exposing the political point-scoring that drives far too many regulatory actions"); *see also* Michael C. Macchiarola, *In Respect of Resistance to the "Rubber Stamp,"* ASU LAW BLOG (Apr. 19, 2012), http://asulawjournal.lawnews-asu.org/?p=422. Unless otherwise explained, the terms "consent decree" and "consent judgment" are used interchangeably throughout this Article.

6 Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 827 F. Supp. 2d at 328, 332 (S.D.N.Y. 2011).

7 *See generally* Louis Brandeis, *What Publicity Can Do,* HARPER'S WEEKLY, Dec. 20, 1913, at 10; *see also* Knut A. Rostad, *Rakoff's Bank of America Opinion: "The Tipping Point"* ADVISORONE (Sept. 16, 2009), http://www.advisorone.com/2009/09/16/rakoffs-bank-of-america-opinion-the-tipping-point (asserting that "Judge Rakoff's total rejection of the settlement frames, far more powerfully than any argument to date, the moral basis for reform in compelling terms that resonate with ordinary investors").

8 *See, e.g.*, *A Financial Regulator Under Fire: Unsettling Wall Street*, THE ECONOMIST, Dec. 3, 2011, http://www.economist.com/node/21541055 [hereinafter THE ECONOMIST] (agreeing that "before a suitable punishment can be set, there must be a determination as to what occurred, and why it was wrong" and adding that "[o]f such sentiments are revolutions born").

interest in knowing the truth."[9]

This Article proceeds, in five parts, to examine each of the three relevant opinions. Part I summarizes each controversy and articulates Judge Rakoff's critique of the Commission's settlement practice. This part lays the predicate for the analysis that follows. Part II describes the history of the consent judgment practice at the Commission and examines the motivations and developments that have made it all too convenient for the Commission and defendants to routinely favor settlement. This part of the Article also surveys the surprisingly scant literature and precedent that exist on the subject and examines the indispensible role that the courts have come to play in the Commission's settlement practice. Part III examines the wisdom of a policy that favors settlements generally and investigates the proper deference that a court owes an administrative agency proposing a settlement. This part highlights the various issues raised by the Commission's current affinity for settlement and suggests that a more active role for courts is both necessary and responsible in cases where the Commission seeks judicial enforcement powers to assist in the monitoring of wrongdoers post-settlement. Also, this part explores the role that a "public interest" inquiry plays as an appropriate judicial check on the SEC's settlement practice. Part IV briefly explores the anticipated results of this issue's newfound attention and theorizes as to the likely effects on the Commission's ongoing practice of gaining settlements. Finally, Part V offers a short conclusion.

I. Three Controversies with a Common Thread

Judge Rakoff has been "publicly stewing over the SEC's approach to settlements with alleged Wall Street malefactors since 2009."[10] While each of the cases examined here has unique facts and circumstances, a common thread binds the three. Together, they shed light on a long running and unchecked practice.[11] More than the simple musings of a frustrated judge, the opinions are thoughtful and measured, and reveal deep inconsistencies and troubling assumptions in the Commission's use of the courts as enforcement partner.[12] In each case, the Judge objects to the Commission's taking the judiciary for granted—involving the court as

9 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 335.

10 *See* Bario, *supra* note 2.

11 *See, e.g.*, The Economist, *supra* note 8 (describing the settlement practice as one of the SEC's "pet habits").

12 *See, e.g.*, Brief of Appointed Pro Bono Counsel for the United States District Court at 1, Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 673 F.3d 158 (2d

an ongoing monitor without providing a full accounting of the underlying facts triggering such a necessity.[13] The Judge's concerns are straightforward. Absent an adequate appraisal, it remains nearly impossible for a court to determine (i) its proper role in such an arrangement or (ii) whether the public interest is served by its ongoing involvement. And, "before a suitable punishment can be set, there must be a determination as to what occurred, and why it was wrong."[14] As one commentator has observed, the entire process takes on "an Alice-in-Wonderland aspect" when a company subjects itself to disgorgement or monetary penalty and "routinely says it won't in the future violate the regulations it did not admit to violating in the first place."[15]

At the same time, allowing the judiciary an unfettered role in rewriting or second-guessing each and every Commission settlement would be equally unsatisfactory. Such a regime would frustrate the Commission's work and impart a substantial burden on its efforts to calculate the costs and benefits of the various enforcement strategies at its disposal. Moreover, without clearly defining the scope of judicial inquiry, the Commission and its targets would be forced to bargain with the prospect of eventual judicial interference hanging in the air. Such a regime might also prove unsatisfactory for the judiciary itself, as additional hearings, testimony, and review processes of all proposed Commission settlements would clog already full federal judicial dockets.[16]

Cir. 2012) (Nos. 11-5227-CV(L), 11-5375-CV(CON), 11-5242-CV(XAP)), 2012 WL 3288769 [hereinafter SEC Brief]. The brief stated:

> The district court, asked to approve a problematic consent judgment that included a request for substantial injunctive relief enforced by the court's own contempt power, held that the proposed consent judgment could not meet the acknowledged standards of judicial review where the court had not been provided with any evidentiary basis upon which to exercise its independent judgment.

Id.

13 One particularly colorful description of this objection suggested that the Judge did not want to be treated as a "potted plant." *See* Roger Parloff, *The Judge Who Slapped Citi*, FORTUNE, Nov. 30, 2011, http://finance.fortune.cnn.com/2011/11/30/judge-jed-rakoff-citigroup-sec/.

14 *See* THE ECONOMIST, *supra* note 8.

15 Neal Lipschutz, *Hear Out the SEC Guy, Too,* WALL ST. J. LAW BLOG (Dec 5, 2011, 11:24 AM), http://blogs.wsj.com/law/2011/12/05/hear-out-the-sec-guy-too/; *see also* Matt Taibbi, *Federal Judge Pimp-Slaps the SEC Over Citigroup Settlement*, ROLLING STONE TAIBBLOG (Nov. 29, 2011, 10:10 AM), http://www.rollingstone.com/politics/blogs/taibblog/federal-judge-pimp-slaps-the-sec-over-citigroup-settlement-20111129 ("By accepting hundred-million-dollar fines without a full public venting of the facts, the SEC is leveling seemingly significant punishments without telling the public what the defendant is being punished for.").

16 Samantha Dreilinger, *Is Three a Crowd? The Role of the Courts in SEC Settlements,* 7

Judge Rakoff has drawn attention to a corner of the world where the roles of the judiciary and the Commission routinely intersect. And, his opinions have dared to ask some basic questions about the proper role of each in the process of negotiating and enforcing settlements with corporate wrongdoers. His opinions highlight that the judiciary has, for too long, offered little in the way of a meaningful check on the settlements of the SEC. Today, however, more work is required—to define more exactly the scope of the proper judicial inquiry into the Commission's arrangements and to ensure that judicial force is not employed in anything other than a highly deliberative and responsible manner.

The particular facts and histories of the three relevant cases follow.

A. SEC v. Bank of America

On August 3, 2009, the SEC filed a complaint against Bank of America Corporation ("BofA") in the United States District Court for the Southern District of New York.[17] The Commission alleged that BofA had made materially false and misleading statements in its proxy statement seeking shareholder approval of the $50 billion acquisition of Merrill Lynch ("Merrill").[18] Specifically, the Commission alleged that BofA violated Section 14 of the Securities Exchange Act of 1934 and the accompanying Rules 14a–3 and 14a–9, as a result of its failure to adequately disclose information about Merill's payment of year-end bonuses.[19] BofA's proxy claimed that Merrill had agreed not to pay year-end performance bonuses or other discretionary incentive compensation to its executives prior to the closing of the merger without BofA's consent.[20] In fact, BofA

(2010), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=samantha_dreilinger.

17 *Bank of America Opinion I*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009). An amended complaint was filed on October 19, 2009. In addition, the Commission filed a complaint, on January 12, 2010, alleging that Bank of America failed to adequately disclose, in connection with the proxy solicitation for the Merrill acquisition, information concerning Merrill's losses for the fourth quarter of 2008.

18 *Id.* For a vivid description of the circumstances surrounding the Merrill Lynch acquisition, see Heidi N. Moore, *Bank of America-Merrill Lynch: A $50 Billion Deal from Hell*, WALL ST. J. DEAL JOURNAL BLOG (Jan. 22, 2009, 2:16 PM), http://blogs.wsj.com/deals/2009/01/22/bank-of-america-merrill-lynch-a-50-billion-deal-from-hell/; *see also* GREG FARRELL, CRASH OF THE TITANS (2010) (describing the events leading to Merrill's need for a takeover).

19 *Bank of America Opinion I*, 653 F. Supp. 2d at 508.

20 *See* Bank of America and Merrill Lynch, Notice of Special Meeting of Stockholders (Form 424(B)(3)) (Oct. 31, 2008), *available at* http://www.sec.gov/Archives/edgar/data/70858/000095012308014233/g15211b3e424b3.htm.

had already agreed that Merrill could pay up to $5.8 billion[21] in discretionary year-end and other bonuses to Merrill executives for 2008.[22] Under the terms of the consent judgment proposed to the court, BofA, while not admitting or denying the Commission's specific allegations, agreed to (i) pay a $33 million fine to the Commission and (ii) refrain from making false and misleading statements in future proxy solicitations.[23] On September 14, 2009, in a colorfully worded opinion, Judge Rakoff rejected a proposed consent judgment that would have settled the matter.[24]

Lest there be any doubt about the gravity with which Judge Rakoff would consider whether the proposed consent judgment was acceptable, his September 14th order framed the issue in no uncertain terms:

> In other words, the parties were proposing that the management of Bank of America—having allegedly hidden from the Bank's shareholders that as much as $5.8 billion of their money would be given as bonuses to the executives of Merrill who had run the company nearly into bankruptcy—would now settle the legal consequences of their lying by paying the S.E.C. $33 million more of their shareholder's money.[25]

After taking particular issue with the notion that "the victims of the violation pay an additional penalty for their own victimization," Judge Rakoff ordered written submissions and oral arguments on the subject.[26]

Of the three cases examined in this Article, the BofA situation seems to be the most egregious example of the consent decree gone wild. The underlying facts of the case make the proposed settlement almost indefensible. And, the court soundly rejected the

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21 Sec. Exch. Comm'n. v. Bank of Am. Corp., (*Bank of America Opinion II*) 09 CIV. 6829 (JSR), 2010 WL 624581 (S.D.N.Y. Feb. 22, 2010). This amount represented nearly 12% of the "approximately $50 billion" of total consideration exchanged in the merger. *See generally,* Final Consent Judgment as to Defendant Bank of America Corporation, Sec. Exch. Comm'n. v. Bank of America Corp., 677 F. Supp.2d 717 (S.D.N.Y. 2010) (Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR)), 2010 WL 430122.

22 *Bank of America Opinion I*, 653 F. Supp. 2d at 508.

23 *Id.*

24 *See id.*; *see also* Kara Scannell, Liz Rappaport & Jess Bravin, *Judge Tosses Out Bonus Deal*, WALL ST. J., Sept. 15, 2009, http://online.wsj.com/article/SB125294493976909051.html.

25 *Bank of America Opinion I*, 653 F. Supp. 2d at 508; *see also* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. & PUB. POL'Y 639, 654 (2010) (observing that "Judge Rakoff left no ambiguity about the SEC's self-interest in agreeing to settle with Bank of America").

26 *Bank of America Opinion I*, 653 F. Supp. 2d at 508. The court heard oral argument on August 10, 2009 and received written submissions from the parties on August 24, 2009 and September 9, 2009.

proposal on fairness, reasonableness, and adequacy grounds. With respect to the proposal's fairness, the court observed that "[i]t is not fair, first and foremost, because it does not comport with the most elementary notions of justice and morality, in that it proposes that the shareholders who were the victims of the Bank's alleged misconduct now pay the penalty for that misconduct."[27] The Commission made a feeble attempt to defend the corporate penalty as a worthy signaling device, reasoning that such a mechanism informed shareholders that unsatisfactory corporate conduct had occurred and allowed for a better assessment of management's quality and performance.[28] Such a desperate argument could not overcome the court's distaste for the fact that the BofA shareholder's would be paying for their own injury. In the court's word, such a construction would be "absurd."[29]

With respect to the reasonableness of the proposed settlement, Judge Rakoff could not resist commenting that "a proposal that asks the victims to pay a fine for their having been victimized is . . . as unreasonable as it is unfair."[30] The Judge's opinion went on to illustrate two additional unreasonable aspects of the proposed consent judgment.

First, contrary to existing Commission policy, the proposed settlement failed to adequately address the question of why the Commission did not "pursue charges against either Bank management or the lawyers who allegedly were responsible for the false and misleading proxy statements."[31] In fact, aside from drawing the ire of Judge Rakoff, the notion that the BofA victims would bear the cost of their own victimhood stood in direct contradiction to the Commission's own 2006 policy statement concerning the imposition of financial penalties.[32] The "Statement of the Securities and Exchange Commission Concerning Financial Penalties" (the "Statement") accompanied the filing of two settled actions with corporate defendants and was the Commission's attempt to "pro-

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27 *Id.* at 509.

28 Reply Memorandum of Plaintiff Securities and Exchange Commission in Support of Entry of the Proposed Consent Judgment at 13, Sec. Exch. Comm'n. v. Bank of America Corp., 677 F. Supp. 2d 717 (S.D.N.Y. 2010) (No. 09-Civ.-6829 (JSR)), 2009 WL 2876664.

29 *Bank of America Opinion I*, 653 F. Supp. 2d at 509.

30 *Id.* at 510.

31 *Id.* These facts give rise to interesting issues of attorney-client relationships and privilege, addressed by the court, but beyond the scope of this Article.

32 *See* Press Release, Sec. Exch. Comm'n., Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm.

vide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised."[33] In the Statement, the Commission offered quite directly that any such activity should "take into account whether the penalty would be paid by shareholders who had been the principal victims of the violation."[34] The Statement further instructed that "[w]here shareholders have been victimized by the violative conduct, or by the resulting negative effect on the entity following its discovery, the Commission is expected to seek penalties from culpable individual offenders acting for a corporation."[35] No such culpable individual offenders were fingered by the Commission in the BofA case. Instead, the instruction seems to have simply been ignored.

Judge Rakoff's second illustration of the settlement's unreasonableness took aim at the consent judgment's request for injunctive relief, describing the use of injunctive relief as "pointless" in the circumstance where its imposition lacks a factual predicate.[36] BofA's submissions to the court advanced a position that the proxy statement in issue "was totally in accordance with the law."[37] Maintaining such a position effectively hindered any proper imposition of injunctive relief by the court. As the court noted, "notwithstanding the injunctive relief here sought by the S.E.C., the Bank would feel free to issue exactly the same kind of proxy statement in the future."[38] It is well understood that the sanction of contempt "may only be imposed for violation of a particularized provision known and reasonably understood by the contemnor."[39]

Judge Rakoff's succinct description of the proposed settlement's inadequacy revealed his overall disapproval with the Commission's product:

> The proposed Consent Judgment is inadequate. The injunctive relief, as noted, is pointless. The fine, if looked at from the

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[33] *Id.*

[34] *Id.* The Commission also named (i) the need for effective deterrence, (ii) the presence of fraudulent intent, (iii) possible harm to innocent third parties, and the possibility of unjust enrichment for the wrongdoer as other factors to be considered. *Id.*

[35] *See id. Accord Securities Law Enforcement: Hearings on H.R. 975 Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce*, 101st Cong., 1 Sess. 47–48 (1989) (statement of David S. Ruder, Chairman, Sec. Exch. Comm'n., attaching Memorandum in Support of the Securities Law Enforcement Remedies Act of 1989).

[36] *Bank of America Opinion I*, 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009).

[37] *Id.* at 511.

[38] *Id.*

[39] *Id.*

> standpoint of the violation, is also inadequate, in that $33 million is a trivial penalty for a false statement that materially infected a multi-billion-dollar merger. But since the fine is imposed, not on the individuals putatively responsible, but on the shareholders, it is worse than pointless: it further victimizes the victims.[40]

Despite conceding that "in certain circumstances," the court's review should include an inquiry into whether the arrangement "serves the public interest," Judge Rakoff's opinion did not address the proper scope of a "public interest" inquiry any further.[41] And, while not couched explicitly in "public interest" language, the Judge objected to BofA's characterization of its decision to pay the fine as part of the settlement as a proper exercise of its business judgment. Instead, the Court wondered whether a proper business decision could be made by parties seemingly not disinterested:

> It is one thing for management to exercise its business judgment to determine how much of its shareholders' money should be used to settle a case brought by former shareholders or third parties. It is quite something else for the very management that is accused of having lied to its shareholders to determine how much of those victims' money should be used to make the case against the management go away. And even if this decision is arguably within their purview, it calls for greater scrutiny by the Court than would otherwise be the case.[42]

The court instructed the parties to prepare to litigate the action, and set a trial date of February 1, 2010.[43]

The Commission and BofA returned a few months later, new settlement in hand. The revised proposal incorporated some modest measures designed to ensure that BofA would not engage in similar misconduct in the future.[44] Toward that end, the revised

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[40] *Id.* at 512.

[41] *See id.*

[42] *Bank of America Opinion I*, 653 F. Supp. 2d 507, 510 (S.D.N.Y. 2009).

[43] *Id.* at 512.

[44] *Bank of America Opinion II*, 09 CIV. 6829 (JSR), 2010 WL 624581, at *6 (S.D.N.Y. Feb. 22, 2010). Specifically, the Bank agreed to (i) engage an independent auditor to assess accounting controls and procedures and ensure adequate disclosure; (ii) engage a disclosure consul, in consultation with the Commission to report to the audit committee for three years; (iii) engage a compensation consultant to advise a fully independent compensation committee of the board; and (iv) submit executive compensation plans to shareholders for a non-binding vote for the next three years. With respect to penalties, the parties agreed to increase the amount of the fine imposed on Bank of America from the original $33 million rejected by Judge Rakoff to the new and improved $150 million. In addition, the $150 million would be distributed, pursuant to Sarbanes-Oxley "Fair Fund" provisions, to Bank of America shareholders who

settlement comprised two parts: (i) a package of prophylactic measures tailored to adequately prevent nondisclosures in the future and (ii) a penalty provision to better "serve the purpose of partially compensating victims."[45]

Judge Rakoff found the changes to be an improvement—however modest—over the first settlement.[46] Begrudgingly, he offered that "[n]o one can quarrel that these remedial steps are helpful, so far as they go, and may help to render less likely the kind of piecemeal and mincing approach to public disclosure that led to the Bank's problems in the instant cases."[47] But, as one observer noted, "the outcome hardly met the judge's view of an ideal result that should impose meaningful sanctions or lead Bank of America to implement real changes in its corporate governance to protect shareholders in the future."[48] According to the Judge, the new and improved $150 million fine remained "paltry" in light of the controversy's size.[49] Moreover, the proposed remedies were likely to have only a "very modest impact on corporate practices or victim compensation."[50] Finally, in the new construction, the wrongdoers still escaped unpunished.[51] Nonetheless, Judge Rakoff unenthusiastically approved the settlement, characterizing it as "better than nothing" but still "half-baked justice at best."[52]

Regardless of the specific outcome in the BofA dispute, Judge Rakoff's scathing opinions are noteworthy in two regards. First, despite creating a whole host of inconveniences for the Commission, the Judge showed great measure and restraint.[53] In the end, his tinkering reflects the reality that the authority to approve a settlement is not the same as the authority to craft one.[54] At the same time, the Judge's rigor signaled that potential settlements with the

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were harmed by the bank's nondisclosures and not former Merrill shareholders now holding Bank of America stock as a result of the merger. *See id.* at *5.

45 *Id.* at *3.

46 *See* Peter J. Henning, *Should the Perception of Corporate Punishment Matter?,* 19 J. L. & POL'Y 83, 89 (2010).

47 *Bank of America Opinion II*, 2010 WL 624581, at *4.

48 Henning, *supra* note 46, at 90.

49 *Bank of America Opinion II*, 2010 WL 624581, at *4.

50 *Id.* at *5.

51 *Id.* at *6.

52 *Id.* at *5.

53 *See id.* at *6 ("[T]he considerable power given federal judges to assure compliance with the law should never be confused with any power to impose their own preferences.").

54 *See* Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 332 (2011).

Commission would garner more scrutiny than had previously been the norm.[55]

And, it would not be long before another opportunity for review presented itself.

B. SEC v. Vitesse Semiconductor Corp.

On December 10, 2010, the SEC filed an enforcement proceeding against Vitesse Semiconductor Corporation ("Vitesse") and four of the company's officers and directors.[56] The complaint alleged that, for more than a decade, Vitesse "engaged in fraudulent revenue recognition practices and stock options backdatings[57] that were concealed from its shareholders and the public by innumerable material misstatements in Vitesse's filings with the S.E.C."[58] Simultaneous with the complaint, the SEC filed proposed consent judgments with the company and two of its officers. By all indications, the Commission anticipated that the court would simply approve the settlement as negotiated.[59]

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55 *See, e.g.*, David S. Hilzenrath, *Judge Jed Rakoff on Free Love, the Death Penalty, Defending Crooks and Wall Street Justice,* WASH. POST, Jan. 20, 2012, http://www.washingtonpost.com/business/economy/judge-rakoff-on-free-love-the-death-penalty-defending-crooks-and-wall-street-justice/2012/01/05/gIQAIGKrDQ_story.html (offering that "Jed S. Rakoff is driving regulators nuts by refusing to rubber-stamp the kind of deals that have long defined Securities and Exchange Commission justice").

56 Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 305–6 (S.D.N.Y. 2011).

57 *Id.* at 305. "Options backdating" describes generally the practice of strategically dating the issuance of stock options contracts awarded to corporate executives to correspond to a low stock price. The options backdating practice has been used by corporations to (i) enhance the value of options grants for employees and (ii) retain the tax benefits of having issued "at the money" contracts. While not per se illegal, the SEC has increasingly espoused the position that backdating might be considered fraudulent. For a thoughtful description of options backdating practices, incentives that drove corporations to the practice, and the Commission's thoughts on enforcement, see Linda Chatman Thomsen, Director, Div. of Enforcement, Sec. Exch. Comm'n., Options Backdating: The Enforcement Perspective (Oct. 30, 2006), http://www.sec.gov/news/speech/2006/spch103006lct.htm ("Too many companies seem to have succumbed to the temptation to make in the money grants that appeared—for all corporate intents and purposes—to be at the money grants."). In the *Vitesse* case, the Commission alleged that the backdating occurred between 1995 and 2006 and included the re-pricing of forty stock option grants without proper accounting, resulting in the company's failure to record appropriately $184 million in compensation expenses. *See Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 306.

58 *Vitesse Semiconductor Corp.*, 771 F. Supp. at 305. The complaint alleges that the fraudulent practices were orchestrated by the four individual defendants: CEO Louis Tomasetta, CFO Eugene Hovanec, Controller Yatin Mody, and Director of Finance Nicole Kaplan. *Id.* at 306.

59 *Id.* at 306 (describing the SEC as "confident that the courts in this judicial district were no more than rubber stamps"); *see also* Maurice Pesso, *Guest Post: Judge Rakoff Again Criticizes SEC Settlements, How Will D&O Insurers Respond?*, WHITE AND WIL-

Again, Judge Rakoff charged that the consent judgments lacked information explaining why they should be approved and how they met the requisite legal standards for court approval.[60] In response to the Judge's request for additional clarity, the Commission submitted a December 21, 2010 brief and participated in a hearing the following day.

In its submission to the court, the Commission offered the standard that the court should apply to its approval determination, writing that it is "well established" that court approval of a proposed consent judgment required a determination that the agreement serve "the public interest."[61] The Commission further provided that, in making such a determination, the court "need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts" and that there has been a valid consent by the parties.[62] Quoting Judge Rakoff's opinion from the earlier *Bank of America* decision, the Commission asserted that the court "has the obligation, within carefully prescribed limits, to determine whether the proposed Consent Judgment settling [a] case is fair, reasonable, adequate and in the public interest."[63] Finally, the SEC suggested that the scope of the court's inquiry is not unlimited, and must show "substantial deference to the SEC as the regulatory body having primary responsibility for policing the securities markets."[64]

The court offered its opinion on March 21, 2011.[65] While Judge Rakoff once again needled the Commission with his sharp critique, the *Vitesse* opinion is ultimately remarkable for its restraint. The Judge acknowledged that, at first glance, the terms of the proposed consent judgments might appear inadequate based

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LIAMS LLP (Mar. 28, 2011), http://www.whiteandwilliams.com/resources-alerts-345.html.

60 *Vitesse Semiconductor Corp.*, 771 F. Supp. 2d at 306 (commenting that the Commission filed the proposed Consent Judgments "without so much as a word of explanation as to why the Court should approve these Consent Judgments or how the Consent Judgments met the legal standards the Court is required to apply before granting such approval").

61 SEC Brief, *supra* note 12, at 32 (citing SEC v. Randolph, 736 F.2d 525, 529–30 (9th Cir. 1984)).

62 *Id.* at 35 (quoting Metro. House. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980)).

63 *Vitesse Semiconductor Corp.*, 771 F. Supp. 2d at 304, 306–7 (referencing SEC Letter Brief dated Dec. 21, 2010).

64 *Id.* at 307 (referencing SEC Letter Brief dated Dec. 21, 2010).

65 *Id.* at 304.

on the relatively small size of the monetary penalties and the fact that the allegations of material misconduct by the defendants lasted over a decade.[66] Yet, despite the fact that the three defendants neither admitted nor denied liability, Judge Rakoff found the terms of the settlement to be "fair, reasonable, adequate, and in the public interest."[67]

The carefully crafted decision reveals a balance of purposeful deliberation and practical concern. In arriving at his conclusion, Judge Rakoff considered several factors beyond the terms of the actual settlement. First, the fact that the two corporate officers had pled guilty to parallel criminal charges and were cooperating with the government in its criminal case against two other Vitesse officers was compelling.[68] In real terms, the guilty pleas meant that the "public is not left to speculate about the truth of the essential charges" alleged in the Commission's complaint.[69] With respect to the company, the Judge was impressed that Vitesse had let "its money do the talking" by contributing substantial funds to a class action settlement pool despite its troubled financial condition.[70] In the Judge's estimation, "[n]o reasonable observer of these events could doubt that the company has effectively admitted the allegations of the complaint."[71]

Despite approving the settlement, Judge Rakoff again registered his displeasure with the Commission's longstanding practice of seeking court approval for settlements in which serious allegations of fraud are asserted against defendants without requiring an express admission or denial.[72] While the effects of such a policy were somewhat minimized in the *Vitesse* matter where two of the defendants had already pled guilty to related criminal charges, nonetheless, the Judge again took the opportunity to question whether a practice of non-admission/non-denial might ultimately render a proposed consent judgment "so unreasonable or contrary to the public interest as to warrant its disapproval."[73]

At the time of the *Vitesse* disposition, however, neither the Judge nor the Commission could have anticipated that yet another

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66 *Id.* at 307.

67 *Id.* at 308.

68 *Id.* at 307 ("These terms are very much colored by the fact that Mody and Kaplan have pleaded guilty to parallel criminal charges and are now cooperating with the Government.").

69 *Vitesse Semiconductor Corp.*, 771 F. Supp. 2d at 310.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

showdown over that very issue would again embroil the two a little more than half a year later.

C. SEC v. Citigroup Global Markets, Inc.

In a third strongly worded opinion, on November 28, 2011, Judge Rakoff emphatically rejected a proposed $285 million settlement of an enforcement action that the SEC had brought against Citigroup Global Markets, Inc.[74]

On October 19, 2011, the SEC had filed a civil enforcement action accusing Citigroup of a substantial securities fraud.[75] In familiar style, the Commission simultaneously filed a proposed consent judgment.[76] Pursuant to the terms of the consent judgment, Citigroup would pay a total of $285 million, consisting of a disgorgement of profits of $160 million, $30 million in interest, and a civil penalty of $95 million.[77] Specifically, the Commission charged Citigroup with violations of Sections 17(a)(2) and (3) of the Securities Act of 1933 for misleading investors about the quality of securities underlying a $1 billion synthetic collateralized debt obligation.[78] The complaint related to a fund known as "Class V Funding III" and alleged that Citigroup employed the fund "to dump some dubious assets on misinformed investors."[79] While Class V Funding III was marketed as consisting of attractive assets, the Commission asserted that the fund was, in fact, arranged to include a "substantial percentage of negatively projected assets" and that Citigroup had taken a substantial short position in the same assets.[80] Citigroup realized profits of $160 million, while investors lost more than $700 million.[81]

Largely because Citigroup had agreed to the proposed settlement and consent judgment absent an admission or denial of the allegations, Judge Rakoff had, in an order dated October 27, 2011, "put some questions to the parties" concerning the proposed settlement.[82]

Among the questions posed by the court were the following:

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74 Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 827 F. Supp. 2d 328, 334–35 (S.D.N.Y. 2011).

75 *See* Complaint, Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387), 2011 WL 4965843.

76 *See Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 330.

77 *Id.*

78 *See* Complaint, *supra* note 75.

79 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 329.

80 *Id.*

81 *Id.*

82 *Id.* at 330.

> Given the S.E.C.'s statutory mandate to ensure transparency in the financial marketplace, is there an overriding public interest in determining whether the S.E.C.'s charges are true? Is the interest even stronger when there is no parallel criminal case?[83]

The court's inquiries were aimed at defining the proper scope of the "public interest" prong of its review. And, the question calls attention to at least two problems with a proposed settlement that disposes of the controversy without an appropriate level of detail as to the underlying conduct. First, by approving a final judgment without making available the evidence developed in the course of the Commission's investigation, interested parties are left to "draw their own conclusions about the evidence underlying the allegations in the SEC Complaint."[84] As the Judge's question hints, such a result might seem particularly displeasing given the Commission's responsibilities. Moreover, the Commission's decision to charge Citigroup with only a negligence-based offense could lend credence to a subsequent Citigroup assertion, in related proceedings, that the judgment resulted from a lack of scienter.[85] Such a result would seem to frustrate the Commission's own policy of barring subsequent public denials on the part of defendants.[86]

On November 28, 2011, the court issued its opinion in the matter. Despite "the substantial deference due the S.E.C. in matters of this kind," the court refused to approve the consent judgment.[87] After an in-depth discussion concerning the appropriate scope of review,[88] Judge Rakoff emphatically rejected the Commis-

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83 Sec. Exch. Comm'n.'s Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement at 15, Sec. Exch. Comm'n. v. Citigroup Global Markets Inc., 827 F. Supp. 2d 336 (S.D.N.Y. 2011) supplemented (Dec. 29, 2011) (No. 11-07387), 2011 WL 5307417.

84 Brief of Union Central Life Ins. Co. et al. as Amici Curiae Responding to the Court's October 27, 2011 Order at 6, Sec. Exch. Comm'n. v. Citigroup Global Markets Inc., 827 F. Supp. 2d 336 (S.D.N.Y. 2011) (No. 11-CV-07387), *available at* http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2011/11_-_November/SECvCiti—proposedamicus.pdf. The brief also commented that "despite the fact that any proposed settlement must serve 'the public interest,' the SEC is advocating for a proposed Final Judgment that does not directly address the harm reaped upon investors by CGMI's alleged sale of over $1 billion in RMBS that it allegedly designed to fail." *Id.* at 7.

85 *Id.* at 8–9.

86 *See* 17 C.F.R. § 10 app.A (providing that the defendant agree not to "take any action or make any public statement, denying, directly or indirectly, any allegation in the complaint or finding or conclusions in the order, or creating, or tending to create, the impression that the complaint or the order is without a factual basis").

87 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 330.

88 *See generally* discussion of "The Likely Effects of the Newfound Attention," part IV, *infra.*

sion's contention that the public interest was not an appropriate consideration in assessing the proposed settlement, and "regretfully" concluded that "the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest."[89] The Judge's toughest objection concerned the casual nature by which the Commission requested the application of judicial power. In short, the Judge simply could not abide that the Commission asked the court to "employ its power and assert its authority when it does not know the facts."[90]

Turning to the economic effects of the proposed settlement, the Judge first noted that the settlement amount was "pocket change" to an entity as large as Citigroup.[91] Moreover, in his view, the arrangement would leave the defrauded investors "substantially short-changed," dealing "a double blow to any assistance the defrauded investors might seek to derive from the S.E.C. litigation in attempting to recoup their losses through private litigation" since the non-admission/non-denial nature of the arrangement ameliorates any collateral estoppel assistance.[92] The court was also "troubled" when it compared the $95 million penalty sought with the $535 million penalty imposed in the consent judgment entered into a year earlier between the SEC and Goldman Sachs "involving remarkably similar alleged conduct in the same time period."[93]

The opinion concluded by consolidating the case with a parallel action against the Citigroup official responsible for the Class V Funding III fund and scheduling a trial for July 16, 2012.[94] The

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89 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 332.

90 *Id.* at 335 (noting that "[a]n application of judicial power that does not rest on the facts is worse than mindless, it is inherently dangerous").

91 *Id.* at 333–34. For the court, this was particularly distasteful in light of the fact that Citigroup was a "recidivist." In fact, the SEC has accused Citigroup of fraud five times since 2003, settling in each case. *See* Tim Fernholz, *Why the SEC Will Soon Be Prosecuting More Cases Against Big Banks—And Losing*, THE NEW REPUBLIC, Dec. 1, 2011, http://www.tnr.com/article/97963/SEC-banks-settlement#. Repeat offenders seem to be not all that rare. A recent New York *Times* analysis of SEC enforcement actions over the last fifteen years, for example, found "at least 51 cases in which 19 Wall Street firms had broken antifraud laws they had agreed never to breach." *See* Edward Wyatt, *Promises Made, and Remade, by Firms in S.E.C. Fraud Cases*, N.Y. TIMES, Nov. 7, 2011, http://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-break-promises.html?pagewanted=all. These results might not be all that surprising in light of Professor Baynard's assertion that "the civil sanctions available to the SEC—inconveniences, really—are unlikely to deter committed recidivists." *See* Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN. ST. L. REV. 189, 221 (2008).

92 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 334.

93 *See* SEC Brief, *supra* note 12, at 19.

94 *See Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 335; Sec. Exch. Comm'n. v. Stoker, 873 F. Supp. 2d 605 (S.D.N.Y. 2012). On July 31, 2012, a federal trial jury

Commission found itself scrambling to craft a response.[95]

On March 15, 2012, a panel of three Second Circuit judges stayed the *Citigroup* proceedings pending resolution of Citigroup's appeal of Judge Rakoff's rejection of the proposed settlement.[96] In granting the stay, the panel was persuaded that Citigroup presented a "strong showing of likelihood of success" in having the Judge's rejection set aside.[97] The full appeal has moved to a separate Second Circuit panel that remains "free to resolve all issues without preclusive effect"[98] after having heard the arguments in February 2013.

II. The Commission's Consent Judgment Practice and the Affinity for Settlement

In civil litigation, it is well established that a dispute can be resolved by contract between the parties, and courts remain "nearly powerless to shape their private bargain."[99] In fact, "[p]urely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint."[100] This policy choice embraces the fact that private resolution is highly desirable, resulting in savings for the parties in terms of the time and money typically expended in protracted litigation.[101] In fact, settle-

found that the SEC had failed to prove Mr. Stoker liable for the alleged securities fraud. *See* Sec. Exch. Comm'n. v. Stoker, No. 11 –cv-7388 (JSR) (S.D.N.Y. July 31, 2012).

95 Jean Eaglesham & Suzanne Kapner, *SEC Cops Want to Fight U.S. Judge*, Wall St. J., Dec. 16, 2011, http://online.wsj.com/article/SB10001424052970204844504577098833058976236.html (observing that the "settlement's rejection is proving to be a nightmare for the SEC" and commenting SEC staff is likely to suggest that the commission appeal the *Citigroup Global Markets, Inc.* decision). For a more thorough description of the procedural history of the *Citigroup Global Markets, Inc.* matter, see SEC Brief, *supra* note 12, at 7–10.

96 Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 673 F.3d 158 (2d Cir. 2012).

97 *Id.* at 169.

98 *Id.* at 161.

99 Henderson, *supra* note 3 at 4; *see also* Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir. 1998) (holding that a settlement and dismissal was accomplished by "mutual agreement of the parties, and did not require any judicial action"); *Bank of America Opinion I*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) ("Society greatly benefits when lawsuits are amicably resolved, and, for that reason, an ordinary civil settlement that includes dismissal of the underlying action is close to unreviewable.").

100 *Citigroup Global Markets Inc.*, 827 F. Supp. 2d at 332. A plaintiff need only file a notice of dismissal with the court. Fed. R. Civ. P. 41(a)(1)(A)(i). If the case has moved beyond the preliminary stage, a stipulation of dismissal signed by all parties must be filed. *Id.*(a)(1)(A)(ii).

101 Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham

ments routinely bring relief to injured parties more expeditiously than "a long wait for a judicial finding of wrongdoing."[102] A strong and established public policy in favor of settlement also reduces the number of trials, and is consistent with the civil justice system's primary objective to ensure "the just, speedy, and inexpensive determination of every action."[103] Moreover, leaving it to the parties to resolve their own dispute is generally supported on economic efficiency grounds.[104]

Today, the vast majority of Commission proceedings (over 90%) are settled—not litigated on the merits.[105] And, the Commission, by its own admission, has a "longstanding policy of settling cases on the basis of neither requiring an admission nor permitting a denial by the defendant."[106] At least one court has signaled that a federal policy in favor of settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement."[107] And, the overwhelming majority of courts have agreed—approving SEC settlements rather routinely, and "without scrutinizing their factual bases or requiring substantive

J. CORP. & FIN. L. 627, 651 (2007) (noting that "[i]n most civil cases, equal parties enter into good faith negotiation motivated to arrive at a compromise agreement, thus avoiding the time, cost, emotional toll, and risk of trial"); *see also* Henderson, *supra* note 3, at 4.

102 Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1196–97 (2009).

103 *See* Johnson, *supra* note 101, at 651 (quoting Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1995)).

104 *See, e.g.*, Ronald H. Coase, *The Problem of Social Cost,* J. L. & ECON. Oct. 1960 (positing that, in a world without transaction costs, efficient outcomes could be best achieved by individual negotiation, and further providing that government is best to simply determine how rights would be assigned in a negotiation between firms and individuals absent such frictions). *But cf.* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (asserting that private settlement comes at a public price since the point of adjudication is not merely to resolve private disputes, but to bring reality closer to our ideals through the decision making of public officials).

105 *See* David M. Weiss, *Reexamining the SEC's Use of Obey-The-Law Injunctions*, 7 U.C. DAVIS BUS. L.J. 6 (2006); Johnson, *supra* note 101, at 647 ("The SEC settles most enforcement actions by consent."); Parloff, *supra* note 13 (observing that "about 90% of SEC cases are currently concluded by consent decree, and the lynchpin for virtually every one of those is that the defendant doesn't admit wrongdoing"); *see also* Eaglesham & Kapner, *supra* note 95 ("In the past year, the SEC went to trial in 19 cases, while filing a record-high 735 enforcement actions.").

106 Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 308 (S.D.N.Y. 2011) (referencing SEC Letter Brief of Dec. 21, 2010).

107 United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990); *see also* Sec. Exch. Comm'n. v. Wang, 944 F.2d 80, 85 (2d Cir. 1991) (observing a "strong federal policy favoring the approval and enforcement of consent decrees").

modifications."[108]

Some have warned, however, that the public's affinity for private settlement should not be embraced reflexively in the context of the settlements of a public agency.[109] Indeed, closer scrutiny seems a wise policy, as public agency settlements routinely lack at least three hallmarks of the best private settlements.[110] Notably, public agency settlements, in general, and Commission settlements, in particular, can be distinguished from the best private settlements because they (i) regularly impact third parties, (ii) often lack good faith negotiations between two equal parties, and (iii) generally derive from less noble motivations.[111]

Significant judicial scrutiny of settlements is not uncommon. In fact, several types of settlements expressly require judicial approval. Class actions,[112] shareholder derivative settlements,[113] bankruptcy proceedings,[114] and cases involving minors or incompetents[115] all require judicial approval. In addition, criminal plea agreements[116] require judicial consent. While the specific rationale for requiring a judicial approval or consent varies according to context, in each case, the court is employed in an effort to protect claimants and ensure a "fair shake" for all involved.[117]

A. The History of SEC Settlements

In a footnote to its letter brief to the court in the *Vitesse* matter, the Commission suggested that its practice of settling enforcement actions in which defendants neither admit nor deny the allegations

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108 *See* Scott B. Schreiber et al., *SEC Announces New Policy Regarding "Neither Admit Nor Deny" Language in Settlements*, ADVISORY (Arnold & Porter LLP, Washington, D.C.), Jan. 2012, at 2, *available at* http://www.arnoldporter.com/resources/documents/Advisory%20SEC_Announces_New_Policy_Regarding_Neither_Admit_Nor_Deny_Language_Settlements.pdf.

109 *See* Johnson, *supra* note 101, at 652 (suggesting that "[t]he framework used to examine public policy interests in governmental settlements should be distinct and separate from the framework used to examine private settlements").

110 *Id.*

111 *Id.*

112 Federal Rule 23(e) provides that "the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." FED. R. CIV. P. 23(e).

113 *Id.* 23.1(c).

114 FED. R. BANKR. P. 9019(a).

115 *See, e.g.*, N.Y. C.P.L.R. 1207 (MCKINNEY 2011).

116 FED. R. CRIM. P. 11(c).

117 *See* Rothman, *supra* note 54, at 331, 352; *see also* SEC Brief, *supra* note 12, at 25 (arguing that "[t]he law is clear that a federal judge has a responsibility to independently determine whether a proposed consent judgment satisfies well-established standards of being fair, adequate, reasonable, and in the public interest").

of a complaint dates back to at least 1972, when the Commission provided its express approval for the policy in a release entitled "Consent Decrees in Judicial or Administrative Proceedings."[118] In essence, "neither admit nor deny" represents a crude construction resulting from a desire to adopt a policy satisfying both the Commission's "insistence that its allegations not be disavowed and also defendants' desire to argue in subsequent litigation that they are not bound by admissions."[119]

In a history lesson, no doubt embarrassing for the Commission, Judge Rakoff describes a more robust version of a practice "a bit more complicated than the S.E.C.'s footnote suggests."[120] It seems that the Commission's "non-admission/non-denial" practice started long before 1972 and by the time of the Commission's release, had grown to be strongly desired by defendants eager to deny wrongdoing and strategically employ the collateral estoppel advantages of a Commission settlement in parallel private civil actions.[121] By 1972, as Judge Rakoff describes,

> [I]t had become obvious that as soon as courts had signed off on such settlements, the defendants would start public campaigns denying that they had ever done what the S.E.C. had accused them of doing and claiming, instead, that they had simply entered into the settlements to avoid protracted litigation with a powerful administrative agency.[122]

Against this backdrop, the Commission's 1972 Release can be seen as little more than a minor improvement or refinement, aimed at keeping the settling defendant from subsequently denying in public the complaint's original allegations.[123] Today's proposed settlements support this interpretation, routinely including

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118 Consent Decrees in Judicial or Administrative Proceedings, Securities Act Release No. 352, Exchange Act Release No. 5337, 1972 WL 125351 (Nov. 28, 1972) (codified as amended 17 C.F.R. § 202.5(e)).

119 William O. Reckler & Blake T. Denton, *Understanding Recent Changes to the SEC's "Neither Admit Nor Deny" Settlement Policy*, Client Alert (Latham & Watkins, New York, N.Y.), Jan. 12, 2012, at 2; *see also* Fernholz, *supra* note 91 ("[S]uch settlements are flawed as instruments of justice."); Parloff, *supra* note 13 ("[S]ince 1972, the SEC has required corporations in the consent decree to promise not to deny the allegations of the complaint *in public*.").

120 Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 308 (S.D.N.Y. 2011).

121 *Id.*

122 *Id.*

123 *See* Consent Decrees in Judicial or Administrative Proceedings, *supra* note 118. Today, defendants routinely agree not to "take any action or make any public statement, denying, directly or indirectly, any allegation in the complaint or findings or conclusions in the order, or creating, or tending to create, the impression that the complaint or the order is without a factual basis." 17 C.F.R. § 10 app.A.

boilerplate language prohibiting the settling party from engaging in similar securities law violations in the future, and from making or sponsoring any public statement denying any allegations in the government's complaint.[124]

Despite the minor improvement that a "non-admission/non-denial" regime might represent over a system in which a public denial was often pronounced before the ink on the settlement was dry, it remains difficult to uncover the proper respect being afforded the truth in today's practice of routinely embracing a "non-admission/non-denial" posture in settlement.[125] In fact, fostering such a policy typically disfavors the truthful facts of a particular situation, instead resorting to a comfortable contrivance that each party can live with. Such a posture seems hostile to both the Commission's charge to protect the integrity of the nation's securities markets and the duty of courts to defend and ensure the public interest.[126] The irony of truth taking a back seat to convenience in the federal securities realm cannot be overstated. In particular, such a convenience is at least unbecoming within an overarching regulatory structure that regularly calls upon registrants to abide by full, fair, and accurate disclosure of the kind that a prudent investor would like to know before making an investment decision. Certainly, the truth must also play an integral role in a court's fulfilllment of its public interest duties.

While not required, the court's approval has increasingly become a convenient imprimatur to each Commission settlement. Since 1972, and largely unchallenged, the Commission has regularly employed the courts as its enforcement partner—expected to

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124 *See* Richard J. Morvillo et al., *To Neither Admit Nor Deny: SEC Litigation Position Reiterates Need to Examine Standard Provisions in SEC Settlements* (Crowell & Moring LLP, Washington, D.C.), April 2001, at 1, *available at* http://www.crowell.com/pdf/Consents.pdf.

125 *See, e.g.*, *Vitesse Semiconductor Corp.,* 771 F. Supp. 2d at 309 (bemoaning the resulting "stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C.").

126 Perhaps even more troubling is the practice discussed by SEC Commissioner Luis Aguilar in a recent speech (and highlighted by Judge Rakoff in *Vitesse*):

> I hope that 2011 brings an end to the press release issued by a defendant after a settlement explaining how the conduct was really not that bad or that the regulator over-reacted. I hope that this revisionist history in press releases will be a relic of the past. If not, it may be worth revisiting the Commission's practice of routinely accepting settlements from defendants who agree to sanctions 'without admitting or denying' the misconduct.

See Commissioner Luis A. Aguilar, Sec. Exch. Comm'n., Speech by SEC Commissioner: Setting Forth Aspirations for 2011, Address to Practicing Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011), http://www.sec.gov/news/speech/2011/spch020411laa.htm.

stand by, ready to impose contempt charges or injunctive relief in the event that the settling party subsequently violates the agreement's terms.[127]

B. The Insatiable Desire to Involve the Courts

In each of the cases that are the subject of this Article, the Commission sought more than simple settlement and dismissal. Instead, the Commission opted to seek a consent decree—a judgment or order reflecting the settlement terms agreed to by the parties, and containing an injunction.[128] Unlike simple dismissal, settlement through consent decree or consent judgment requires judicial approval,[129] as a judge "must be confident that the settlement achieved through the consent decree or consent judgment is in the public interest."[130]

C. Comparing Simple Settlement with Consent Judgments

The distinctions between simple dismissal and consent judgment are significant. While both represent an arrangement between the Commission and the alleged wrongdoer, the consent decree emboldens the Commission—retaining the court as its ongoing enforcement partner.[131] In fact, in a recent article, Professor DiSarro highlighted several key distinctions between consent decrees and settlement agreements.[132] Among these, the mode of enforcement remains the most significant.[133] In effect, the pres-

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127 *Cf.* Reckler & Denton, *supra* note 119, at 2 (observing that "[w]hile the SEC can settle administrative actions brought internally without review by an administrative law judge, it must obtain a federal judge's approval to settle an action brought in district court").

128 *See In re* Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1025 (2d Cir. 1992) (describing a consent decree as "no more than a settlement that contains an injunction"); Gates v. Shinn, 98 F.3d 463, 468 (9th Cir. 1996) ("When a decree commands or prohibits conduct, it is called an injunction."); *see also* Rothman, *supra* note 54, at 332 (describing a consent judgment as a "court decree that all parties agree to").

129 *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 n.7 (2001) ("Private settlements do not entail the judicial approval and oversight involved in consent decrees.").

130 Rothman, *supra* note 54, at 332; *see also* United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 85–86 (D. Alaska 1977).

131 *See generally* Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 276–79 (2010).

132 *Id.* at 276.

133 *Id.* at 277. The DiSarro article also points to five other differences, most beyond the scope or concern of this Article. The other differences include: (i) the consent decree is a public document subject to public access and inspection; (ii) the court ordering the consent decree has inherent enforcement powers; (iii) the injunctive

ence of an injunction in the consent decree makes non-compliance with the settlement terms contempt of court.[134] By contrast, failure to abide by a simple settlement agreement would represent breach of contract.[135] This difference goes a long way to explaining the Commission's embrace of a policy that routinely involves the courts in its settlements with defendants.

A second difference between the consent decree and the simple settlement concerns the ability of the parties to keep the terms of their agreement beyond the eyes of others. The consent decree is a public document subject to inspection.[136] By comparison, a settlement agreement remains the private document of the parties to the controversy, and its terms are routinely kept confidential.[137]

A third difference between the consent decree and the simple settlement concerns the subsequent enforcement of the agreement's provisions. Because a consent decree is a court order, the issuing federal court retains the inherent power to enforce its terms. The enforcement of settlement agreements, by contrast, is generally the province of the state courts and the parties enjoy no routine access to the federal courts absent party diversity and a federal court filing.[138] When private parties ask a court to retain jurisdiction to enforce a settlement, however, the court has absolute discretion whether or not to do so.[139]

The particularity of a settlement may also change when it is embodied in a consent decree. While the injunctive provisions of a consent decree "must be stated in reasonable detail and cannot incorporate other documents by reference," settlement agreements are "not held to any requisite level of particularity."[140]

Finally, as a court document, the consent decree remains sub-

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provisions of the consent decree "must be stated in reasonable detail and cannot incorporate other documents by reference"; (iv) a court can insist on subsequent changes to a court issued consent decree; and (v) consent decrees can form the basis for the award of attorney's fees where a federal statute permits such an award. *Id.* at 276–79.

134 *Id.* at 277. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986) ("Noncompliance with a consent decree is enforceable by citation for contempt of court.").

135 DiSarro, *supra* note 131, at 277.

136 *Id.*

137 *Id.*

138 *Id.* at 278 (adding that "[s]ome courts have concluded that parties stipulating to the jurisdiction of a federal court to resolve settlement disputes is the functional equivalent of a consent decree. This reasoning is flawed.").

139 *See generally* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381–82 (1994).

140 DiSarro, *supra* note 131, at 278.

ject to change at the wishes of the issuing court, and "consent decrees can subsequently be modified or terminated by the court, even over the objections of one of the parties."[141] Any change to a settlement agreement, on the other hand, can only be accomplished through mutual consent of the parties.[142]

Proposed settlements with the Commission are routinely accompanied by boilerplate language regularly included in settlement documents for both administrative proceedings and injunctive actions.[143] The language typically provides that the settling party refrain from (i) similar securities law violations in the future and (ii) making or permitting any public statement denying any allegations in the government's underlying complaint.[144] Today, the Commission routinely opts for the consent judgment instead of simple settlement. Presumably, by employing the consent judgment, the Commission reduces its enforcement costs. In fact, with respect to the Commission's consent judgment practice, the Commission has displayed an insatiable appetite for involving the court in its ongoing enforcement efforts. In the event of non-compliance, the consent judgment ensures that the government need not file a lawsuit to effect enforcement.[145] The Commission expects the court to stand by, ready to (i) accept a petition to set aside the agreement, (ii) provide injunctive relief, or (iii) enforce a contempt charge, as each might be required following a settler's breach. Moreover, while the Commission has routinely sought judicial authority in reaching a settlement, it has very rarely called upon a court to employ its enforcement powers.

D. Subsequent Enforcement Efforts: Injunction and Contempt

While the Commission has increasingly sought the judiciary's imprimatur in its settlement efforts, it has very rarely called upon a court to enforce an injunction or issue a contempt order following the non-compliance of one of its settlements. The Commission has shown some willingness to respond to subsequent defendant denials by threatening to invoke a settlement's contractual right to petition the court to vacate a consent judgment.[146] And, the Commission has actually moved to vacate consent judgments based upon the defendant's denial of culpability. In at least one case, for

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141 *Id.*
142 *Id.*
143 Morvillo et al., *supra* note 124, at 1.
144 For a discussion of the typical SEC boilerplate see *id.*
145 Henderson, *supra* note 3, at 4.
146 Morvillo et al., *supra* note 124, at 1–2.

example, the Commission withdrew its motion only after the defendant withdrew his denial.[147]

There is ample evidence that the injunctive remedy has been seen as a "cornerstone" of the Commission's enforcement toolkit since its founding.[148] As one commentator describes: "[l]ike other special types of government settlements . . . a consent decree is a judicial Sword of Damocles intended to increase performance of the defendant under the terms of the settlement."[149] As the Commission is fast recognizing, however, this "sword"—like most—is double-edged. As the three cases examined in this Article highlight, the Commission's choice to employ the court as its enforcement partner reduces the Commission's own monitoring and enforcement costs. Such an advantage brings costs all its own, however. Most notably, such a strategy means that the court might ask questions that cause a certain amount of discomfort for the Commission.[150] In light of Judge Rakoff's recent predilection (and the copycats that are likely to follow) and the infrequency with which the Commission has actually called upon a court to enjoin a settling party from subsequent violations, it is high time for the Commission to reconsider whether seeking court approved consent judgments as a matter of course continues to represent a wise policy.

Injunctions allow the Commission to sanction repeat offenders with contempt of court.[151] The civil contempt remedy remains available to the Commission in the event that either (i) a defendant is engaging in an ongoing violation of an injunction or (ii) compensation is due the Commission as a result of a defendant's violation of an injunction.[152] Criminal contempt charges may also be brought against defendants who disobey previous injunctions.[153]

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147 Sec. Exch. Comm'n. v. Angelos, C.A. No. B96-834 (D. Md., Mar. 20, 1996), Lit. Rel. No. 14886 (Apr. 22, 1996), http://www.sec.gov/litigation/litreleases/lr14886.txt.

148 Russell Ryan, *Rethinking SEC Injunctions After Appeals Court Reprimand,* 37 Sec. Reg. & L. Rep. (BNA) No. 36, at 1488 (Sept. 5, 2005) (noting that injunctions have "been the cornerstone of the SEC's enforcement program for more than 70 years"); *see also* Weiss, *supra* note 105, at 6 (commenting that "[s]ince the founding of the Commission more than seventy years ago, the injunction has served as the SEC's most reliable enforcement tool").

149 Henderson, *supra* note 3, at 4; *see also* Morvillo et al., *supra* note 124, at 1 (commenting that "[t]his provision stems from the Commission's desire to use its police (and public relations) powers to promote deterrence").

150 *See* sources cited *supra* note 149.

151 Weiss, *supra* note 105.

152 *See* Universal City Studios, Inc. v. N.Y. Broadway Int'l Corp., 705 F.2d 94, 96 (2d Cir. 1983).

153 Weiss, *supra* note 105.

There is no disputing that it is among the "most formidable weapons" in the court's arsenal, and "one with significant potential for harm if it is wielded imprudently."[154] It follows, therefore, that courts should make that remedy available to an administrative agency deliberately, and only after a satisfactory showing that the underlying facts are serious enough to warrant its necessity.[155] In the words of Judge Rakoff:

> [W]hen a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.[156]

Despite the formidable nature of the contempt remedy, by its own admission, the Commission "has not frequently pursued civil contempt proceedings and does not appear to have initiated such proceedings against a 'large financial entity' in the last ten years."[157] Before asking a court to play a significant role in the ongoing monitoring of the defendant's behavior, the Commission must explain to the court exactly what it has bargained for. Aside from satisfying the requirement of independent judicial power, such a requirement is made all the more necessary by the cynical nature of the routine settlement bargain described below.

E. The Cynical Nature of the Consent Judgment Bargain

It remains difficult to refute that, as a practical matter, the practice of routine settlement, absent an express admission or denial, offers a convenience for the Commission and defendants alike.[158] From a subject's perspective, settlement invariably offers a desirable alternative to the expensive and unwanted publicity of a trial.[159] In addition, settling defendants will often seek concessions

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154 United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO, 44 F.3d 1091, 1095–96 (2d Cir. 1995).

155 *See e.g.*, Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (noting that the injunctive power "is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated").

156 *Id.* at 332.

157 SEC's Memorandum of Law, *supra* note 83, at 23.

158 Pesso, *supra* note 59, at 1.

159 *See* Weiss, *supra* note 105 (citing to James D. Cox et al., SECURITIES REGULATION: CASES AND MATERIALS 773 (4th ed. 2004)).

concerning the violations alleged in the Commission's complaint and may negotiate with the Commission with respect to the language of the complaint and the collateral and administrative consequences of the consent judgment.[160] By contrast, a loss at trial may result "not only in immediate sanctions but also in the defendant being collaterally estopped from relitigating related issues in subsequent private actions."[161] In addition, a cooperative and sophisticated defendant might be able to negotiate with the Commission about the shape and frequency of publicity surrounding a settlement.[162] For the Commission, its staff is simply too small to try more than the smallest fraction of the cases it investigates.[163] By allowing defendants to settle without admitting liability, the Commission benefits from a willingness of defendants to enter into settlements at an earlier time—all without requiring the Commission to devote substantial resources to taking enforcement actions to trial.[164] Accordingly, settlements offer the Commission a convenient combination of discernable victory without the corresponding expense in time and treasure.[165]

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160 *See* Sec. Exch. Comm'n. v. Clifton 700 F.2d 744, 748 (D.C. Cir. 1983).

161 Weiss, *supra* note 105; *see also* Pesso, *supra* note 59 ("By entering into the consent judgments without admitting liability, the defendants are not collaterally estopped from asserting their innocence in parallel civil actions.").

162 Dreilinger, *supra* note 16, at 13 (offering that "[a] defendant may therefore be able to shape the public's perception of the SEC's allegations by negotiating for the inclusion of mitigating factors, eliminating some or all of a corporate defendant's employees from the charges, or softening the typically harsh language in the litigation releases").

163 *See, e.g.*, Macey, *supra* note 25, at 646 ("Because investigations take time, the SEC focuses on bringing cases that do not require much, if any, investigative effort."). In fiscal year 2011, the SEC filed 735 enforcement actions, representing an 8.6% increase over 2010; *see* SEC. & EXCH. COMM'N., FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, 2 (2011), http://sec.gov/about/secpar/secpar2011.pdf.

164 Pesso, *supra* note 59; *see also* Robert Khuzami, Former Director, Div. of Enforcement, Sec. Exch. Comm'n., Remarks Before the Consumer Federation of America's Financial Services Conference (Dec. 1, 2011), http://www.sec.gov/news/speech/2011/spch120111rk.htm (suggesting that, absent the arrangement, there "would be longer delays before victims get compensated, the expenditure of SEC resources that could be spent stopping the next fraud, and—quite possibly—less money in the pockets of wronged investors. And we'd lose the certainty that the victims would actually get compensation."). *Cf.* Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011) ("For now, however, the S.E.C.'s practice of permitting defendants to neither admit nor deny the charges against them remains pervasive, presumably for no better reason than that it makes the settling of cases easier.").

165 *See, e.g.*, Joshua A. Naftalis, Note, *"Wells Submissions" to the SEC as Offers of Settlement Under Federal Rule of Evidence 408 and Their Protection From Third-Party Discovery*, 102 COLUM. L. REV. 1912, 1922 (2002) (noting the importance of settlements to the Commission); THE ECONOMIST, *supra* note 8 ("By settling, the SEC guarantees a good-enough result. It collects money. . . The regulators can claim victory in press releases and self-congratulatory reports to Congress."); *see also* S.E.C. FY 2011 REPORT, *supra*

In the BofA matter, Judge Rakoff seized on the "cynical" nature of the bargain between the Commission and an investigative target, characterizing that arrangement as one in which the Commission can claim that it is exposing wrongdoing in a high-profile merger, while the target simultaneously claims coercion.[166] "And all this is done at the expense, not only of the shareholders, but also of the truth."[167] Many have echoed this cynical view.[168] Commenting on the BofA case, one commentator observed that, in light of the recent spate of scandals, "the inference is unavoidable that the commission wanted to announce a seemingly tough settlement in a high-profile case, as part of its understandable campaign to re-establish itself as the tough cop of Wall Street."[169] The wisdom of a policy encouraging these bargains becomes more suspect in the case where the corporate management negotiating a potential settlement is composed of the same managers involved in the alleged wrongdoing.[170]

SEC civil enforcement actions follow a predictable rhythm. In the normal case, if the Commission approves the recommendation of its staff to file a civil action, the staff drafts and files a complaint with a U.S. District Court.[171] Typically, pleadings are followed by "discovery, including interrogatories, depositions, documentary discovery, and motion practice," culminating in a hearing or trial.[172] Settlements can be reached at any time in this process and are initiated and negotiated in an opaque process beyond the public record.[173] Undoubtedly, "[a]ll settlements are negotiated reso-

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note 163, at 2 ("Despite funding constraints, SEC staff worked diligently to build an agency whose ability to support capital markets and protect investors large and small continued to improve.").

166 Lawrence Chu & David J. Berger, *Federal District Court Rejects Proposed Consent Judgment between Bank of America and the SEC*, WSGR ALERT, (Wilson Sonsini Goodrich & Rosati, Palo Alto, C.A.) (Sept. 2009), *available at* http://www.wsgr.com/publications/pdfsearch/wsgralert_bank_of_america.pdf.

167 *See Bank of America Opinion I*, 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009).

168 *See, e.g.*, John C. Coffee, Jr., *The End of Phony Deterrence? 'SEC v. Bank of America'*, N.Y.L.J., Sept. 17, 2009; Sheehan, *supra* note 2; Cassidy, *supra* note 2.

169 Coffee, *supra* note 168.

170 *See, e.g.*, *Bank of America Opinion I*, 653 F. Supp. 2d at 510:

> It is one thing for management to exercise its business judgment to determine how much of its shareholders money should be used to settle a case brought by former shareholders or third parties. It is quite something else for the very management that is accused of having lied to its shareholders to determine how much of those victims' money should be used to make the case against the management go away.

171 Johnson, *supra* note 101, at 644.

172 Dreilinger, *supra* note 16, at 9.

173 *Id.*

lutions in which both parties agree to a compromise outcome instead of obtaining every element of relief or sanction that may have been sought."[174]

In a recent speech, the Commission's former Director of Enforcement, Robert Khuzami, defended the Commission's work and outlined the specific process by which decisions are made to strike a compromise with a defendant:

> When the Division of Enforcement recommends that the Commission settle a case, it is because our informed judgment tells us that what we are obtaining in settlement is within the range of outcomes we reasonably can expect to get after we prevail at trial, taking into account the strength of the case as well as the delay and resources required for a trial and the benefits of returning money to harmed investors quickly—not to mention the chances that we might lose at trial, or win but be awarded less than what the settlement achieves.[175]

While individual settlements are, no doubt, the work of a dedicated group of skilled, honest and professional personnel at the SEC and the result of a deliberative process, the reality remains that the Commission has ample motivation to settle the large majority of its cases. The fact that, today, settlements represent the preferred SEC enforcement method only serves to enhance the need for careful examination of the legitimacy of individual SEC settlements.[176]

The primary factors weighing in favor of the routine settlement of cases come in two main flavors. First, the reality of the Commission's economics dictates that the conservation of its resources plays an integral role in its decision making.[177] Second, the threat of reputational harm that can result from a loss at trial is a significant motivator in favor of settlements.[178] Invariably, the Commission's support and bargaining strength are enhanced through aggressive and successful settlement activity.[179] Very crudely, the Commission would most likely prefer settlements with many to full-fledged trials with a few.[180]

Chief among the many pressures that the Commission must

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174 Khuzami, *supra* note 164.

175 *Id.*

176 Johnson, *supra* note 101, at 669.

177 *See generally id.* at 671.

178 *See generally id.*

179 *See generally id.*

180 *Cf.* Coffee, *supra* note 168 ("[T]he SEC has to be prepared to litigate (and not reflexively settle). Ultimately, this dilemma may require that the SEC bring fewer cases in order to be able to litigate more intensively those that it does bring.").

navigate is the economic reality that the Commission faces in carrying out its mission. Simply put, the Commission's task is massive. Today, the Commission employs approximately 3,844 people and has responsibility for the regulation of over 35,000 individual entities.[181] And, as many have observed, the Commission has neither the staff nor the funding to litigate every enforcement action.[182] In an effort to conserve resources, staff attorneys are routinely instructed to prioritize cases that have important public policy implications, or are necessary to send important signals to regulated industries and entities.[183] Factors unrelated to a case's strength, therefore, routinely affect the Commission's decision making process with regard to individual settlements.

Apart from economic concerns, the Commission's settlement decisions are also influenced by the agency's important reputational concerns.[184] Enforcement actions have traditionally defined the mission of the agency.[185] It is clear that the Commission is largely evaluated on the basis of how well its Division of Enforcement performs.[186] Today, the Commission's bargaining strength is founded, in part, on its successful history and the perception that it only pursues winnable cases resulting from effective investigations. Losing a high-profile case, therefore, may substantially compromise the entire enforcement program of the Commission.[187] And,

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181 *See* S.E.C. FY 2011 REPORT, *supra* note 163, at 9.

182 *See, e.g.*, Khuzami, *supra* note 164:

> [L]itigation requires resources, lots of resources. And we are an agency on a modest budget.
>
> Trials are time-consuming and the agency spends a great deal of money deposing witnesses, producing exhibits, and arguing motions.
>
> And our opponents are well-armed with teams of expensive lawyers – a single company could spend an amount on its defense equal to half or more of our Division's entire annual operating budget.
>
> A settlement conserves our resources and allows us to redirect them in productive ways.

Id.

183 Dreilinger, *supra* note 16, at 11.

184 *Id.*

185 John Sivolella, *Bureaucratic Decision Making—SEC Enforcement and the Federal Courts' Ideology* 29 (Apr. 2007) (unpublished), www.allacademic.com/meta/p196843_index.html; *see also* Macey, *supra* note 25, at 644 (arguing that the SEC "focuses on the raw number of cases that it brings and on the sheer size of the fines that it collects").

186 Macey, *supra* note 25, at 643.

187 *See, e.g.*, Khuzami, *supra* note 164:

> We also have to consider the risks associated with litigation, including that cases are won and lost on subtle concepts of materiality, intent, and the meaning of a single sentence in a 500-page offering document.
>
> Litigation also takes time. Some judges move their dockets along rap-

the cost of a Commission loss at trial is borne by both the Commission and the public at large. Successful defendants do not generally leave the trial process unscathed either, with significant damage often affecting reputation and purse, despite the ultimate victory on the merits.

In theory, the Commission's "public interest" mandate serves as a check on the types of settlements that the Commission can agree to, and, more generally, on the entire settlement negotiation process.[188] Reference to this public interest mission is noticeably absent, however, from many of the Commission's recent public statements regarding its consent judgment practice. Increasingly, the courts are taking up the public interest mantle, and the debate is shifting to just how deeply a court can investigate the public interest implications of an individual settlement proposed for its approval.

III. The Proper Deference to be Accorded the SEC

In approving settlements, courts are given wide judicial discretion, limited only by "notions of reasonableness and deference."[189] Confronted with a proposed consent judgment from a federal agency, however, courts are constrained in the scope of their inquiry.[190] In particular, the law requires that courts "give substantial deference to the SEC as the regulatory body having primary re-

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> idly, but in other cases—real cases that we have in fact litigated—it can take years before a case sees the inside of a courtroom, and more years before all appeals are exhausted.
>
> A settlement removes the uncertainty and puts money in the pockets of investors relatively quickly.

Id.

188 *See, e.g.*, Sec. Exch. Comm'n. v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (commenting that the SEC "of all agencies" has "a duty, inherent in its statutory mission to see that truth emerges"). The efficacy of the public interest mandate, however, is far from certain. As one commentator has observed:

> [T]heoretically, the SEC's settlement negotiations are guided by its mandate to enforce the federal securities laws in the public interest. Yet, what constitutes actions in the 'public interest' is largely undefined, leaving the Commission staff to engage in what one former SEC attorney describes as an 'arbitrary exercise' that may be influenced by internal and external pressures such as public policy concerns, the overall political climate, and agency self-interest.

Dreilinger, *supra* note 16, at 10.

189 Henderson, *supra* note 3, at 4.

190 *See, e.g.*, Sec. Exch. Comm'n. v. Wang, 944 F.2d 80, 85 (2d Cir. 1991) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.").

sponsibility for policing the securities markets."[191] Such an approach is consistent with a philosophy that courts asked to pass on the judgment of executive agencies must do so with less information, expertise, and political oversight than the agencies.[192] As one author recently commented:

> In the case of settlements, a court asked to approve a consent decree is not privy to (i) the details of the alleged wrongdoing, (ii) the intricacies of the negotiation between the parties, (iii) the facts of how the settlement or the litigation will affect the parties, (iv) the costs and benefits of proceeding with the case, or (v) how the settlement will affect other parties.[193]

On the one hand, the court must satisfy its own judicial needs and should be reluctant to assert its authority absent a proper articulation of the underlying conduct. At the same time, however, proper deference should be afforded the administrative agency charged with carrying out the affairs over which it is expert. And, these issues might be best addressed separately. First, the ability to craft the specific terms of any settlement seems squarely within the Commission's bailiwick and principles of deference would require the court to grant the Commission significant latitude to tailor the arrangement with an individual investigative target. When the Commission desires to employ the court as its enforcer, however, it is equally appropriate that the bar be raised. In such a case, the Commission wishes to involve the court in an ongoing effort. Such an undertaking should not be engaged without a court's true understanding of the underlying facts that give rise to the need for its might. To ask a sentinel to stand post absent the proper knowledge of just what he is guarding seems as improper as it is illogical. Accordingly, a district court must retain the exercise of its "independent judgment in assessing whether the proposed consent judgment accords with the public interest, not least because concern for the public interest is not meaningfully severable from the required consideration of the consent judgment's fairness, reasonableness, and adequacy."[194]

While each of the cases examined in this Article has unique facts and circumstances, there is a clear theme to the objections

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191 *See Bank of America Opinion II*, 09 CIV. 6829 (JSR), 2010 WL 624581, at *6 (S.D.N.Y. Feb. 22, 2010).

192 Henderson, *supra* note 3, at 5 (noting that "[d]eference to the executive branch that negotiates the settlement on behalf of the public is consistent with judicial deference to executive agencies generally").

193 *Id.*

194 *See* SEC Brief, *supra* note 12, at 46.

that Judge Rakoff raises. In essence, a court's work must navigate the choppy waters of (i) a Constitutional issue of separation of powers and (ii) a question of the proper level of inquiry required to establish that a settlement it ratifies is fair, reasonable, adequate and in the public interest. Each such issue is examined in this Part.

A. The Separation of Powers Concern

A deferential role for courts in evaluating consent judgments negotiated by government agencies finds root in the United States Constitution.[195] The decision whether and what to prosecute is an exclusively executive function.[196] And, by settling a matter, the respective parties signal their assent to extinguish the ongoing case or controversy that is the very prerequisite for a district court's jurisdiction under the Constitution.[197]

Increasingly, the Commission has emphasized the need for its deliberate balancing of all of the many factors that affect its settlement decisions. In large measure, the Commission views itself as the expert charged with managing the public interest through the overall decision making involved in all of its many enforcement activities. With such a broad task, it is not sufficient for the Commission to come to a conclusion that a particular transgression was serious enough to warrant a suit. Instead, the agency must measure whether "the costs of pursuing the suit were greater than any benefits in terms of deterrence or compensation that might flow from pursuing it further."[198] And, how can the Commission's subjective and holistic decision be second-guessed by a court that lacks a window into all of the agency's activities? Only the Commission seems properly equipped to understand the requirements of a specific case within a complete portfolio of all of its endeavors and constraints.

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195 SEC Memorandum of Law, *supra* note 83, at 8; *see* United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995) (noting the "constitutional difficulties that inhere" in judicial review of settlements for compliance with the "public interest"); Maryland v. United States, 460 U.S. 1001, 1005–06 (1983) (Rehnquist, J., dissenting from summary affirmance) (explaining the separation of powers problems created by a "public interest" judicial review of consent decrees).

196 Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

197 SEC Memorandum of Law, *supra* note 83, at 8 (citing Matter of S.L.E., Inc., 674 F.2d 359, 364 (5th Cir. 1982) ("If a dispute has been settled or resolved . . . it is considered moot. With the designation of mootness comes the concomitant designation of non-justiciability.").

198 Henderson, *supra* note 3, at 6.

The benefits of allowing the Commission to control the consent decree process, including the decision of whether to enter into such arrangements on a "non-admission/non-denial" basis seem clear:

> While it gives up a number of advantages when it proceeds by injunction rather than by litigation, including the filing of findings of fact and court opinions clearly setting forth the reasons for the result in a particular case, the SEC is thus able to conserve its own and judicial resources; to obtain contempt remedies, including fines and prison terms, not available to it under its own statutory scheme; and to protect the public by informing potential investors that a certain person has violated SEC rules in the past and by reminding defendants that they must obey the law in the future. While the defendants in such cases give up the right to contest the need for an injunction, they receive significant benefits in return: they are permitted to settle the complaint against them without admitting or denying the SEC's allegations and they often seek and receive concessions concerning the violations to be alleged in the complaint, the language and factual allegations in the complaint, and the collateral, administrative consequences of the consent decree. We are reluctant to upset this balance of advantages and disadvantages.[199]

Accordingly, the Commission maintains that consent judgments resulting from arm's-length negotiations between sophisticated parties are entitled to a presumption of reasonableness by the reviewing court.[200] And, the presumption is heightened where the consent judgment is the result of an enforcement effort by a federal government agency responsible for ensuring the "maintenance of fair and honest markets."[201] The Commission maintains that its overall settlement strategies and its "neither admit nor deny" policy, in particular, are necessary to facilitate settlements that "preserve the breadth of its enforcement reach."[202] In essence, the Commission's view is that it must be free from judicial intrusion in the negotiation of its settlements with investigative targets. And, only in such a regime can the aims of the Commission be accomplished and more money returned to wronged investors more quickly.

In a public statement in response to a court's refusal to accept the *Citigroup* settlement, the Commission's former Director of En-

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199 S.E.C. v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983).

200 *See, e.g.*, SEC Memo of Law, *supra* note 83, at 1. *See also* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005).

201 Necessity for Regulation, 15 U.S.C. § 78b (2010).

202 Reckler & Denton, *supra* note 119, at 4.

forcement, Robert Khuzami, echoed the sentiments of the *Clifton* court and emphasized the involved and thorough nature of the Commission's deliberations. Mr. Khuzami suggested that to turn down settlements simply because they lacked an admission would represent an unwise policy. He further stated:

> The court's criticism that the settlement does not require an 'admission' to wrongful conduct disregards the fact that obtaining disgorgement, monetary penalties, and mandatory business reforms may significantly outweigh the absence of an admission when that relief is obtained promptly and without the risks, delay, and resources required at trial. It also ignores decades of established practice throughout federal agencies and decisions of the federal courts. Refusing an otherwise advantageous settlement solely because of the absence of an admission also would divert resources away from the investigation of other frauds and the recovery of losses suffered by other investors not before the court.[203]

Understandably, Mr. Khuzami's public statement embellishes Judge Rakoff's position. In fact, in all three cases, the Judge is careful to establish that the lack of an admission is not the sole factor informing his agitation.[204] Moreover, he concedes that a reviewing court must tread lightly because deference is, indeed, due the work of the Commission. Instead, the Judge's objections concern the fact that the court's powers are requested, in each case, without a full and proper showing of the facts giving rise to such a need. Again, the argument is around the level of deference that a court must show the Commission and not whether a court's power is absolute. For Judge Rakoff, then, the issue is one of line drawing and not one of whether there exists a line.[205] And, ultimately, it is the "public interest" prong of the inquiry that affords the court its widest latitude to meddle.

Just as the Commission has an interest in protecting and defending its proper role within an independent executive branch, so too do the courts have ample reason to assert the constitutional

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[203] Robert Khuzami, Former Director, Div. of Enforcement, U.S. Sec. Exch. Comm'n., Court's Refusal to Approve Settlement in Citigroup Case (Nov. 28, 2011), http://www.sec.gov/news/speech/2011/spch112811rk.htm.

[204] *Bank of America Opinion I*, 653 F. Supp. 2d 507 (S.D.N.Y. 2009); Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011); Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

[205] SEC Brief, *supra* note 12, at 54 ("As the district court stated over and over, it simply lacked any factual basis upon which to determine whether the settlement was fair, reasonable, adequate, or in the public interest.").

independence of the federal judiciary in these types of disputes. "[O]ur Constitution unambiguously enunciates a fundamental principle–that the 'judicial Power of the United States' must be reposed in an independent Judiciary."[206] As the pro bono counsel appointed to represent Judge Rakoff in the *Citigroup* appeal argued, "[d]epriving the district court of its capacity to reach a sound and reasoned judgment regarding the propriety of a proposed consent judgment and the imposition of injunctive relief would undermine the judiciary's independence and thereby threaten the constitutional balance of power."[207]

B. The Public Interest Concern

In large part, any proper "public interest" inquiry cannot be divorced from the question of the proper deference that need be afforded the Commission. Is the Commission the ultimate arbiter of public interest within its general charge to maintain the integrity of the federal securities markets? Or, is that task subject to the second-guessing of a court that lacks the full picture of the Commission's overall activities?[208] As a practical matter, a court's public interest review cannot be severable from the reasonable, fair and adequate prongs of a proper judicial inquiry. For, as Judge Rakoff reminds, it is the public and the parties to whom reasonableness, adequacy, and fairness are owed.[209]

Yet, of the attacks on the SEC's consent judgment practice offered by Judge Rakoff over the course of the three cases, the "public interest" concern might be the most stinging. The issue comes to a head in the *Citigroup* dispute and, then, as a result of a substantial backpedalling on the part of the Commission. In fact, the Commission's inconsistent approach to the threshold required to establish "public interest" suggests a certain level of intellectual confusion as these cases have evolved. In the *Bank of America* case, for example, the court offered very little discussion of public interest.[210] In the initial rejection of the consent judgment, the court discredited the proposed settlement for its lack of fairness, reason-

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206 *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982).

207 SEC Brief, *supra* note 12, at 55; *see also* United States v. Rojas, 53 F.3d 1212, 1214 (11th Cir. 1995) ("[S]eparation of powers would be implicated when the actions of another Branch threaten an Article III court's independence and impartiality in the execution of its decisionmaking function.").

208 *See* Dreilinger, *supra* note 16, at 6 ("Allowing judges to embark on a searching public interest inquiry for every single SEC settlement could harm the SEC, defendants, and even the courts.").

209 *Citigroup Global Markets, Inc.*, 827 F. Supp. 2d at 335.

210 *See supra* text accompanying notes 41–42.

ableness and adequacy "even upon applying the most deferential standard of review."[211] As a result, any public interest inquiry remained extraneous, and the court did not have to involve itself in such an inquiry to find the proposal objectionable.

In the *Vitesse* case, the Commission's brief articulated the proper standard for the court to apply in determining whether to approve consent judgments in SEC enforcement actions. In fact, Judge Rakoff's opinion quoted liberally from the Commission's submission.[212] Characterizing the scope of the court's review as "well established", the Commission wrote that "[b]ecause actions brought by the Commission seek to enforce the federal securities laws, they should serve the 'public interest.'"[213] The Commission further elaborated that, to ensure that the public interest is served, the court:

> [N]eed not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been a valid consent by the parties.[214]

The Commission's brief quoted from the language of the earlier *Bank of America* opinion, providing that the *Vitesse* court had "the obligation, within carefully prescribed limits, to determine whether the proposed Consent Judgment settling [a] case is fair, reasonable, adequate, and in the public interest."[215] Finally, the standard of review suggested by the Commission and adopted by the *Vitesse* court provided that the court "give substantial deference to the SEC as the regulatory body having primary responsibility for policing the securities markets, especially with respect to matters of transparency."[216]

In the *Citigroup* matter, however, the SEC tried another standard on for size. While retaining the "fair, adequate, and reasonable" language articulated in *Bank of America* and *Vitesse*, the Commission's memorandum reversed course from its filings in the

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211 *Bank of America Opinion I*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009).

212 Sec. Exch. Comm'n. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011).

213 *Id.* at 306 (referencing SEC Letter Brief dated Dec. 21, 2010, which cites Sec. Exch. Comm'n. v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984)).

214 *See id.* (citing Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983)).

215 *See id.* at 307 (quoting *Bank of America Opinion II*, No. 09-CV-6829 (JSR), 2009 WL 2842940, at *1 (S.D.N.Y. Aug. 25, 2009)).

216 *See id.* (quoting *Bank of America Opinion II*, No. 09-CV-6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 5624581, at *6 (S.D.N.Y. Feb. 22, 2010)).

prior cases, and suggested that "the public interest . . . is not part of [the] applicable standard of review."[217] Ultimately, the question of whether the court possesses the ability to inquire into whether a settlement placed before it is in the public interest is barely worthy of a discussion. And, the Commission's efforts to walk back from its own articulation of such a standard only serves to hurt the credibility of its efforts to define the scope of such an inquiry.

The more interesting question than whether there exists a public interest inquiry within the proper scope of judicial review is just how robust such a review should be and where its boundaries should be drawn. In essence, where a public interest inquiry ends and proper deference for the Commission begins becomes the question of the day in these cases. For, as one commentator has observed, "government agencies with missions, policies, and enforcement tools similar to the SEC have utilized a public interest inquiry to facilitate—and even improve—the settlement process."[218]

Any position in favor of enhanced judicial review for securities settlements suffers mightily from the absence of statutory guidance on what constitutes a settlement consistent with the public interest.[219] The courts, too, have not yet developed a consistent test or set of factors to support a meaningful public interest inquiry.[220] As a result, judges are left to navigate a vague mandate in favor of consent judgments.[221]

Over time, ad hoc judicial inquiries for individual settlements could do more harm than good. It is not difficult to imagine that a commission that relies on the settlement process to resolve more than 90% of its enforcement actions might strain under an additional burden if defendants are discouraged from undergoing the intense, lengthy, and costly bargaining process with the Commission only to have judges enforce their own requirements or reject a proposed settlement altogether.[222] Of course, in an effort to save time and resources, the Commission might choose to avoid the courts altogether.[223]

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[217] Opinion and Order at 5, Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., No. 11 Civ. 7387 (JSR) (S.D.N.Y. Nov. 28, 2011).

[218] Dreilinger, *supra* note 16, at 29.

[219] *Id.* at 6.

[220] *Id.*

[221] *Id.*

[222] *Id.* at 6–7.

[223] *Id.* at 7 (noting that this option "is especially attractive given the Commission's recently acquired power to impose civil monetary penalties 'against any person' in administrative proceedings").

In the coming days and years, the courts, the Commission, and individual defendants will be left to define the scope of the proper inquiry for the court. In that regard, Judge Rakoff has done a real service to begin a process of defining these roles that should have started long ago.

IV. The Likely Effects of the Newfound Attention

A few years removed from the *Bank of America* matter, some effects of Judge Rakoff's crusade are already taking hold. First, and predictably, the Commission has responded aggressively to charges leveled at the way that it does its business. Most notably, the merits of the defense of its practices are likely to be considered in the Commission's appeal of the *Citigroup* decision. Second, if imitation remains the greatest form of flattery, Judge Rakoff has enjoyed his share of adulation. The Judge's fans are not limited to the press, academics, and commentators. Other judges have shown various degrees of support for this line of thought, as the Commission is being asked to satisfy specific court-directed inquiries like no time in recent memory.[224] A position in favor of enhanced judicial scrutiny, however, today remains vacuous because the "public interest" standard remains relatively undefined. And, the success of any such policy will depend on a careful weighing of the costs and benefits of such an approach. Finally, once these matters become better settled, and the appellate courts have more clearly articulated the appropriate standards of review, there is likely to be an effect in the market for directors and officers insurance. Some of the likely effects of the newfound attention that Judge Rakoff has brought to these issues are briefly explored below.

A. The Citigroup *Appeal*

On December 15, 2011, the Commission filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit

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224 *See, e.g.*, Letter from Hon. Rudolph T. Randa, U.S. District Judge, to Andrea R. Wood & James A. Davidson, Counsel for SEC (Dec. 20, 2011), *available at* www.wlrk.com/docs/kossletter.pdf (refusing to approve a proposed settlement between the SEC and Koss Corporation and directing the Commission to show that the settlement is fair, reasonable, and in the public interest); *see also* Fed. Trade Comm'n. v. Circa Direct, No. 11-civ-2172, 2012 WL 589560 (D.N.J. Feb. 22, 2012) (challenging a settlement of alleged violations of the Federal Trade Commission Act and ordering the parties to submit briefs responding to whether the settlement is fair, adequate, and in the public interest); Sec. Exch. Comm'n. v. Merendon Mining (Nevada) Inc., No. C10-955RAJ (W.D. Wash. Mar. 5, 2012) (rejecting a proposed settlement between the SEC and three alleged Ponzi scheme defendants and taking issue with the SEC request for injunctive relief while reserving decisions on monetary relief for the future).

seeking review of Judge Rakoff's November 28th Order in the *Citigroup* matter. In addition, on December 16, 2011, the bank filed a motion in the district court seeking to stay the proceedings pending the appeal.[225] In support of the appeal, former Enforcement Director Khuzami again took the opportunity to defend the Commission's proposed settlement as "reasonably reflect[ing]the relief the SEC would likely have obtained if it prevailed at trial."[226] He also characterized Judge Rakoff's approach as contrary to legal authority and "at odds with decades of court decisions that have upheld similar settlements by federal and state agencies across the country."[227] With the appeal moving to the Second Circuit, there remained an interesting question of whether Judge Rakoff's position would be represented (aside from the record in the District Court) in a proceeding that amounted to "basically an appeal without an adversary."[228] That question was answered in the affirmative when the Second Circuit allowed for the appointment of pro bono counsel to represent and brief Judge Rakoff's position.[229] The case was heard by the Second Circuit on February 8, 2013.[230]

B. The Copycat Effect

Several recent cases suggest that the importance of Judge Rakoff's decisions will be found less in the resolution of any particular matter than with the change in the approach that the judiciary might take to pre-packaged SEC settlements.[231] On several occasions since Judge Rakoff first expressed his reservations, individual

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225 Citigroup subsequently filed its own Notice of Appeal and Memorandum in Support of the Stay Motion.

226 *SEC Enforcement Director's Statement on the Citigroup Case*, SEC News Digest, Issue 2011-241 (Dec. 15, 2011), http://www.sec.gov/news/digest/2011/dig121511.htm.

227 *Id.*

228 For an interesting description of this unlikely situation and some possible outcomes see Carolyn Kolker, *Analysis: In Citi Appeal, Who Will Speak for Rakoff?,* REUTERS (Jan. 17, 2012, 5:20 PM), http://www.reuters.com/article/2012/01/17/us-frankel-rakoff-idUSTRE80G28Q20120117.

229 *See* Sec. Exch. Comm'n. v. Citigroup Global Markets, Inc., 673 F.3d 158, 161 (2d Cir. 2012).

230 See Peter Lattman, *Court Hears Arguments on Judge's Rejection of S.E.C.-Citigroup Deal*, DEALBOOK BLOG (Feb. 8, 2013, 4:56 PM), http://dealbook.nytimes.com/2013/02/08/appeals-court-hears-arguments-over-judge-rakoffs-rejection-of-citigroup-settlement/.

231 *See, e.g.*, Edward Wyatt, *In Challenging S.E.C. Settlement, a Judge in Wisconsin Cites a Court in New York,* N.Y. TIMES, Dec. 28, 2011, http://www.nytimes.com/2011/12/29/business/judge-in-wisconsin-challenges-sec-settlement.html?_r=0 ("The fact that a federal judge halfway across the country cited the [*Citigroup*] case less than a month later means that other judges have noticed the ruling—which is significant because most S.E.C. enforcement cases rely on similar, negotiated settlements.").

judges have agreed that the settlement practice should require more than a judicial rubber stamp.

One commentator has summarized the effects of the Bank of America case and its progeny succinctly:

> By echoing the concerns that arose in *Bank of America*, these judges gave credence to Judge Rakoff's over-arching criticisms of the SEC settlement process and showed that Judge Rakoff was more than a publicity-hungry gadfly. In fact, as more judges 'pull a Rakoff' and break with the long-entrenched tradition of judicial deference, *Bank of America* becomes more interesting—and important. Judge Rakoff's decision will not be remembered for the outcome of the case, but rather how it sparked a new trend of judicial scrutiny for securities settlements.[232]

The newfound judicial scrutiny has come from several corners. In March 2010, for example, Judge William Pauley, of the Southern District of New York, rejected a Commission proposal to amend the historic global settlement that brokerage firms agreed to following the much celebrated conflicts of interest inquiries in 2003.[233] Labeling the proposed amendment "counterintuitive," Judge Pauley found it to be contrary to the public interest, despite the Commission's endorsement.[234] In August 2010, Judge Ellen S. Huvelle, of the D.C. Circuit, refused to "rubber-stamp" the Commission's proposed settlement with Citigroup over the bank's failure to fully disclose its exposure to subprime mortgages during the recent financial crisis.[235] Judge Huvelle raised significant questions about the proposed $75 million settlement and her concerns "mirrored Judge Rakoff's."[236]

Judge Rakoff's most recent kindred spirit seems to be Judge Rudolph T. Randa of the District Court of the Eastern District of Wisconsin. Upon being presented with a proposed settlement of fraud charges against Koss Corporation, a maker of stereo head-

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232 Dreilinger, *supra* note 16, at 5–6.

233 *See* Ashby Jones, *In Rejecting SEC Settlement, Has Pauley Pulled a Rakoff?*, WALL ST. J. LAW BLOG (Mar. 18, 2010, 12:58 PM), http://blogs.wsj.com/law/2010/03/18/in-rejecting-sec-settlement-has-pauley-pulled-a-rakoff/.

234 *See generally* Peter J. Henning, *When Judges Refuse to Be Rubber Stamps,* DEALBOOK BLOG (Mar. 22, 2010, 12:33 PM), http://dealbook.blogs.nytimes.com/2010/03/22/when-judges-refuse-to-be-rubber-stamps/.

235 *See* Peter J. Henning, *Can the S.E.C. Avoid Scrutiny of its Settlements?*, DEALBOOK BLOG (Aug. 17, 2010, 5:18 PM), http://dealbook.blogs.nytimes.com/2010/08/17/can-the-s-e-c-avoid-scrutiny-of-its-settlements/ (noting that one day later, albeit in a criminal case brought by the Department of Justice, another federal judge asked tough questions about what he viewed as a "sweetheart deal" with Barclays Capital, before he reluctantly approved the settlement).

236 *See* Schreiber et al., *supra* note 108, at 2, n.3.

phones, the Judge cited Judge Rakoff's *Citigroup* opinion and asked the Commission to provide a "written factual predicate for why it believes the court should find that the proposed final judgments are fair, reasonable, adequate and in the public interest."[237]

C. Costs and Benefits

At least one commentator has suggested a more practical lens through which the Commission's actions in these cases might be viewed. Describing the *Bank of America* case in particular, Professor Henderson offered the following assessment:

> Imagine that the SEC believed that the disclosures in the proxy statement were faulty and misleading, but that the circumstances of the deal were such that the mistakes were not worthy of aggressive punishment. (Perhaps because the executives at Bank of America were pressured into doing the deal as a public service to "save" the economy from collapse.) Accordingly, we can think of the suit and the settlement as telling shareholders that they were paying for the mistakes their agents made, perhaps hoping that shareholders would, either through lawsuit or otherwise, try to discipline those agents. Seen in this way, the apparent accommodation that the SEC made could instead be viewed as a rational calculation of the costs and benefits of the litigation and a pursuit of something approximating optimal deterrence of future proxy violations.[238]

Under such an interpretation, Judge Rakoff's efforts can be seen as "piling on to some extent," as, in a sense, they uproot the delicate balance of the Commission's value judgments.[239] By rejecting the settlements, Judge Rakoff suggests that "the SEC was systematically making errors about the tradeoffs in the deterrence calculation."[240] While we can hold out hope that Judge Rakoff's decisions will cause the SEC to be more thoughtful and deliberative in its efforts, it adds to the uncertainty of the entire settlement process. A less optimistic view is that the Judge's efforts will simply raise the costs of entering consent judgments.[241]

> Presumably the SEC prefers to use consent decrees in cases like this because they are the most efficient way to enforce the terms

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237 *See* Letter from Hon. Rudolph T. Randa, U.S. District Judge, to Andrea R. Wood & James A. Davidson, Counsel for SEC, Sec. Exch. Comm'n. v. Koss Corp., No. 2:11-CV-00991 (E.D. Wisc. Dec. 20, 2011), *available at* www.wlrk.com/docs/file/kossletter.pdf; *see also* Wyatt, *supra* note 231.

238 Henderson, *supra* note 3.

239 *Id.*

240 *Id.*

241 *Id.*

> of the agreement. By raising the costs of this alternative to pure settlements, which definitely do not require judicial approval, the options for the government and the parties are reduced. This in turn reduces the range of mutually beneficial bargains that can be struck, and may result in much higher costs for all other parties.[242]

D. The Effect on the Insurance Market

Few would argue that the added opacity surrounding SEC enforcement proceedings in the wake of Judge Rakoff's efforts "will affect the costs of defense for SEC enforcement proceedings and impact defense and settlement costs for related shareholder class actions and derivative litigation."[243] In particular, the underwriters of directors and officers ("D&O") insurance have undoubtedly taken notice of the evolving landscape, and will be anxiously monitoring the ongoing controversy surrounding the Commission's settlement policy.

Typically, SEC settlements themselves are uninsurable under D&O policies because they usually include fines, disgorgement, and equitable relief.[244] The costs of defending an SEC investigation, however, are generally recoverable under a D&O policy.[245] Some observers who follow the insurance market have suggested that if Judge Rakoff's criticisms ultimately result in a change in SEC policy where the Commission will only enter into settlements with defendants who admit liability, there will be a corresponding change in the insurance market. "If defendants cannot settle with the SEC without admitting liability, there likely will be fewer settlements and some defendants may decide to litigate until a final judgment—all resulting in increased costs of defense."[246] Accordingly, those in the insurance field are monitoring these issues closely.

E. Changes to Criminal Cases at the Commission

One measurable effect of Judge Rakoff's critique is found in a recently announced change to Commission policy.[247] On January 6, 2012, the Commission, through its Director of Enforcement, an-

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242 *Id.*

243 Pesso, *supra* note 59.

244 *Id.*

245 *Id.*

246 *Id.* (noting that "[i]n recent years, defense costs for even a single SEC defendant have run into the millions of dollars").

247 *See generally* Aruna Viswanatha & Sarah N. Lynch, *SEC Changes Settlement Lan-*

nounced that defendants are now prohibited from settling civil cases using the "neither admit nor deny" language if they have already admitted to wrongdoing in a parallel criminal case.[248] Under the new policy, where a defendant is the subject of a parallel criminal conviction, non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") that contains admissions or acknowledgements of criminal conduct, the SEC will no longer permit that defendant to enter into a "non-admission/non-denial" style settlement. Instead of the traditional charging language, Commission settlement orders will now include language citing the fact and nature of the criminal disposition.[249] In addition, the Commission's staff will have the discretion to incorporate into the settlement order any relevant facts admitted during the defendant's plea allocution, in a jury verdict form, or in the NPA or DPA.[250]

The Commission, through its Director of Enforcement, has expressly denied that there is a connection between Judge Rakoff's opinions and the policy change. While the new policy represents an additional consideration for a prospective settling party, the practical impact of the change is likely to be modest for several reasons. First, the new policy does not apply to the vast majority of settling parties.[251] In this regard, it is limited to situations where the defendant has (i) pled guilty, (ii) been convicted, or (iii) made substantive admissions in an NPA or DPA.[252] Second, the new policy is somewhat limited in that settling parties are not required to make admissions beyond the scope of what they had already made in a criminal proceeding. The policy merely calls for the inclusion of language that "the defendant has admitted the parallel criminal action."[253]

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guage for Some Cases, REUTERS (Jan. 7, 2012, 5:15 PM), http://www.reuters.com/article/2012/01/07/us-sec-policychange-idUSTRE8051VB20120107.

248 *See* Steve Schaefer, *SEC Rule Change Doesn't Mean Much for Wall Street Settlements*, FORBES, Jan. 6, 2012, http://www.forbes.com/sites/steveschaefer/2012/01/06/sec-rule-change-wont-have-wall-street-admitting-guilt/ (quoting the full statement by SEC Director of Enforcement Robert Khuzami outlining the new policy).

249 *See* Schreiber et al., *supra* note 108, at 1.

250 *See* Posting of DavisPolk Client Newsflash, *SEC Changes "Neither Admit Nor Deny" Practice for Criminal Conviction Cases*, to dpwmail@davispolk.com (Jan. 9, 2012), http://www.davispolk.com/files/Publication/2202fc41-1395-49a8-b40f-fa8022c05ac9/Presentation/PublicationAttachment/38595d57-62a0-44f6-ba26-0b7f9da97fc0/01.09.12.lit.html (offering that "[t]he SEC's newly announced approach is likely to arise most notably in cases involving the Foreign Corrupt Practices Act or insider trading, where SEC enforcement actions often run parallel to criminal proceedings").

251 *See* Reckler & Denton, *supra* note 119, at 1 (noting that "[t]he vast majority of SEC cases fit into that unchanged category").

252 *See* Schreiber et al., *supra* note 108, at 2.

253 *Id.* at 3.

In the end, despite the Commission's denials, it is difficult to maintain a position that this policy change would have happened absent Judge Rakoff's more general criticisms.[254] Moreover, it remains unclear whether the change will be the beginning of a broader shift to more aggressive enforcement policies.[255]

CONCLUSION

The role of the federal judiciary in approving Commission settlements is an important one. Ultimately, defining the scope of that involvement has significant ramifications for the courts, the Commission, investigation targets, and the public at large. And adopting a reliable standard for the proper judicial public interest inquiry can preserve the utility and efficiency of the Commission's settlement process and, at the same time, satisfy the courts' burden that its enforcement mechanisms are warranted.

In the meantime, the level of skepticism will continue to filter into the individual consent judgments that the Commission presents routinely to the courts. Judge Rakoff's trilogy has already changed the equation for the Commission and its targets. Undoubtedly, the three cases examined in this Article have shed light on the cynical nature of a settlement process that, for too long, has offered a comfortable bargain for the Commission and defendant alike.[256] If the Judge's handiwork makes the Commission more deliberate and thoughtful in its work, that will be a benefit. The cost, however, must be measured in the increased uncertainty of outcomes. It remains to be seen just how much a more inquisitive bench will add to the cost of entering into consent judgments. In the end, all must guard against these cases amounting to little more than judicial meddling. Such a limited outcome would be unfortunate, and would simply push parties "towards less efficient means of resolving their disputes."[257]

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254 *See, e.g.*, *id.*; David Dayen, *Rakoff Gets Results: SEC Dropping No-Fault Settlement Language in Some Cases*, FIREDOGLAKE (Jan. 6, 2012, 12:15 PM), http://news.firedoglake.com/2012/01/06/rakoff-gets-results-sec-dropping-no-fault-settlement-language-in-some-cases/ (observing that "[t]his is a first step to stopping this travesty of allowing companies to get off the hook and pay their way out of fraud violations without even admitting they did anything wrong," and further asserting that "this never happens without the work of Jed Rakoff").

255 Schreiber et al., *supra* note 108, at 3.

256 *See, e.g.* Neal Lipschutz, *Rakoff Decision May Be 'Unprecedented,' But He's Still Right*, WALL ST. J LAW BLOG (Dec. 16, 2011, 1:50 PM), http://blogs.wsj.com/law/2011/12/16/if-rakoff-decision-is-unprecedented-hes-still-right/ (suggesting that Judge Rakoff was "calling 'stop' to a long-standing practice that took expediency too far").

257 Henderson, *supra* note 3; *see also* DavisPolk Client Newsflash, *supra* note 250

In the meantime, there can be no denying the observations made by Judge Rakoff's diligence and recently echoed by Professor Coffee:

> Too often, the goal of the SEC has been to achieve a settlement with a defendant that affirms its authority, but makes no sense. This may be the product of logistical constraints and caseload pressure, and a partial answer may be to allocate more resources to the SEC. But the SEC has to be prepared to litigate (and not reflexively settle). Ultimately, this dilemma may require that the SEC bring fewer cases in order to be able to litigate more intensively those that it does bring.[258]

And, the alarmist claims that more rigorous judicial inquiry somehow equates to the SEC's enforcement program being hamstrung by the inability to negotiate future settlements rings hollow in light of the responsible and deliberative consideration regularly afforded these matters by district courts and the multiple enforcement options still available to the Commission.[259]

In the end, no settlement is worth the public's interest in knowing the truth.

("[T]o the extent this and other changes to settlement policies at the SEC and other federal agencies make matters harder to settle, the number of litigated matters might increase and parties might begin to experiment with alternate ways to resolve cases.").

258 Coffee, *supra* note 168, at 4.

259 *See generally* SEC Brief, *supra* note 12, at 53–4.

WAGE THEFT IN NEW YORK: THE WAGE THEFT PREVENTION ACT AS A COUNTER TO AN ENDEMIC PROBLEM

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I. Introduction

Francisco Alvarez[1], an immigrant worker originally from Ecuador, has won three separate judgments against three different employers for claims of unpaid wages.[2] However, Francisco has not received any of the money his employers owe him, wages he earned while working on different construction sites around New York City. Francisco is a member of the Latino/a immigrant rights organization Make the Road New York ("MRNY") in New York City and Long Island.[3] Working with the organization's legal team, he filed claims of unpaid wages with the New York State Department of Labor ("NY DOL") on three separate occasions. Each time, after waiting roughly nine to twelve months while the NY DOL investigated his claims, he received judgments in his favor. By the time he received the news, his employers had already hidden their assets[4]

[1] All names in this piece have been changed to protect the identity of the subjects.

[2] Case file, on file with Make the Road New York. Contact author for details.

[3] Make the Road New York has community centers in Brooklyn, Queens, Staten Island, and Long Island. Its 11,000 members "work together in active member-led committees around issues of critical importance to low-income, immigrant workers and their families, such as wage theft." Deborah Axt, Amy Carroll, & Andrew Friedman, *Advocacy Story: The Campaign to Pass the New York Wage Theft Act*, 45 Clearinghouse Rev. 154, 154 (2011) [hereinafter *Advocacy Story*]; *see also* Make the Road New York, www.maketheroadny.org/whoweare_aboutourcommunity.php (last visited Nov. 19, 2012).

[4] Interview with Elizabeth Wagoner, former Staff Attorney, Make the Road New York, in N.Y.C. (Aug. 3, 2011). Notes on file with the author.

and claimed they could not afford to pay the judgments.

Fellow MRNY member Maria, an immigrant worker from Mexico, had better luck, but still had to wait months before receiving her pay.[5] While working at a lamp factory in Manhattan, she worked over seventy hours a week without being paid overtime for more than a year. Maria received almost $10,000 in unpaid overtime, with the assistance of the MRNY legal team.

Maria and Francisco are but two examples of wage theft in New York City. According to estimates, nearly one billion dollars are stolen annually from low-wage workers in New York City alone.[6] MRNY's fourteen years of organizing and advocating with workers around similar stories of wage theft[7] inspired the organization's members, community organizers, and attorneys to tackle the problem head on. They decided to draft legislation to change New York State's existing labor law and gain more protections for immigrant workers.[8]

This paper will examine this widespread problem of wage theft in New York City, especially amongst low-wage workers. The paper will focus on the Wage Theft Prevention Act ("WTPA"), legislation that increases workers' protections under the New York Labor Law.[9] Part I will discuss what is commonly known as wage theft and common employment and labor law violations. This section will also discuss current data on the breadth of workplace violations in low-wage industries in New York City, and discuss who is most affected by wage theft. Part II will discuss current legal remedies available to victims of wage theft, under federal and New York law. This section will also analyze key provisions of the 2010 law passed in New York State to combat wage theft, the WTPA, and how the new law differs from former New York State Labor Laws and federal remedies. Part IV addresses objections to the WTPA. Part V discusses the need for both the NY DOL and workers' rights groups to conduct education and outreach in order to effectively implement the new law. Wage theft is a serious problem affecting our

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5 Sam Dolnick, *Workers' Safeguards Strengthened by N.Y. Law*, N.Y. TIMES, Dec. 13, 2010, http://www.nytimes.com/2010/12/14/nyregion/14wage.html?emc=eta1 (quoting Maria saying that the new wage theft law in New York State "is very great because this [wage theft] won't happen to someone else").

6 *See* Annette Bernhardt, Diana Polson, & James DeFilippis, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 44 (2010), http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf [hereinafter WORKING WITHOUT LAWS].

7 *Advocacy Story*, *supra* note 3, at 1.

8 *See infra* text accompanying notes 113–25.

9 *See infra* text accompanying notes 10–55, for a discussion of wage theft.

communities, and the WTPA will be an effective tool for combating wage theft and protecting workers' rights.

II. Wage Theft: A Pervasive Problem in New York

A. Wage Theft and Low-Wage Industries

Wage theft is a widespread problem that affects many workers from different backgrounds and in different industries. Wage and hour violations[10] are especially common in low-wage industries.[11] The term "wage theft" refers to various violations of federal, state, and local wage and hour or labor laws, including nonpayment of wages due for work completed, including overtime.[12] It occurs "when an employer violates the law and deprives a worker of legally mandated wages" governed by the Fair Labor Standards Act ("FLSA") and state labor laws.[13] In addition, wage theft refers to the following scenarios: employers fail to give workers a final paycheck after leaving a job, workers receive less than the hourly minimum wage or less pay than promised, workers work off the clock without pay, have tips stolen or illegal deductions from paychecks, and workers are misclassified as independent contractors by their employers (in order to avoid coverage under federal and state labor laws).[14]

A sample of workers from low-wage industries in three major U.S. cities found that "over a quarter of low-wage workers receive less than the minimum wage rate required by law: 60% of those are underpaid by more than $1.00 an hour."[15] Organizations and researchers have various definitions of what constitutes a low-wage industry. The primary data utilized in this paper, from a 2008 study conducted by researchers at the National Employment Law Project

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10 The term wage and hour laws can refer to "any law that covers claims for unpaid minimum, overtime and promised wages, as well as rest breaks, meal periods, child labor, etc." *See* Nat'l Emp't Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft 10 (Jan. 2011), http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1 [hereinafter Winning Wage Justice].

11 Working Without Laws, *supra* note 6.

12 Kim Bobo, Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid – and What We Can Do About It 7 (2008).

13 *Id.*

14 Interfaith Worker Justice, http://www.iwj.org/issues/wage-theft (last visited Oct. 11, 2012); *see also* Winning Wage Justice, *supra* note 10, at 6.

15 Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 21 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.

("NELP"),[16] defines "low-wage industries" as industries in which the average hourly wage for front-line workers (workers other than management) was less than 85% of New York City's average wage.[17] The "85% threshold" is a measure commonly used to identify low-wage industries.[18] Other scholars have defined low-wage jobs as those in which a full-time, year-round worker earns less than the poverty threshold for a family of four (two adults and two children).[19] NELP used 2000 Census data to create a list of industries in New York City in which median wages fell below 85% of the city's average hourly wage.[20] Examples of low-wage industries include restaurant work, poultry processing, janitorial services, garment manufacturing, agricultural jobs, domestic homecare workers, and retail.[21] Studies show the low-wage workforce is majority female[22] and foreign-born undocumented women workers are most likely to experience workplace violations.[23]

New job growth since the recent "Great Recession" has been

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16 WORKING WITHOUT LAWS, *supra* note 6, at 12–13.

17 *Id.* at 54.

18 *Id.*

19 HEATHER BOUSHEY ET AL, UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 2 (2007), *available at* http://inclusionist.org/files/lowwagework.pdf (defining low-wage work with wage-based definitions, as opposed to approaches that describe low-wage workers as those whose annual earnings are below a certain threshold and describing two alternative ways of calculating what is a low-wage job, the basic-income approach and the social-inclusion approach).

20 WORKING WITHOUT LAWS, *supra* note 6, at 54.

21 *See* NAT'L EMP'T LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF LABOR STANDARDS FOR LOW-WAGE WORKERS 6–7 (Oct. 2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf. The 2006 policy update lists resources and statistics on wage and hour violations in many low-wage sectors, barriers to enforcing wage and hour laws, and recommendations for improvement, naming examples of successful legislative and organizing campaigns. Statistics of violations in low-wage industries include: nearly 80% of workers in the agriculture industry are underpaid, in 2000 the U.S. Department of Labor ("U.S.DOL") has found that 100% of poultry processing plants were in violation of wage and hour laws, in 2005 a study found that the majority of employers in the New York City restaurant business "were not in compliance with overtime and minimum wage laws," in 2001, "about half of the garment-manufacturing businesses in New York City were in violation of the Fair Labor Standards Act," in 2000, "the U.S.DOL found that 60% of nursing homes routinely violated overtime, minimum wage, and/or child labor laws," 26% of domestic homecare workers earn below the poverty line, and 67% of workers do not receive overtime payment.

22 Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LABOR REV., Sept. 2000 at 26, *available at* www.bls.gov/opub/mlr/2000/09/art3full.pdf.

23 NAT'L EMP'T LAW PROJECT, WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: SUMMARY OF FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY (Aug. 2011), *available at* http://www.nelp.org/page/-/Justice/2011/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf?nocdn=1.

primarily concentrated in low-wage industries. These industries have accounted for 49% of recent job growth in the private sector between January 2010 and January 2011.[24] U.S. Bureau of Labor statistics also show an increase in the number of low-wage workers in New York State: in 2009 there were 192,000 low-wage workers in the state, compared to 95,000 in 2005.[25] This suggests that many workers' current job prospects are in low-wage industries. Thus, combating wage theft amongst low-wage industries is increasingly important.

Wage theft, while causing individual workers to suffer economic losses, also impacts the economy as a whole and unfairly disadvantages employers who comply with the law. The effects of wage theft on individual workers and their families can be devastating, as minimum-wage workers bring home more than half (54%) of their family's weekly earnings.[26] Low-wage workers who are victims of wage theft still have to pay rent, feed themselves and their family, and pay for childcare or education costs.[27] Additionally, workers who suffer wage theft therefore have less money to save for future expenses.[28] Researchers "estimate that [New York City] workers lose an average of $3,016 annually" because of wage and hour violations, "out of total annual earnings of $20,644."[29] Subsequently, workers had approximately 15% of their earnings lost due to wage theft.[30] Researchers also estimate that approximately 317,263 workers in New York City suffer at least one pay-based labor law violation per week, meaning that low-wage workers lose

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24 NAT'L EMP'T LAW PROJECT, A YEAR OF UNBALANCED GROWTH: INDUSTRIES, WAGES, AND THE FIRST 12 MONTHS OF JOB GROWTH AFTER THE GREAT RECESSION 4 (Feb. 2011), *available at* http://www.nelp.org/page/-/Justice/2011/UnbalancedGrowthFeb2011.pdf?nocdn=1 (analyzing eighty-two detailed industries and creating three groups based on their median wages: lower-wage, mid-wage, and higher-wage industries, and tracking the job losses and job growth of each group).

25 JACOB MEYER & ROBERT GREENLEAF, COLUMBIA LAW SCHOOL NAT'L STATE ATTORNEYS GEN. PROGRAM, ENFORCEMENT OF STATE WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS 55 (Apr. 2011), *available at* http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=551819&rtcontentdisposition=filename%3DWage%20and%20Hour%20Report%20FINAL.pdf (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR JUSTICE STATISTICS, CHARACTERISTICS OF MINIMUM WAGE WORKERS, http://www.bls.gov/cps/earnings.htm#minwage (workers at or below minimum wage).

26 *See* KAI FILION, ECON. POLICY INST., MINIMUM WAGE ISSUE GUIDE 2–3 (Jul. 21, 2009).

27 *See* BOBO, *supra* note 12, at 22.

28 *Id.*

29 WORKING WITHOUT LAWS, *supra* note 6, at 6.

30 *Id.*

more than $18.4 million per week combined,[31] money that is not able to be reinvested in the community. Using these figures, wage theft can be said to account for nearly $1 billion annually in stolen wages for low-wage workers in New York City.[32] Less disposable income translates into less money spent at local businesses.[33] In addition, ethical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs than their dishonest competitors who are increasing profits by violating the law.[34] Furthermore, dishonest employers steal from taxpayers when they do not pay their fair share of payroll taxes.[35]

B. Illustrating the Problem: Wage Theft Statistics in New York City

1. Minimum Wage Violations

Statistics show that in New York City alone, many workers receive far less than the minimum wage mandated by law. Twenty-one percent of the workers surveyed (male and female) were paid less than the minimum wage in their previous workweek, and more than 50% were underpaid by more than $1 an hour.[36] At least one-third of the workers in laundry and dry-cleaning businesses, in private households, in beauty salons, nail salons, barbershops, and grocery stores were paid less than the minimum wage.[37] Immigrant women suffered especially high rates of minimum wage violations. Forty percent of unauthorized immigrant women in the study suffered violations in the week prior to the study, compared to 13% of U.S.-born women and 24% of foreign-born authorized immigrant women (and 10% for U.S.-born men).[38] Latino/a workers suffered higher rates of minimum wage violations than Asian, black, or white workers (U.S.-born white workers in the sample did not report minimum wage violations).[39] Also, there was little variation of minimum wage violation rates between immigrant workers (male and female) who had recently settled in the U.S. and those who had been here for more than six years, as well as little difference in violation rates amongst immigrants (male and female) who spoke

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31 *Id.*
32 *Id.* at 44.
33 WINNING WAGE JUSTICE, *supra* note 10, at 6.
34 *See* BOBO, *supra* note 12, at 22.
35 *Id.*; s*ee also* WINNING WAGE JUSTICE, *supra* note 10, at 6–7.
36 WORKING WITHOUT LAWS, *supra* note 6, at 18.
37 *Id.* at 26.
38 *Id.* at 38, 40.
39 *Id.* at 38.

English well and those who spoke little English.[40]

2. Overtime Violations

Lack of overtime pay[41] is a serious wage and hour violation that affects countless workers in New York City alone. Regarding overtime violations, 36% of male and female workers surveyed worked more than forty hours during the previous workweek and are therefore eligible to receive overtime pay. Amongst these workers, a shocking 77% were not paid the legally required overtime pay (the average worker had worked over thirteen hours extra, without proper compensation).[42] Overtime violation rates were very high amongst *all* industries included in the survey; these violations were highest among hairdressers, cosmetologists, and laundry and dry-cleaning workers.[43] Ninety-eight percent of workers in these occupations who worked more than forty hours a week in the previous workweek suffered overtime violations.[44] The personal and repair services, social services, child day care centers, and schools combined had a 97% rate of overtime violations[45] Eighty-five percent of workers in private households also reported that they did not receive payment due for overtime.[46] As one workers' rights advocate put it, it can seem like "nobody pays overtime."[47]

Immigrant workers disproportionately suffered from overtime violations, and undocumented immigrant female workers reported higher rates of overtime violations than documented immigrant fe-

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40 *Id.* at 38, 39.

41 29 U.S.C. § 207(a)(1) (2011) (after forty hours of work for the same employer in one workweek, employees are due payment at a rate not less than one and one-half times the employee's regular rate of pay); 29 U.S.C. § 213 (2011) (under FLSA, certain positions are exempt from overtime coverage); U.S. DEP'T OF LABOR, E-LAWS-FAIR LABOR STANDARDS ACT ADVISOR: EXEMPTIONS, http://www.dol.gov/elaws/esa/flsa/screen75.asp (listing positions exempt from overtime coverage); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2011) (overtime is calculated the same under New York State Labor Law as under FLSA); *Frequently Asked Questions*, N.Y. STATE DEP'T OF LABOR, WAGES AND HOURS, http://www.labor.ny.gov/workerprotection/laborstandards/faq.shtm#5 (last visited Oct. 11, 2011) (where an employee is subject to both the state and federal overtime laws, the employee is entitled to overtime according to the law that would provide the higher rate of pay); *see also* U.S. DEP'T OF LABOR, E-LAWS-FAIR LABOR STANDARDS ACT ADVISOR: WHEN IS OVERTIME PAY DUE?, *available at* http://www.dol.gov/elaws/faq/esa/flsa/011.htm2.

42 WORKING WITHOUT LAWS, *supra* note 6, at 18, 20.

43 *Id.* at 29–30.

44 *Id.* at 29.

45 *Id.* at 29–30.

46 *Id.*

47 Conversation between the author and immigrant workers' rights advocate. Summer 2010.

male workers. Eighty-three percent of immigrant workers reported overtime violations, compared with 63% for U.S.-born survey participants (with foreign-born men suffering slightly more than foreign-born women).[48] Amongst immigrant workers, unauthorized foreign-born women workers had a 90% overtime violation rate, compared to 75.5% for authorized women immigrant workers.[49] U.S.-born women workers reported a 74% rate of overtime violations, compared to 51% for U.S.-born males.[50] In contrast to minimum wage violations, English-speaking ability did make a difference for overtime violation rates: immigrant workers who reported that they did not speak English well or at all reported a violation rate of 89%, compared with a 68% violation rate amongst workers who reported speaking English well or very well.[51]

3. Illegal Retaliation Against Workers

Many workers are afraid to speak up about unsafe working conditions or unpaid wages because of a well-founded fear of retaliation.[52] Twenty-three percent of respondents made a complaint about unsafe working conditions or unpaid wages.[53] Forty-two percent of these respondents reported that their employers had taken negative actions after they spoke out: 74% had their hours cut or received less desirable assignments, 32% were fired or suspended, 32% were threatened with firing or deportation, and 31% were harassed or had an increase in work load.[54] Twenty-three percent of the total workers surveyed reported that even though they experienced serious problems at work in the last year, such as on-the-job safety issues, wage theft, or discrimination, they did not make a complaint, for fear of retaliation.[55]

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48 WORKING WITHOUT LAWS, *supra* note 6, at 41.

49 *Id.*

50 *Id.*

51 *Id.*

52 *See* Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) (workers fear retaliation by their employers that may cause employees to accept substandard conditions); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058–59 (N.D. Cal. 1998); Aguilar v. Baine Services Sys., Inc., 538 F. Supp. 581, 584 (S.D.N.Y. 1982) (employees not only stand to lose their jobs if they speak up, but their dignity and ability to provide for their families).

53 WORKING WITHOUT LAWS, *supra* note 6, at 22.

54 *Id.*

55 *Id.* at 22–23.

III. Federal and New York State Laws Governing Wage Theft

A. Federal Law: The Fair Labor Standards Act

The federal law governing wage theft is the Fair Labor Standards Act ("FLSA").[56] Enacted in 1938,[57] it provides for a federal minimum hourly wage,[58] in addition to other provisions that protect workers' rights. For example, FLSA mandates that employers must pay overtime at a rate of time and a half of the employee's regular rate of pay if employees work over forty hours a week.[59] In addition, FLSA bans employers from retaliating against an employee for asserting his or her rights guaranteed by FLSA.[60] FLSA defines "employee" as "any individual employed by an employer."[61] An "employer" is broadly defined as "any person acting directly or indirectly in the interest of an employer, in relation to an employee,"[62] and defines "employ" as "to suffer or permit to work."[63] FLSA coverage is thought of in two ways: individual and enterprise.[64] Individual FLSA coverage extends to workers who are directly engaged in interstate commerce or in production of goods for interstate commerce.[65] Enterprise coverage extends to employees who are employed by a business that is engaged in interstate commerce or in the production of goods for interstate commerce.[66] Businesses with annual gross value of sales of over $500,000 a year are by definition engaged in interstate commerce, and all of its employees are covered under FLSA.[67] Not all workers are covered under FLSA; if a worker's employer is not involved in a business that is deemed to be involved in interstate commerce, or if the business's annual sales are less than $500,000 (as is the case with many small restaurants and shops), then a worker's only rem-

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56 29 U.S.C. §§ 201–219 (2011).

57 *Id.*

58 *Id.* § 206(a)(1) (current federal minimum wage is $7.25 an hour).

59 *Id.* § 207(a)(1)-(2) (creating the eight-hour work day).

60 *Id.* § 215(a)(3).

61 *Id.* § 203(e)(1).

62 *Id.* § 203(d).

63 *Id.* § 203(g).

64 *See* Wage and Hour Division, U.S. Dep't of Labor, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA) (July 2009), *available at* http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.; *see also id.* §§ 203(a), (r)(1).

65 Wage and Hour Div., U.S. Dep't of Labor, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (July 2009), *available at* www.dol.gov/whd/regs/compliance/whdfs14.pdf.

66 *See* 29 U.S.C. § 203(s)(1)(A) (2011). The FLSA contains a lengthy list of employees who are exempt from some of its provisions. *Id.* § 213.

67 *Id.* § 203(s)(1)(A).

edy is governed by state labor laws. Undocumented immigrant workers are eligible to seek redress under FLSA.[68]

Workers covered under FLSA may bring administrative actions[69] and also have a private right of action[70] (for violations of unpaid wages, overtime, or retaliation, for example). Administrative complaints may be filed with the U.S. Department of Labor ("U.S. DOL").[71] The U.S. DOL will investigate the claim and has the right to file an action against the employer.[72] Advocates have critiqued the U.S. DOL for a shortage of staffing, resulting in long wait times for workers' claims to be resolved.[73] Advocates also claim that the U.S. DOL does not administer strict penalties to employers who violate the law.[74] The Brennan Center for Justice analyzed data relating to the U.S. DOL's Wage and Hour Division enforcement activities during the years 1975–2004.[75] The organization found that the Department's resources and activities to enforce wage and hour laws had declined while the number of workers and workplaces in the U.S. had increased.[76] A March 2009 report by the Government Accountability Office determined that the U.S. DOL's Wage and Hour Division only successfully investigated one out of ten cases brought to the Department by undercover agents.[77] According to the U.S. DOL, in 2010 the number of Wage and Hour

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68 *See* NAT'L EMP'T LAW PROJECT & NAT'L IMMIGRATION LAW CTR., IMMIGRATION AND LABOR ENFORCEMENT IN THE WORKPLACE: THE REVISED DOL-DHS MEMORANDUM OF UNDERSTANDING 3 (2011), *available at* http://www.nelp.org/page/-/Justice/2011/ImmigrationLaborEnforcementWorkplace.pdf?nocdn=1 (indicating that the Department of Labor and Department of Homeland Security reiterate that immigration enforcement will not interfere with employment and labor rights enforcement in the workplace).

69 29 U.S.C. § 216(c) (2011).

70 *See* U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., BRIDGE TO JUSTICE: WAGE AND HOUR CONNECTS WORKERS TO NEW ABA-APPROVED ATTORNEY REFERRAL SYSTEM, *available at* http://www.dol.gov/whd/resources/ABAReferralPolicy.htm (last visited Dec. 3, 2012).

71 *See How to File a Complaint*, U.S. DEP'T OF LABOR, www.dol.gov/wecanhelp/howtofilecomplaint.htm (last visited Dec. 3, 2012).

72 29 U.S.C. § 216(c) (2011).

73 *See generally* Todd A. Palo, *Minimum Wage, Justifiably Unenforced?*, 35 SETON HALL LEGIS. J 36, 44 (2010).

74 *Id.* at 48.

75 Annette Bernhardt & Siobhán McGrath, *U.S. Trends in Wage and Hour Enforcement by the U.S. Department of Labor: 1975-2004*, BRENNAN CTR. FOR JUSTICE (Sept. 2005), http://www.nelp.org/page/-/EJP/TrendsInEnforcement2005.pdf.

76 *See id.*

77 GREGORY D. KUTZ & JONATHAN T. MEYER, U.S. GOV'T ACCOUNTABILITY OFFICE, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 4 (Mar. 2009), *available at* http://www.gao.gov/products/GAO-09-458T.

Division investigators increased, allowing the agency to reduce the backlog of complaints and conduct more targeted investigations of industries at high-risk of wage and hour law violations.[78]

A worker covered by FLSA may also choose to exercise a private (civil) right of action against the employer, for violations of minimum wage, overtime, and anti-retaliation provisions.[79] The statute of limitations is two years; three years if the employer's violation is found to be willful.[80] Under a FLSA civil claim, a court may award damages in the amount of unpaid minimum wages and overtime due, plus liquidated damages in the amount equal to the unpaid wages.[81] Workers may receive reasonable attorney's fees in FLSA private civil suits.[82]

Many low-wage workers are exempt from coverage. Multiple low wage industries are exempt from FLSA's minimum and maximum hours requirements[83] and certain child labor provisions.[84] Examples include seasonal amusement park workers,[85] camp workers,[86] employees in the catching, farming, and processing of seafood,[87] some agricultural workers,[88] babysitters,[89] and domestic caretakers of the elderly.[90] Employees employed by businesses that report less than $500,000 annual gross revenue do not have to comply with FLSA.[91] Finally, "independent contractors" are not covered under FLSA.[92] By having employees fill out IRS form 1099s (the form used by independent contractors) instead of W-2 forms, employers avoid FLSA minimum wage requirements.[93] Therefore, access to state law remedies and state enforcement agencies is key

78 U.S. DEP'T OF LABOR, AGENCY FINANCIAL REPORT FISCAL YEAR 2010 15 (2011), *available at* http://www.dol.gov/_sec/media/reports/annual2010/2010annualreport.pdf.

79 29 U.S.C. § 216(b) (2011).

80 *Id.* § 255(a).

81 *Id.* § 216(b).

82 *Id.*

83 *Id.* § 213.

84 *Id.* § 213(c).

85 29 U.S.C. § 213(a3) (2011).

86 *Id.*

87 *Id.* § 213(a5).

88 *Id.* § 213(a6).

89 *Id.* §213(a15).

90 *Id.*

91 29 U.S.C. § 203(s)(1)(A)(ii) (2011).

92 *Id* § 203(r)(1) (2011).

93 *See* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 378–79 (2008); *see also* NAT'L EMP'T LAW PROJECT, 1099'D: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (2005), *available at* http://www.nelp.org/page/-/Justice/1099edFactSheet2010.pdf?nocdn=1.

to addressing wage theft, because not all workers are covered by federal law.

B. New York State Labor Law

1. General Provisions

As in other states, New York State has its own law governing wage and hour violations, the New York State Labor Law ("NYS LL").[94] Similar to federal law, workers may file an administrative complaint with the New York State Department of Labor ("NY DOL"),[95] or file a private civil suit in state court. The statute of limitations is six years.[96] According to NYS LL, the state minimum wage must equal or exceed the federal minimum wage.[97] The law regarding overtime requirements is similar to FLSA,[98] as employers are required to pay workers who work over forty hours a week the overtime pay rate of one-and-a-half times their regular rate of pay.[99] However, NYS LL provides for an additional extra hour of minimum wage pay owed to the employee if he or she works more than ten hours in a single day.[100] New York's definitions of employee and employer are similar to FLSA definitions.[101] As it is a state law, the NYS LL extends coverage to all workers throughout the state. Like FLSA,[102] the NYS LL allows for attorney's fees for the prevailing party.[103] Similar to the U.S. DOL policy,[104] the New York State Attorney General issued an opinion in 2003 expressing that undocumented workers may assert their rights under the NYS LL without fear of immigration consequences.[105] While undocumented workers are covered by the NYS LL, many workers do not realize this, and many employers take advantage of this situation.[106]

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94 N.Y. LAB. LAW §1 *et seq.* (McKinney 2011).

95 *See infra* notes 108–20, 213–27 and accompanying text for further discussion about the NY DOL.

96 N.Y. LAB. LAW §§ 198(3), 663(3) (McKinney 2011).

97 *Id.* § 652(1) (New York State minimum wage is currently $7.25/hour, the same as federal law).

98 29 U.S.C. § 207(a)(1)–(2) (2011).

99 N.Y. COMP. CODES R. & REGS. tit.12, § 142–2.2 (2011).

100 *Id.* §§ 137-1.7, 142–2.4; WORKING WITHOUT LAWS, *supra* note 6, at 20.

101 N.Y. LAB. LAW §§ 651(5)–(6) (McKinney 2011). *Compare with* 29 U.S.C. § 203(e)(1) –(5) (2011).

102 29 U.S.C. § 216(b) (2011).

103 N. Y. LAB. LAW §§ 198(1-a), 663(1) (McKinney 2011).

104 *See supra* note 68 and accompanying text.

105 Formal Opinion No. 2003-F3, N.Y. Op. Atty. Gen. No. F3, 2003 WL 22522840 (N.Y.A.G. Oct. 21, 2003).

106 Interview with Amy Carroll, former Legal Director, Make the Road New York, in N.Y.C. (Aug. 11, 2011). Notes on file with the author.

NYS LL is especially important to low-wage workers, as many businesses produce less than $500,000 in annual gross revenues and do not produce goods for interstate commerce and are not covered by FLSA. Thus, for many New Yorkers who work in small businesses—such as restaurants, landscaping, and construction companies—NYS LL is the only remedy available.[107]

2. New York State Labor Law Reform

a. *History of Workers' Rights Organizations' Advocacy Efforts to Reform the New York State Labor Law*

Workers' rights advocates in New York State have long called for better protections against wage theft and for the NY DOL to improve enforcement regarding wage and hour violations.[108] Citing a lack of enforcement by the NY DOL and insufficient penalties that did not deter employers from violating the law, immigrant workers from The Workplace Project in Long Island, NY, lobbied for The Unpaid Wages Prohibition Act ("UWPA"), which passed in 1997.[109] The UWPA's main provisions altered the NYS LL to create a felony offense for wage theft and increased fines for repeat offenders (from $200–$10,000 to $500–$20,000).[110] The law also increased civil penalties for repeat or willful offenders of nonpayment of wages, so that employers must pay an increased fine to the NY DOL up to an additional 100% (or double) the amount of wages owed to the worker.[111] In addition, because of the 1997 law, NY DOL investigations are now required to review violations for six years prior to the commencement of an action, as opposed to two years as was former NY DOL practice.[112]

The Unpaid Wages Prohibition Act, while a step in the right direction, did not effectively address wage theft in New York State.

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107 *See* JENNIFER GORDON, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW 39 n.8 (Sept. 1999), *available at* http://carnegieendowment.org/files/imp_wp4gordon.pdf.

108 *See* CAMPAIGN TO END WAGE THEFT, PROTECTING NEW YORK'S WORKERS: HOW THE STATE DEPARTMENT OF LABOR CAN IMPROVE WAGE-AND-HOUR ENFORCEMENT 16 (Dec. 2006), *available at* http://www.mfy.org/wp-content/uploads/reports/Protecting-Workers-Dept-of-Labor.pdf (many of these provisions were included in the WTPA) [hereinafter CAMPAIGN TO END WAGE THEFT].

109 GORDON, *supra* note 107, at 3–9 (the Act altered the following provisions of the NYS LL: Creation of 196-A, 198.3, 198-a, creation of 199-A, 218.1); *see also* N.Y. LAB. LAW §§ 196(A), 198.3, 198-a, 199-A, 218.1 (McKinney 2011).

110 N.Y. LAB. LAW § 198-a (McKinney 2011).

111 N.Y. LAB. LAW § 218.1 (McKinney 1997), *amended by* N.Y. LAB. LAW § 218.1 (McKinney 2010).

112 N.Y. LAB. LAW § 198.3 (McKinney 2011); *see also* GORDON, *supra* note 107, at 7

Organizers of the legislation focused on targeting repeat offenders, but many employers who were committing wage theft were never caught to begin with.[113] Organizers also claimed that the NY DOL did not use the new tools that the law had given the agency.[114] After the law was passed, the Workplace Project reported an increase in workers who came to their offices and became involved with the organization.[115] The bill did not require additional spending and did not directly attack the agency's practices.[116] These two aspects were perhaps reasons why the bill was able to pass, but organizers caution that it may have also "undermined its effectiveness."[117]

> Because the Workplace Project did not continue to focus its organizing and advocacy work for the implementation of the law as it had for its passage, the Department of Labor was let off the hook. Without ongoing activism and bad publicity, the DOL had little incentive to do things differently after the bill became law.[118]

A main goal of the legislation itself was to deter employers from stealing wages, so that even if the agency was not able to do its job, the law would be "self-enforcing."[119] Deterrence is very difficult to measure. Workers' rights advocates continued to fight wage theft after the implementation of the law, suggesting that the law did not adequately address wage theft in New York. For example, in 2006, nine years after the law was passed, workers' rights advocates declared it to be "open season on low wage workers, because employers know they can violate the law with impunity."[120]

In 2009, after requests from MRNY Workplace Justice Project committee members and many consultations with MRNY organizers, the organization's legal team began drafting legislation to

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113 *See* GORDON, *supra* note 107, at 30–32.

114 *Id.* at 31. For example, wage theft activists report that it is not agency practice for the NY DOL to investigate violations for six years prior to the commencement of an action, as they are required to do by the NY LL. Interview with Amy Carroll, *supra* note 106.

115 GORDON, *supra* note 107, at 32.

116 *Id.*

117 *Id.*

118 *See id.*, at 32 (quoting Jennifer Gordon, former director of The Workplace Project).

119 *Id.*

120 Press Release, Brennan Ctr. for Justice, Report Urges Better Enforcement of Minimum Wage and Overtime Laws (Dec. 13, 2006), *available at* http://www.brennancenter.org/content/resource/report_urges_better_enforcement_of_minimum_wage_and_overtime_laws/ (quoting Amy Carroll, former Legal Director of Make the Road New York).

reform the NYS LL. During the past fourteen years MRNY has won millions of dollars in unpaid wages and damages for their primarily low-wage, Latino/a immigrant members.[121] Despite their victories for individual workers, immigrant workers continued to suffer wage theft.[122] As MRNY directors wrote in a recent article, wage theft became a policy priority because of their members' experiences "combating wage theft, facing retaliation, and attempting to collect on judgments when they won."[123] According to MRNY, the existing law's provisions did not create incentives for employers to comply with the law; penalties for wage theft were very low, as was the chance of getting caught.[124] The bill also needed to address the difficulty in receiving unpaid wages and damages. As Amy Carroll, the former Legal Director at MRNY and lead drafter of the WTPA, aptly said, "winning cases is easy but finding the money is hard."[125] From the very beginning of the campaign, organizers pitched the law as targeting lawbreakers; the messaging conveyed that law-abiding employers do not have anything to fear, because this law would impact only those who were stealing wages.[126] MRNY conducted extensive research on other states' labor laws and FLSA.[127] MRNY Workplace Justice Project Committee members were surprised to find out that even Arizona, a state that has come under scrutiny for its harsh anti-immigrant laws, offered better worker protections than NYS LL.[128]

In 2010 Senator Diane Savino and Assemblyman Carl Heastie introduced the WTPA in the New York State Senate and Assembly, respectively.[129] Advocates hailed the Act as a "key component of

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121 *Advocacy Story*, *supra* note 3, at 154.

122 *Id.*

123 *Id.*

124 *Id.* at 1.

125 Interview with Amy Carroll, *supra* note 106.

126 *Id.*

127 *Id.*

128 23 ARIZ. REV. STAT. ANN. §§ 23-362, 364 (2007) (Arizona's revised labor law, the "Raise the Minimum Wage for Working Arizonans Act," which includes similar enforcement provisions to the WTPA). Arizona has come under fire for the anti-immigrant bill SB1070. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, http://www.nytimes.com/2010/04/24/us/politics/24immig.html.

129 *See Senator Savino Introduces Bill to Protect Workers from Wage Theft*, N.Y. STATE SENATOR DIANE J. SAVINO, http://www.nysenate.gov/video/2010/mar/12/senator-savino-introduces-bill-protect-workers-wage-theft (last visited Oct. 11, 2011). The Wage Theft Prevention Act was supported by various organizations in addition to MRNY, including United Food & Commercial Workers Local 1500, Small Business United For Health Care, The Working Families Party, Retail, Wholesale & Department Store Union, 32BJ SEIU, New York Hotel & Motel Trades Council, 1199 SEIU, Drum Major

the fight to end wage theft in New York."[130] After a series of amendments to the bills, negotiated over a nine-month period, the WTPA passed in both houses of the New York State Legislature and was signed by Governor Patterson on December 13, 2010.[131] The law was enacted on April 9, 2011.[132] Subsequent sections of this paper will discuss key provisions of the WTPA and its effect on NYS LL, and how it better addresses the insidious problem of wage theft in New York State than the former NYS LL. Key provisions include: increasing economic incentives for employers to comply with the law, thus deterring employers from violating the NYS LL; protecting workers against unlawful retaliation by increasing penalties for employers; ensuring that workers are able to collect unpaid wages after judgments in their favor; improving record-keeping provisions; and expanding the required notice given to employees about wage rates. These provisions will be discussed in detail in subsequent sections of this paper.

b. *New Law for Workers' Rights: A Discussion of Substantive Sections and Goals of the WTPA*

The following sections describe the main goals of the WTPA. Topics include substantive changes to the NYS LL and MRNY's reasons for targeting specific provisions.

i. Economic Incentives for Employers to Comply with the Law

Workers' rights advocates in New York have long complained that former NYS LL provisions did not effectively deter employers from breaking the law and committing wage theft.[133] Increasing economic incentives for employers to comply with the law is a key theme of the WTPA, in hopes of deterring wage theft. Prior to the WTPA, NYS LL allowed for liquidated damages of an additional

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Institute for Public Policy, New York State AFL-CIO, Morton Williams Supermarkets, The National Employment Law Project, New York State Trial Lawyers Association, New York Communities for Change, Workers Rights Law Center, and MFY Legal Services, Inc.

130 Annette Bernhardt, *Testimony Before the New York City Council, Committee on Civil Service and Labor Regarding Proposed Resolution 245-A* (Nov. 10, 2010), *available at* www.nelp.org/page/-/Justice/. . ./NYCwagethefttestimonyNov2010.

131 *Governor Patterson Signs Into Law the Wage Theft Prevention Act*, LABOR AND EMP'T N.Y. (Dec. 20, 2010, 12:50 PM), http://nysbar.com/blogs/LELblog/2010/12/governor_paterson_signs_into_l_3.html.

132 *Id.*

133 *See Advocacy Story*, *supra* note 3, at 154.

25% of the unpaid wages,[134] an amount thought to be token and no real deterrence.[135] The WTPA increased the maximum amount of liquidated damages up to 100%,[136] meaning that employers may now have to pay up to double the amount of wages owed to workers. Like the WTPA, twenty-one states plus the District of Columbia provide for double damages,[137] while seven states provide for treble damages (back pay plus 200% liquidated damages) for minimum wage violations and/or payment of wages violations.[138] This increase may help deter employers from violating the NYS LL, since they will suffer greater economic consequences and have to pay double the amount they would have had to pay workers in the first place. This increase in liquidated damages provides that a worker may receive an equal amount of liquidated damages under NYS LL or FLSA (workers are able to recover 100% liquidated damages under FLSA).[139]

ii. Protecting Workers Against Retaliation by Punishing Employers who Retaliate

Illegal retaliation was one of the main concerns of MRNY members and staff, because they saw the threat as preventing employees from pursuing claims for unpaid wages or workplace violations.[140] Many MRNY members feared employers would call

134 N.Y. LAB. LAW § 198(1-a) (McKinney 2009), *amended by* L. 2010, c. 564 § 7.

135 *See Advocacy Story, supra* note 3, at 154–55.

136 N.Y. LAB. LAW § 198 (McKinney 2011).

137 Alaska: ALASKA STAT. § 23.10.110(a) (1995); Arkansas: ARK. CODE ANN. § 11-4-218(a)(2) (2006); California: CAL. LABOR CODE §§ 1194.2(a) (West 2011), 2673.1(e) (West 1999); Colorado: COLO. REV. STAT. § 8-4-109(3)(a)-(b) (2007); Connecticut: CONN. GEN. STAT. §§ 31-68(a) (1963), 31-72 (1967); Weems v. Citigroup, Inc., 289 Conn. 769 (2008); District of Columbia: D.C. CODE § 32-1012(a) (1993); Florida: FLA. STAT. § 10.24(e) (2004); Georgia: GA. CODE ANN. § 34-4-6 (1970); Hawaii: HAW. REV. STAT. § 387-12(b) (1999); Indiana: IND. CODE § 22-2-2-9 (1986); Kansas: KAN. STAT. ANN. § 44-315(b) (1999); Kentucky: KY. REV. STAT. ANN. § 337.385(1) (West 2010); Minnesota: MINN. STAT. § 177.27(8) (2009); Missouri: Mo. Rev. Stat. § 290.527 (2006); Montana: MONT. CODE ANN. §§ 39-3-206(1) (1993); MONT. CODE ANN. § 39-3-407 (1979); North Carolina: N.C. GEN. STAT. § 95-25.22(a1) (1991); North Dakota: N.D. CENT. CODE § 34-14-09.1(2) (1989); Oklahoma: OKLA. STAT. tit. 40, § 197.9 (1965); Oregon: OR. REV. STAT. § 652.230(1) (1995); South Dakota: S.D. CODIFIED LAWS § 60-11-7 (2008), Vermont: VT. STAT. ANN. tit. 21, §§ 342a(b) (2006); 395 (2001); and Wisconsin: WIS. STAT. §§109.03(5) (2011); § 109.11(2)(b) (1993).

138 Arizona: ARIZ. REV. STAT. ANN. §§ 23-355(a), 23-364(g) (2012); Idaho: IDAHO CODE ANN. §§ 44-1508(2),45-615 (West 2012); Maine: ME. REV. STAT. tit. 26, §§ 626-A, 670 (2012); Massachusetts: MASS. GEN. LAWS ch. 151, §§ 1B, 20 (2012); Michigan: MICH. COMP. LAWS §§ 408.393, 408.488 (2012); New Mexico: N.M. STAT. ANN. § 50-4-26(c) (2012); and Ohio: OHIO CONST. art. II § 34a.

139 29 U.S.C. § 216 (2011).

140 Interview with Amy Carroll, *supra* note 106.

immigration officials if they spoke out about abuses at the workplace.[141] The WTPA changes key provisions in the NYS LL to more effectively deter employers from unlawfully retaliating against a worker who speaks up about violations such as unpaid wages or workplace safety issues. Nine other states and the District of Columbia also include anti-retaliation provisions in their labor laws.[142] While the NYS LL has always outlawed illegal retaliation,[143] the WTPA expands the protection given to workers and grants the NY DOL more enforcement powers. For example, the WTPA expands the types of criminally prohibited retaliation to include retaliatory actions taken against workers complaining about nonpayment and exercising any other wage and hour rights, closing loopholes allowed under prior law.[144] Threats are now included as a form of retaliatory conduct. Protection against retaliation applies as long as the employee has a good faith belief that the employer has violated the labor law.[145] Under the WTPA, "any person" is prohibited from retaliating against an employee, not just the employer.[146] Regarding costs to employers who retaliate, the NY DOL had the power to fine an employer up to $10,000.[147] With the passage of the WTPA, the DOL can now order the person who retaliated against the employee to pay the employee up to $10,000 in liquidated damages as well.[148]

The WTPA contains similar provisions regarding retaliation as those contained in FLSA. Under FLSA, "any person"[149] who willfully retaliates against an employee may be "subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both."[150] FLSA also provides for such "legal or equitable relief as may be appropriate," including reinstatement of the employee.[151] FLSA also provides for liquidated damages equal to

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141 *Id.*

142 Arizona: ARIZ. REV. STAT. ANN. §§ 23-364(b), (g) (2012); California: CAL. LAB. CODE §§ 98.6, 1171.5 (West 2012); Connecticut: CONN. GEN. STAT. § 31-69b (2012); District of Columbia: D.C. CODE § 32-1010 (2012); Idaho: IDAHO CODE ANN. § 44-1509 (2012); Illinois: 802 ILL. COMP. STAT. 105/11(c) (2012); Massachusetts: MASS. GEN. LAWS ch. 151 § 19(1) (2012); Michigan: MICH. COMP. LAWS § 408.483 (2012); New Mexico: N.M. STAT. ANN. § 50-4-26.1 (2012); and Ohio: OHIO CONST. art. II, § 34a.us

143 N.Y. LAB. LAW § 215 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.

144 N.Y. LAB. LAW § 215(3) (McKinney 2011).

145 *Id.* § 215(1)(a).

146 *Id.*

147 N.Y. LAB. LAW § 215 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.

148 N.Y. LAB. LAW § 215(1)(b) (McKinney 2011).

149 29 U.S.C. § 215(a)(3) (2011).

150 *Id.* § 216(a) (2011).

151 *Id.* § 216(b) (2011).

the amount of lost wages, but does not provide for up to $10,000 in liquidated damages, as does NYS LL, altered by the WTPA.[152]

iii. Ensuring that Workers are Able to Collect Unpaid Wages by Granting Courts and the NY DOL the Necessary Mechanisms to Enforce Judgments

WTPA provisions address the fact that many MRNY members never receive payment after they receive judgments in their favor. Under prior NYS LL, the NY DOL did not have the power to obtain asset information in order to assist with collecting unpaid wages,[153] nor does FLSA provide this power to the U.S. DOL.[154] The WTPA grants courts and the NY DOL the power to freeze assets and order increased penalties after employers default on judgments. If the Labor Commissioner of the NY DOL issues an Order to Comply against an employer and they have yet to pay the employee the wages due, the NY DOL may now order the employer to provide a list of their assets ten days after the appeal period ends.[155] In addition, if the employer does not provide the NY DOL with a list of assets (such as bank accounts and real property), courts have the authority to award up to $10,000 civil penalty for lack of compliance.[156] This is extremely important because often low-wage workers receive a judgment in their favor but never see the money, because, for example, the employer has transferred his or her assets to someone else, sold the business and moved on, or has disappeared and is nowhere to be found. Finally, the WTPA also provides that where an employer defaults on a final judgment or Order to Comply for more than ninety days, the employer must pay an additional 15% in damages.[157] These increased penalties are meant to deter employers from violating the NYS LL, and portray the message that it is cheaper for employers to comply with rather than violate the law.

iv. Improved Record-Keeping Provisions under the WTPA

The WTPA strengthens existing record-keeping requirements for employers, allowing workers to have more complete information about their wage rates and hours worked. MRNY included these provisions to increase transparency and provide workers with

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152 *Id.*; N.Y. LAB. LAW § 215(1)(b) (McKinney 2011).
153 N.Y. LAB. LAW § 196 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.
154 This provision is not listed in FLSA.
155 N.Y. LAB. LAW § 196(1)(d) (McKinney 2011).
156 *Id.*
157 N.Y. LAB. LAW §§ 198(4), 218(1), 219(1), 663(4) (McKinney 2011).

important information about their wages due.[158] In addition to former NYS LL provisions requiring accurate payroll records, the law now states that employers must keep records on an ongoing basis.[159] For example, employers may not create records after the period of time the employee worked. This helps to prevent fraudulent record-keeping on part of employers, which can be used in an attempt to refute NY DOL investigations regarding unpaid wages or overtime. Additionally, payroll records must now include information regarding how the employee is paid.[160] If the employee is paid by piece rate, the record must detail what rates apply and the number of pieces paid at each rate.[161] While former law required that employers give employees wage statements or pay stubs,[162] the WTPA provides that pay stubs contain additional information, such as the employer's name, address and phone number, dates covered by the payment, and hours worked, including overtime hours.[163] FLSA contains similar provisions to the WTPA; under FLSA, an employer is required to "make, keep and preserve" employment records and state how an employee is paid (for example, by shift), but FLSA does not specify that employers must keep the records on an ongoing basis.[164] Under FLSA, employers are required to keep records for three years,[165] compared to six years under the WTPA.[166]

v. Improved Notice Given to Employees about Wage Rates

The WTPA improves former labor law provisions regarding the wage rate notice that is given to employees prior to employment—increasing the information to be provided, and requiring annual updates—and requires notice of labor law violations to be posted in the workplace. The WTPA also allows for workers to receive up to $2,500 in damages if they do not receive a wage rate notice within their first ten business days on the job, which helps deter employers from non-compliance with the law.[167]

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158 *Advocacy Story*, *supra* note 3, at 155.
159 N.Y. LAB. LAW § 195(4) (McKinney 2011).
160 *Id.*
161 *Id.*
162 N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.
163 N.Y. LAB. LAW §195(3) (McKinney 2011).
164 29 U.S.C. § 211(c) (2011).
165 *Id.*; U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FACT SHEET #21: RECORDKEEPING REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), *available at* http://www.dol.gov/whd/regs/compliance/whdfs21.htm.
166 N.Y. LAB. LAW § 195(4) (McKinney 2011).
167 *Advocacy Story, supra* note 3, at 155; N.Y. LAB. LAW § 198(1-b) (McKinney 2011).

Like the improved record-keeping provisions, MRNY targeted wage-rate notice provisions to increase transparency and information available to the worker.[168] Translation of documents was also a concern of MRNY, because English is a second language for many MRNY members.[169] While the former law required employers to give written notice to each employee about wage rates when they are hired,[170] the WTPA requires employers to provide each new hire and all employees written notice of their wage rates by February 1st of each year.[171]

The WTPA also expands what must be included in the written notice of wage rates. The notice must now include how the employee is paid—by the hour, shift, or day, for example—which will help advocates and the NY DOL better calculate worker's correct wages.[172] The official employer name and any names that the employer uses for business, as well as addresses and phone numbers, must now be included on the notice of wage rate.[173] This helps advocates, the NY DOL, and the workers themselves correctly identify their employer (since employers often hide behind various. "doing business as" names) and contact or locate employers.[174] Wage rate notices must also include any allowances taken out of employees' paychecks.[175] While former NYS LL did not require that the notice be in any language other than English,[176] the notice must now be in English and in the employee's native language; employers may use language templates prepared by the NY DOL.[177]

The WTPA also provides that the NY DOL Commissioner may publicly post violations of the labor law for up to a year in a place visible to employees.[178] For willful violations, the NY DOL Commissioner may post a summary of violations for up to ninety days in a location visible to the public, with misdemeanor charges possible for those who tamper or remove the notice without permission.[179]

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168 *Advocacy Story*, *supra* note 3, at 155; Interview with Amy Carroll, *supra* note 106.
169 Interview with Amy Carroll, *supra* note 106.
170 N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* L.2010, c. 564 § 3.
171 N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).
172 *Id.*
173 *Id.*
174 Interview with Amy Carroll, *supra* note 106.
175 N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).
176 N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* N.Y. LAB. LAW § 195 (McKinney 2010).
177 N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).
178 *Id.* § 219-c.
179 *Id.*

Therefore, employees can now be fully aware of workplace violations committed by their employer, and know to be on the lookout for similar violations. FLSA does not contain a similar provision.[180] MRNY chose to supplement the wage-rate notice provision because of the need for increased language access for immigrant workers. As a result, the improved wage notice requirements allow workers to be aware of correct contact information for their employers as well as important information regarding how they are paid, information that helps facilitate wage and hour claims.

vi. Providing Enforcement Tools to the NY DOL and Improving Agency Process

The WTPA also codifies best practices of the NY DOL and gives the agency tools to more effectively carry out their responsibilities. Based on MRNY Legal Department's experience working with the NY DOL, the organization wanted to provide tools to enable the agency to more efficiently resolve wage and hour violation claims. The WTPA closed various loopholes, clarified inconsistencies in the NYS LL, and codified good practices of the NY DOL, so that pro-worker policies would not be changed by subsequent administrations.[181] For example, the WTPA codifies the NY DOL's practice of keeping employees' identities confidential during an investigation, until necessary to disclose in order to resolve a case.[182] The WTPA also codifies the agency's practice of investigating third party complaints.[183] Prior law contained a loophole that only gave the NY DOL authority to investigate complaints or bring criminal proceedings under Article 6 (nonpayment of wages) of the NYS LL, and not under Article 5 (meal breaks), Article 19 (minimum wage), or Article 19-a (farm workers).[184] The WTPA also tolls the statute of limitations during an NY DOL investigation.[185] This prevents workers from having cases eventually brought in court dismissed because of delays in agency investigations.[186] The new law also gives the NY DOL discretion to assess up to 100% liquidated

180 *But see* 29 U.S.C. § 218b (2011) (employers must post notice of enrollment in a health plan).

181 Interview with Amy Carroll, *supra* note 106.

182 N.Y. LAB. LAW § 196-a(a) (McKinney 2011).

183 *Id.* § 196(1)(b); Interview with Amy Carroll, *supra* note 106.

184 N.Y. LAB. LAW § 196 (McKinney 2010), *amended by* [L 2010, c.564 § 4]; N.Y. LAB. LAW § 218 (McKinney 2010), *amended by* [L.2010, c. 564, § 11]; N.Y. LAB. LAW § 219 (McKinney 2010), *amended by* [L.2010, c. 564, § 12; N.Y. LAB. LAW § 219-c (McKinney 2011).

185 N.Y. LAB. LAW § 198(3) (McKinney 2011).

186 Interview with Amy Carroll, *supra* note 106.

damages during negotiations,[187] increasing the agency's bargaining capabilities to reach settlements quickly.[188]

IV. Objections to the WTPA

Objections to the WTPA include a recent NYS Senate bill that would repeal the WTPA. Bill S.4452, titled "An Act to Repeal the Wage Theft Prevention Act," was introduced on April 6, 2011, by Senator John DeFrancisco, a Republican representing Syracuse and neighboring areas.[189] The justification for the bill claims that New York State has some of the most "anti-business laws in the country, which are making it increasingly difficult for businesses to justify remaining in the state."[190] It proceeds to state that the WTPA increases the burden on businesses and potential liability on employers, "when many are already struggling to survive."[191] Senator DeFrancisco, perhaps sensing that repealing the entire WTPA would not be possible, also introduced Bill S.6063A, calling for the elimination of the annual notice requirement mandated by the WTPA.[192] The bill passed the Senate on February 29, 2012, and is currently in the New York State Assembly for consideration.[193]

Additionally, business groups such as the National Federation of Independent Business and the Business Council of New York State have lobbied against the WTPA.[194] New York State Assembly Minority Leader Brian M. Kolb claims that the WTPA will steal jobs from New York State and create endless paperwork requirements for employers.[195] Assemblyman Kolb also claims that "a few bad ap-

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187 The law mandates up to 100% liquidated damages in an "order to comply," which is issued if settlement is not reached. *See* N.Y. Lab. Law §§ 198, 663 (McKinney 2011).

188 Interview with Amy Carroll, *supra* note 106.

189 S.4452, 2001 S. (N.Y. 2011), *available at* http://open.nysenate.gov/legislation/bill/S4452-2011. As of this writing, the bill was referred to the Labor Committee on January 4, 2012. *Id.*

190 *Id.*

191 *Id.*

192 S.6063A (N.Y. 2012), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S06063&term=&Summary=Y&Actions=Y&Votes=Y&Text=Y

193 *Id.*

194 *See Advocacy Story*, *supra* note 3, at 157; *see also* Press Release, Assembly Minority Leader Brian M. Kolb, *Stop Thief! So-Called "Wage Theft Prevention Act will Steal Away More Jobs and Hurt Businesses*," (Apr. 8, 2011) *available at* http://assembly.state.ny.us/Minority/20110408/.

195 Kolb, *supra* note 194; s*ee also* Brian M. Kolb, *Leader Kolb Again Recognized As A Champion of Small Business—But There Is Still More Work To Do!*, Assemblyman Brian M. Kolb (Aug. 24, 2012), http://assembly.state.ny.us/mem/Brian-M-Kolb/story/49584/.

ples" commit wage theft, therefore the WTPA is unnecessary.[196] Each argument will be addressed in the following paragraphs.

WTPA opponents argue that the law's provisions are more costly and time-consuming for employers. The WTPA alters existing record-keeping requirements in the NYS LL by requiring additional information on pay stubs, such as employer names and addresses.[197] The law also requires that employers provide their employees with annual notice of their wage rates, instead of only at the time of hire,[198] the provision attacked by the recent passage of NYS Senate Bill 6063A.[199] Indeed, the sample form provided by NY DOL is a single page,[200] but Sen. DeFrancisco calls the requirement a "massive, costly mandate on every employer in the state."[201] The WTPA requires that these notices be translated into the employee's native language, and the employer may use document templates translated into different languages provided by the NY DOL.[202] If the NY DOL does not provide a template for the language identified by the employee as his or her primary language, the employer may satisfy his obligation under the law by providing the notice to the employee in English alone.[203] An employer does not have to pay to translate the wage rate notices.[204]

Employers were also required to furnish pay stubs prior to the law.[205] The WTPA provisions create minimal increased paperwork requirements for employers and are not unduly burdensome. It does not mandate any increased business costs, such as an increase in wages. The WTPA will in fact help law-abiding businesses save money. Honest employers will no longer face unfair competition by competitors who save on labor costs by withholding wages due.[206]

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196 *Id.*

197 N.Y. LAB. LAW § 195(3) (McKinney 2011); *see also supra* text accompanying notes 158–66.

198 N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).

199 *See* S.6063A, *supra* note 192.

200 The sample form provided by the NY DOL is available at http://www.labor.ny.gov/formsdocs/wp/WTPA%20Sample%20Wage-Statement.jpg.

201 Dave Jamieson, *Wage Theft Law Targeted for Repeal by New York GOP*, THE HUFFINGTON POST (Mar. 27, 2012, 5:26 PM), http://www.huffingtonpost.com/2012/03/13/wage-theft-law-new-york_n_1342919.html.

202 N.Y. LAB. LAW § 195(1)(b) (McKinney 2011). Templates are provided by NY DOL at http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

203 N.Y. LAB. LAW § 195(1)(c) (McKinney 2011).

204 *See id.* (noting that if an employee speaks a language for which a template is not available from the NY DOL, the employer may comply with this requirement by providing an English-language notice or acknowledgment).

205 N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* [L.2010, c. 564, § 3].

206 *See Advocacy Story*, *supra* note 3, at 157.

Another argument against the WTPA is that only certain employers, "a few bad apples," steal wages from employees, but all employers must comply with the new law. While it is difficult to know exactly how many employers commit wage theft, statistics reveal that it is a widespread problem. As stated previously, it is estimated that wage theft steals $1 billion from New York City workers. In 2010 the NY DOL collected $26.6 million in illegally underpaid wages.[207] The statistics show that the problem of wage theft is endemic and widespread. It is highly unlikely that a problem of this magnitude is created by a few bad apples; but rather it is likely the product of systemic acceptance of lax enforcement and inadequate labor laws.

Finally, WTPA opponents argue that the law will cause businesses to leave New York State en masse, because of increased requirements and costs to businesses. The WTPA is part of a nationwide movement of state labor law reform to fight wage theft.[208] Many states have passed wage theft laws in the last five years.[209] As most wage theft laws are recent, it is difficult to gather statistics regarding the number of businesses who have left states that have increased protections against wage theft. Analyzing business statistics may provide insight regarding the effect of proworker laws on business presence in New York State. U.S. Census Bureau data shows a steady increase in the number of businesses in New York State before the implementation of the Unpaid Wages Prohibition Act in 1997 through 2008, with a slight decline in 2009.[210] It could therefore be inferred that businesses did not leave

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207 Press Release, N.Y. State Dep't of Labor, Labor Department Returns $26.6 Million in Back Wages to Workers in 2010: Second Highest Total in Labor Department History (Jan. 3, 2011), *available at* http://www.labor.ny.gov/pressreleases/2011/january-03-2011.shtm.

208 See the Wage Theft Campaign Map, http://wagetheft.org/campaignmap/campaignmap.html for a list of current wage theft campaigns across the country, including state and local campaigns. WAGE THEFT, http://wagetheft.org/campaignmap/campaignmap.html (last visited Nov. 12, 2012); *see also* TIM JUDSON & CRISTINA FRANCISCO MCGUIRE, WHERE THEFT IS LEGAL: MAPPING WAGE THEFT LAWS IN THE 50 STATES (June 2012), *available at* http://www.progressivestates.org/wagetheft. The Progressive States Network report states that New York and Massachusetts, the highest ranked states, have barely passing grades and have just recently begun addressing wage theft, while the vast majority of states have few protections, if any. *Id.*

209 *Id.*

210 *See* U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES: NEW YORK-ALL INDUSTRIES-BY YEAR, http://www.census.gov/epcd/susb/latest/ny/NY—.HTM. In 1996, New York State had 411,120 total firms, in 2002 the state had 428,425 firms, and in 2008 the state had 443,992 firms. *Id.* In 2009, New York State had 441,241 total firms, a slight decline from 2008. U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES: HISTORICAL DATA TABULATIONS BY ENTERPRISE SIZE-2009, U.S. & STATES, TOTALS, http://

New York State because of the Unpaid Wages Prohibition Act, an act with similar goals as the WTPA.[211] While it is too soon to tell if businesses will leave New York State because of the WTPA, the law does not create undue burdens on employers and only targets employers who violate the law.

The WTPA will even the playing field by reigning in unlawful employers who economically benefit by not complying with the law. The WTPA will help all employers compete fairly, thus fostering a business environment that will encourage business growth in New York. As WTPA advocates have pointed out since the beginning of the campaign, law-abiding employers have nothing to fear.[212]

V. Implementation of the WTPA and Hope for the Future of Workers' Rights in New York State

While it is too early to chart the WTPA's progress, workers' rights advocates are hopeful, and they are already seeing results. "At long last, this puts real teeth in New York's Labor Law," said Andrew Friedman, former Director of MRNY, after the WTPA was signed into law.[213] In March of 2010, an upscale restaurant in New York City agreed to hand over $200,000 to settle a NY DOL investigation into the restaurant's practice of wage and hour violations and retaliatory firing of organized workers.[214] The NYS Attorney General's office stated that $20,000 of the settlement, liquidated damages for workers, was made possible by the WTPA, and that this case is an example of how the law provides new remedies that effectively protect workers.[215] In order to ensure that the WTPA is a successful tool against wage theft, effective enforcement and investigation by the NY DOL is needed, as well as strong education and outreach efforts.

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www.census.gov/econ/susb/data/susb2009.html. A firm is defined as a "business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control." Definitions, U.S. Census Bureau, Statistics of U.S. Businesses, *available at* http://www.census.gov/econ/susb/definitions.html.

211 *See supra* text accompanying notes 108–20.

212 *See Advocacy Story*, *supra* note 3, at 157–58.

213 Dolnick, *supra* note 5.

214 Daniel Massey, *Manhattan Eatery Forks Over Cash for Wage Theft*, Crain's New York Bus. (Mar. 1, 2012, 3:48 pm), http://www.crainsnewyork.com/article/20120301/LABOR_UNIONS/120309990.

215 *Id.*

A. Enforcement of the New Law

Many workers' rights advocates have critiqued the NY DOL's actions regarding enforcement and investigation of wage and hour complaints. A December 2006 report by the Campaign to End Wage Theft, a coalition of over twenty-four community organizations in New York State (including MRNY), detailed suggestions regarding how the NY DOL could improve their enforcement of wage and hour laws.[216] The report listed six recommendations:

> (1) Aggressively investigate complaints and pursue all remedies provided by law, (2) Systematically and proactively investigate high-violation industries, (3) Partner with community and labor groups for expertise and worker outreach, (4) Improve responsiveness to the needs of immigrant workers, (5) Improve coordination with state and local enforcement agencies to protect workers, and (6) Make the NY DOL more accessible, accountable, and transparent.[217]

As MRNY felt strongly about the need to give the NY DOL more tools to be able to do their job effectively, the WTPA addresses many of the community organizations' concerns listed in the 2006 report.[218] For example, the report asked that the NY DOL fully protect workers from retaliation by adopting a formal policy to keep all names of employees who file a complaint confidential.[219] The WTPA codifies this practice of maintaining confidentiality.[220] The report also recommended strengthening the consequences for employer misconduct in order to deter employers from relying on violating worker rights as a business practice and protecting workers from unlawful retaliation.[221] The WTPA addresses both of these issues.[222]

Advocates are hopeful that WTPA provisions granting the NY DOL more power to do their work, combined with recent funding for the agency, will improve enforcement. The NY DOL Labor Standards Division[223] budget has increased over the past few years. For the fiscal year of 2010–11, the Department's budget was

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216 CAMPAIGN TO END WAGE THEFT, *supra* note 108.
217 *Id.* at 3.
218 *See supra* text accompanying notes 181–88.
219 CAMPAIGN TO END WAGE THEFT, *supra* note 108, at 6.
220 N.Y. LAB. LAW § 196-a (McKinney 2011).
221 CAMPAIGN TO END WAGE THEFT, *supra* note 108, at 16.
222 *See supra* text accompanying notes 133–152.
223 *See* DEP'T OF LABOR, LABOR STANDARDS, http://www.labor.ny.gov/workerprotection/laborstandards/labor_standards.shtm (last visited Aug. 15, 2011) (Department of Labor Standards is charged with enforcement of wage and hour laws); *see also* MEYER & GREENLEAF, *supra* note 25, at 71.

$17,474,000, an increase from $14,411,000 in the 2006–07 fiscal year.[224] The NY DOL estimates that over the past five years there has been a 5% increase in the number of full-time employees working on wage and hour enforcement.[225] However, the NY DOL reports an average delay of one-and-a-half years before an investigation begins, due to the large volume of cases.[226] The agency reports that large quantities of wages, fines, and penalties go uncollected: in 2009, $45,608,966 went uncollected, a dramatic increase from $13,637,494 in 2005.[227]

B. Education and Outreach Necessary for Effective Implementation of the WTPA

Changing the law alone will not solve wage theft; the NY DOL and community organizations must have effective outreach programs in the community. If the NYS LL is truly going to deter employers from breaking the law, then they must know about it. The NY DOL has created resources, such as a WTPA fact sheet, and addressed Frequently Asked Questions, available on its website under "Wage and Hour," so that employers may learn more about the WTPA.[228] The fact sheet details the main provisions under the WTPA, and is geared towards employers.[229] The Frequently Asked Questions document about the Wage Theft Prevention Act appears to be comprehensive, and states that NY DOL officers will address inquiries submitted by e-mail in a "timely manner."[230] While the NY DOL website materials are a good starting point for outreach and implementation, this must not be the only employer-outreach the Department does.

In order for there to be effective implementation of the WTPA, organizations like MRNY must conduct outreach about the new provisions as well.[231] In the case of MRNY, the organization's Brooklyn and Queens offices have Workplace Justice Project committees, and two workers rights organizers; the groups meet weekly,

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224 MEYER & GREENLEAF, *supra* note 25, at 71.
225 *Id.* at 77.
226 *Id.* at 130.
227 *Id.* at 144.
228 *Wage Theft Prevention Act: FAQ*, N.Y. STATE DEP'T OF LABOR, http://www.labor.ny.gov/workerprotection/laborstandards/PDFs/wage-theft-prevention-act-faq.pdf (last visited May 12, 2011).
229 *Id.*
230 *Id.*
231 *See* Kirk Semple, *A Boon for Nannies, if Only They Knew*, N.Y. TIMES, Apr. 14, 2011, http://www.nytimes.com/2011/04/15/nyregion/few-domestic-workers-know-about-law-protecting-them.html.

with organizers and worker/members taking on leadership roles within each group.[232] Members participate in planning campaigns, direct action such as protests or boycotts, and skills trainings.[233] Members of the Workplace Justice Project committees who were active in the WTPA campaign helped develop a PowerPoint training, and have given the training to all MRNY member committees.[234] The passage of the WTPA has not only given MRNY the opportunity to conduct more "know your rights" trainings about workers' rights under the NYS LL, but also the opportunity to talk about the increased protections for workers under the WTPA.[235] MRNY Legal Department staff and Workplace Justice Project members continue to conduct workers' rights trainings for social service agencies and community groups in New York City and Long Island, training other advocates about the new law.[236] They also conduct trainings for frontline social service workers and staff who work with immigrants and may not know how to issue spot for wage and hour violations.[237]

Workers' rights organizations must also continue to educate workers that, regardless of their immigration status, they can seek redress under the NY DOL[238] (in addition to FLSA, if workers qualify).[239] "There is a huge misperception in general about whether the [labor] law protects workers, regardless of their immigration status," said Amy Carroll, former Legal Director for MRNY. "Employers add to this misconception by threatening workers, saying that they will call immigration if workers report unpaid wages or unsafe working conditions."[240] MRNY's current outreach is another way to educate the immigrant community in New York City about this misperception. The NY DOL also has a six-person Bureau of

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232 *See* MAKE THE ROAD NEW YORK, http://maketheroad.org/whatwedo_workplace.php and http://maketheroad.org/howwework_community.php (last visited May 12, 2011) (providing more information on MRNY's Workplace Justice Project); *see also Advocacy Story*, *supra* note 3, at 154.

233 *Advocacy Story, supra* note 3, at 154.

234 Interview with Amy Carroll, *supra* note 106.

235 *Id.*

236 *Id.*

237 *Id.*

238 *See* 2003 N.Y. Op. Atty. Gen. F3, *supra* note 105.

239 *See* In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987); *see also* Centeno-Bernuy v. Perry, 2009 Dist. LEXIS 103580, 19-20 (W.D.N.Y. July 14, 2009) (applying FLSA protections to citizens and non-citizens alike).

240 Interview with Amy Carroll, *supra* note 106; *see also* Rivera v. NIBCO, 364 F.3d 1057, 1064 (9th Cir. 2004) (finding that undocumented workers are especially vulnerable to workplace abuse, discrimination, and exploitation as well as the fear of being turned over to immigration officials).

Immigrant Workers' Rights that conducts outreach in immigrant communities.[241]

A mix of legislative reforms and community activism is needed in order to target wage theft. The WTPA is a positive step in the fight against wage theft in New York State. We cannot change the law and expect for wage theft to magically disappear; outreach to employers and workers is needed, including immigrant workers who are not aware that their minimum wage rate is in violation of the law, in addition to better enforcement and investigation by the NY DOL.[242]

CONCLUSION

Wage theft is a widespread problem in New York, especially amongst low-wage workers. Specifically, wage theft disproportionately affects immigrant and women low-wage workers in our communities.[243] Prior NYS LL did not effectively deter employers from violating the law. "The fines were so minimal that many rogue employers saw them as the cost of doing business," said Senator Diane Savino, lead sponsor of the WTPA.[244] Advocates hope that the WTPA will be an effective tool against wage theft in New York State, because the law offers greater protections for workers against wage theft, and we have already seen positive results for workers. Outreach and education by the NY DOL and workers' rights organizations is necessary for further effective implementation of the WTPA. The WTPA is an impressive victory for victims of wage theft in the state, and attempts to repeal the bill must be resisted.

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241 MEYER & GREENLEAF, *supra* note 25, at 163.

242 *See* GORDON, *supra* note 107, at 30.

243 *See supra* notes 15–25 and accompanying text.

244 Dolnick, *supra* note 5 (quoting New York State Senator Diane J. Savino, a Democrat who was the lead sponsor of the WTPA Senate bill).

EVALUATION AS THE PROPER FUNCTION OF THE PAROLE BOARD: AN ANALYSIS OF NEW YORK STATE'S PROPOSED SAFE PAROLE ACT

Amy Robinson-Oost†

I. Introduction

On August 17, 1991, George Cruz, a teenager with no prior convictions, unknowingly shot a man during a drunken altercation in a parking lot in upstate New York.[1] The following day, when Mr. Cruz learned he had killed someone, he turned himself in.[2] He pled guilty to first-degree manslaughter, for which he was sentenced to eight to twenty-four years in prison.[3] During his third parole hearing, the New York State Board of Parole ("the Board") reviewed evidence that Mr. Cruz had voluntarily participated in substance abuse treatment and alternatives to violence programs, and earned forty-five college credits during his fifteen years of incarceration.[4] Family members, including his wife, promised to help him in his reentry.[5] Mr. Cruz admitted his guilt and expressed remorse for his action, as he had always done.[6] Mr. Cruz seemed to be "a prime candidate for parole release."[7] Despite these "positive institutional achievements and his exemplary conduct in prison," the Board denied Mr. Cruz's parole application on the basis that his actions "led to the death of a male victim."[8]

Mr. Cruz is one of many New Yorkers who have repeatedly been denied parole on the basis of the severity of the underlying offense despite positive program accomplishments, post-release plans, and strong evidence of rehabilitation.[9] Although the Board

† CUNY School of Law, Class of 2013. I am grateful to Professor Steve Zeidman, Judith Whiting, and Paul Keefe for their guidance and support. Thank you to Eric Washer, Alfia Agish, Lindsay Cowen, Danny Alicea, Brendan Conner, Erik Oost, and Barbara Robinson for their feedback and encouragement.

1 Cruz v. N.Y. State Div. of Parole, 39 A.D.3d 1060, 1061 (3d Dep't 1997).

2 *Id.* at 1061.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Cruz v. N.Y. State Div. of Parole, 39 A.D.3d 1060, 1062 (3d Dep't 1997).

8 *Id.* at 1061.

9 The New York State Board of Parole's practice of denying parole based on the severity of the offense was unsuccessfully challenged in federal court recently. *See* Gra-

is instructed to balance specific factors in rendering its opinion,[10] and New York courts have asserted that the role of the Board is not to resentence a prisoner according to personal judgments regard-

ziano v. Pataki, No. 06 Civ. 0480(CLB), 2006 WL 2023082, at *1 (S.D.N.Y. July 17, 2006). The complaint alleged that, under Governor George Pataki, prisoners serving indeterminate sentences were repeatedly denied parole pursuant to an "unofficial policy of denying parole release to prisoners convicted of A-1 violent felony offenses, solely on the basis of the violent nature of such offenses and thus without proper consideration to any other relevant or statutorily mandated factor." *Id.* at *2. The class members asserted that this unofficial policy violated their rights to due process and equal protection under the Fourteenth Amendment, as well as the ex post facto clause of Article 1, § 1 of the U.S. Constitution. *Id.* at *1. They argued that they were "denied full, fair and balanced parole hearings as required to be conducted pursuant to the provisions of New York State Executive Law § 259-1, and as a result have been subjected to unconstitutional enhancements of their sentences." *Id.* In a July decision, Judge Charles Brieant denied the State's motion to dismiss the complaint as to all claims. *Id.* at *13. Eighteen months later, after Governor Pataki left office, the defendants filed a second motion to dismiss, alleging the action was moot. *See* Graziano v. Pataki, No. 06 Cv. 480(CLB), 2007 WL 4302483, at *1 (Dec. 5, 2007). This was also denied. *Id.* at *2. After Judge Brieant's death in 2008, Judge Cathy Seibel was appointed to replace him. *A Brief Overview of the Graziano v. Pataki Case*, PAROLE NEWS (Sept. 17, 2012), http://parolenews.blogspot.com/2012/09/a-brief-overview-of-graziano-v-pataki.html. In December 2010, the action was dismissed. *See* Graziano v. Pataki, 689 F.3d 110, 112–13. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal, with Judge Stefan R. Underhill—sitting by designation of the United States District Court for the District of Connecticut—dissenting. *Id.* at 117.

[10] New York law provides that the following factors must be considered when granting discretionary parole release:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

N.Y. EXEC. LAW § 259-i (2)(c)(A) (West, Westlaw through 2011 legislation).

ing the original crime,[11] case law and anecdotes from current prisoners and those formerly incarcerated paint a different picture. They point to a consistent pattern of parole denial that seems to be based purely on the severity of the underlying offense.[12] Reviewing courts rarely overturn such decisions because the standard of review is almost impossible to meet.[13] The larger problem, however, is that New York's parole guidelines are vague and unwieldy, and unfairly allow the Board to place undue emphasis on the severity of the crime as there is no mandate that equal weight be accorded to each factor.[14] On the contrary, courts have repeatedly endorsed the Board's decision to place excessive weight on the seriousness of the crime.[15] A recent interview with Tom Grant, a retired member of the Board, revealed the flawed nature of the parole process in New York.[16] When asked whether there were any decisions relating to parole that he regretted, the former Board member said:

> I happened to see one inmate on two separate occasions during my time on the parole board. He had participated in a heartbreaking crime as a teenager and he had subsequently done remarkably well during his lengthy period of incarceration. I don't believe he had one disciplinary infraction. He had already been denied by two or three parole boards, primarily due to the nature of the offense. It was a fatal shooting and he had an accomplice. During his interview, the other board commissioners and I focused on the logistics because it was unclear who might have actually fired the fatal shot. We denied him. From time to time I thought about the case. I said to myself, "I'll re-examine this, if I ever see this guy again," but it's all random who comes before you at an interview so I didn't know if I would see him again.

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11 *See* King v. N.Y. State Div. of Parole, 190 A.D.2d 423, 432 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994).

12 *See generally* Sterling v. Dennison, 38 A.D.3d 1145 (3d Dep't 2007); Bottom v. N.Y. State Bd. of Parole, 30 A.D.3d 657 (3d Dep't 2006); *see also Storybank*, NYS PAROLE REFORM CAMPAIGN, http://nationinside.org/campaign/nys-parole-reform-campaign/storybank/ (last updated Nov. 9, 2011) (providing anecdotes from parole applicants and family members regarding parole denials despite applicants' rehabilitation successes); Judith Brink, Prison Action Network, Letter to the Editor: *The Parole Board Is Not a Resentencing Body*, TIMES UNION, May 10, 2013.

13 *See, e.g.*, Harris v. N.Y. State Div. of Parole, 211 A.D.2d 205, 206–07 (3d Dep't 1995) (finding a denial of parole arbitrary and capricious where the parole board refused to review the sentencing judge's recommendation, which was favorable to the prisoner, and where the record reflected bias bordering on hostility on the part of the parole board).

14 *See* Watson v. N.Y. State Bd. of Parole, 78 A.D.3d 1367, 1368 (3d Dep't 2010).

15 *See, e.g.*, Gonzalez v. Chair, N.Y. State Bd. of Parole, 72 A.D.3d 1368, 1369 (3d Dep't 2010); Smith v. N.Y. State Div. of Parole, 64 A.D.3d 1030 (3d Dep't 2009); *Sterling*, 38 A.D.3d 1145; *Bottom*, 30 A.D.3d 657.

16 John Caher, *Q&A: Tom Grant*, N.Y.L.J., Sept. 21, 2012.

> Four years go by, and I see him and the same questions come up, as they would. He was still doing well. In my opinion, he had no more likelihood of committing a crime than you or I. This time I voted to release him and the two other commissioners on the panel voted to keep him in. He is still in. He has life at the end of his sentence. I still think about it. We got bogged down with the logistics. He may never go home. That is the one I think about.[17]

This Note will examine a proposed law that is currently before both houses of the New York State legislature that would require, among other things, that the Board modify the criteria on which parole decisions are made.[18] Importantly, the Safe and Fair Evaluation Parole Act ("the Act" or "the SAFE Parole Act") would eliminate as criteria the severity of the offense and the parole applicant's prior convictions because these static facts fail to serve the rehabilitative goal of incarceration.[19] In Section II, parole is defined, explained, and contextualized within the current United States criminal legal system. This includes statistical data regarding post-release supervision and incarceration rates.[20] Section III provides an overview of the history of parole and sentencing in the United States. Section IV introduces and explains parole in New York, with a focus on the text of current New York law and the specific proposed modifications of the SAFE Parole Act. The find-

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17 *Id.*

18 SAFE Parole Act, S. 1128/A. 4108, Reg. Sess. (N.Y. 2013). The Act was introduced on May 13, 2011 as S. 5374/A. 7939, and reintroduced in 2013, when it was given a new number.

19 *See* N.Y. PENAL LAW § 1.05(6) (West, Westlaw through 2011) (providing that one of the purposes of punishment is to "insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection"); Joel M. Caplan & Susan C. Kinnevy, *National Surveys of State Paroling Authorities: Models of Service Delivery*, 74 FED. PROBATION 34, 41 (2010) (noting that the first official draft of the Model Penal Code provided that one of the principal purposes for the sentencing and treatment of prisoners was rehabilitation, and that the Code created a presumption that prisoners would be released when they first became eligible).

20 The larger issue of mass incarceration is beyond the scope of this paper. For more information on this topic see generally WILLIAM J. STUNZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL (2011); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE (2003); Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 14, 2003); Karina Kendrick, Comment, *The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendations for Reform*, 113 W. VA. L. REV. 585, 586 (2010–2011).

ings from a fifty-state survey of parole laws and procedures are analyzed to place New York's current and proposed laws in their proper context in Section V. Finally, this Note provides recommendations and conclusions.

II. Defining and Contextualizing Parole

Parole is a period of supervised release in the community following a prison or jail sentence before the full sentence has been served.[21] It may be required by law, or it may be discretionary, where a government-appointed decision-maker, such as a parole board, determines that it is safe for a prisoner to be released.[22] Parole is a privilege, not a right, in that a state may establish a parole system, but it has no duty to do so.[23] However, a statute may create a constitutionally protected expectation of parole if it contains language mandating release under certain circumstances.[24] For example, the use of a phrase such as "parole shall be ordered if" creates a presumption that parole release will be granted when the criteria following that phrase are met.[25] Presumptive parole has largely fallen out of favor, as most states now employ discretionary parole models,[26] which grant broad discretion to parole boards or other governing bodies to determine parole.[27] This often requires that the parole board write a set of factors or guidelines to be considered in parole determinations.[28] Parole decision-making is an administrative procedure. Thus, the process due is guided by balancing the prisoner's interest in release against the government's interest in public safety, with the express goal of minimizing erroneous decisions.[29]

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21 *See* Black's Law Dictionary 964 (9th ed. 2010).

22 Bureau of Justice Statistics, Dep't of Justice, NCJ-231674, Probation and Parole in the U.S. 2009 1 (2010).

23 Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979).

24 *Id.* at 12; *see also* Bd. of Pardons v. Allen, 482 U.S. 369, 372–73 (1987).

25 *Greenholtz*, 442 U.S. at 19; *Allen*, 482 U.S. at 378–79.

26 *See* Appendix, *infra*, for comprehensive information about state parole guidelines and laws.

27 *See* Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. Crim. Just. 4, 321 (1999).

28 *Allen*, 482 U.S. at 378.

29 *Greenholtz*, 442 U.S. at 13; Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (dictating that three distinct factors must be considered: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

Nationwide, more than 800,000 people are currently under criminal justice supervision following their release from prison.[30] In New York, approximately 22,000 people are released into parole and post-release supervision each year.[31] During the 2009–2010 fiscal year, the New York State Board of Parole granted release to 40% of eligible parole applicants.[32] However, 78% of first-time applicants were denied parole and only 9% of violent felony offenders were released.[33]

Meanwhile, the number of people imprisoned in the United States has increased dramatically over the past forty years.[34] In 2010, there were more than 2.2 million people incarcerated in the United States.[35] In fiscal year 2010, the average cost of incarceration for federal inmates was $28,284.[36] In stark contrast, the average cost of community-based supervision, through parole or probation, is approximately one-tenth of that amount; probation costs approximately $1,250 per person annually, while parole costs $2,750.[37] Amid a nationwide fiscal crisis and prison overcrowding, reduced sentencing, parole, probation, and alternatives to incarceration are obvious ways for states to preserve funds. According to one estimate, increasing the availability of parole and probation and decreasing the prison population by 10% would yield $3 billion annually in cost savings.[38]

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30 *New York State Parole Project*, VERA INST. OF JUSTICE, http://www.vera.org/project/new-york-state-parole-project (last visited Dec. 20, 2011).

31 N.Y. STATE DIV. OF PAROLE, ANNUAL REPORT FOR FY 2009–10 7 (2010), *available at* https://www.parole.ny.gov/pdf/parole-annual-report-2010.pdf.

32 *Id.* at 4.

33 *Id.* In light of such statistics, it is perhaps unsurprising that Mr. Cruz was denied parole three times despite his rehabilitative efforts.

34 PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011 ii (2007) (calculating a 700% increase in the U.S. prison population between 1970 and 2005).

35 BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, NCJ-236319, CORRECTIONAL POPULATION IN THE UNITED STATES 3 (2010) (noting that this figure includes jail inmates and prisoners held in privately operated facilities).

36 Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081–57,082 (Sept. 15, 2011).

37 PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12 (2009).

38 AM. BAR ASS'N., TEXAS & MISSISSIPPI: REDUCING PRISON POPULATIONS, SAVING MONEY, AND REDUCING RECIDIVISM (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_parole_probation.authcheckdam.pdf.

III. The Rise and Fall of Discretion in Parole Determinations

Parole in the United States is more than 100 years old.[39] Over the past century, parole and sentencing laws, which often go hand-in-hand, have undergone several significant changes on national and state levels.[40] The widespread use of indeterminate sentences vested extensive power in the judgment of parole board members. Discretionary parole, which allows paroling authorities to decide releases for eligible prisoners on a case-by-case basis,[41] began to fall out of favor in the 1960s. After the Civil Rights movement, legislatures sought to eliminate or reduce discretion in judicial and executive decision-making to ensure equitable sentencing and post-incarceration releases.[42] To accomplish this goal, state legislators implemented "limiting enactments" such as determinative sentencing, mandatory minimum sentencing, "truth in sentencing" acts, and presumptive parole.[43] Conventional wisdom provided that such measures would reduce disparate sentences and parole determinations based on inappropriate considerations, such as race or age.[44] However, limiting enactments have failed to achieve their intended effect, as criminal justice practitioners continue to employ discretion in direct contradiction with the goals of limiting enactments.[45] One explanation is that standardized tools designed to achieve fairness and uniformity may not have been implemented correctly due to either lack of proper training for hearing officers,[46] or perhaps unrealistic expectations of objectivity in the face of ambiguous guidelines.

The economic collapse of 2008 and ensuing nationwide fiscal crisis prompted many states to reexamine sentencing policy, length of incarceration, and community supervision strategies in an attempt to preserve scarce resources.[47] One recent survey reveals that

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39 Caplan & Kinnevy, *supra* note 19, at 34.

40 *Id.*

41 *Id.*

42 Turpin-Petrosino, *supra* note 27, at 321.

43 *Id.*; *see also* Dhammika Dharmapala, Nuno Garoupa & Joanna M. Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 Fla. L. Rev 1037, 1038 (2010); James Austin, *The Proper and Improper Use of Risk Assessment in Correction*, 16 Fed. Sent'g Rep. 3, 195–96 (2004).

44 Turpin-Petrosino, *supra* note 27, at 323.

45 *Id.* at 330.

46 *Id.*

47 *See, e.g.*, James Austin, JFA Inst., Reforming Mississippi's Prison System 1 (2009), *available at* http://www.floridatac.org/files/document/MDOCPaper.pdf; Brian Mann, *Prison Towns Worry Closures Could Upend Communities*, WNYC News (Feb. 3, 2011), http://www.wnyc.org/articles/wnyc-news/2011/feb/03/cuomo-consolidate

in 2009, several states "fine-tuned sentencing laws, expanded community-based diversion programs, and created policies and programs aimed at reducing recidivism."[48] Mississippi in particular has been praised for its sentencing reforms during the fiscal crisis.[49] According to the Pew Center on the States, Mississippi sought to "enhance public safety and control corrections costs by concentrating its prison space on more serious offenders."[50] To effect this change, Mississippi changed its truth-in-sentencing law by permitting all nonviolent offenders to become eligible for parole after serving 25% of their prison sentence.[51] Previously, the statute had required prisoners to fulfill 85% of their sentences before they became eligible.[52]

States have come up with various solutions to the problems caused by determinate sentencing. Many states provide mandatory parole for certain prisoners and discretionary parole for others, depending on the severity of the crime or the date of the conviction.[53] These states thus maintain a mix of determinate and indeterminate sentencing in their statutes. Almost every state, including New York, employs a multi-factor approach in order to balance the advantages and disadvantages of release.[54] Although the overarching goal of such an approach is to assess whether the prisoner continues to be a risk to the general public, the most determinative factors appear to be the severity of the crime, the crime types, and the prisoner's criminal history.[55] Many parole boards, often instructed by state legislatures, have developed risk assessment tools to assist in parole determinations.[56] As one advocate explains, "these devices are used to identify prisoners by risk level

-upstate-prisons-compensate-affected-communities/ (reporting that New York is closing prisons in light of the financial crisis). *See also* Brown v. Plata, 131 S. Ct. 1910 (2011) (affirming a three-judge panel's decision ordering California to reduce its prison population to remedy long-standing constitutional violations arising from prison overcrowding).

48 *See, e.g.*, AM. BAR ASS'N., *supra* note 38; *see also Significant State Sentencing and Corrections Legislation in 2009*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/justice/sentencing-and-corrections-legislation-in-2009.aspx (last visited Dec. 29, 2011).

49 AM. BAR ASS'N., *supra* note 38; *see also* JFA INST., *supra* note 47, at 1.

50 PEW CTR. ON THE STATES, *supra* note 37.

51 JFA INST., *supra* note 47, at 2.

52 *Id.*

53 *See, e.g.*, ALASKA STAT. ANN. § 33.16.010 (West, Westlaw through 2011); ARK. CODE. ANN. § 16-93-615 (West, Westlaw through 2011).

54 *See* N.Y. EXEC. LAW § 259-i (2)(c)(A) (West, Westlaw through 2011); *see also* Appendix, *infra*, for full list of state statutes and parole guidelines.

55 Caplan & Kinnevy, *supra* note 19, at 35.

56 Turpin-Petrosino, *supra* note 27, at 324.

which in turn can be used to better inform the decision to incarcerate, release and supervise."[57] When coupled with discretion, such methodologies have proven to be an accurate and reliable way to reduce the prison population and protect public safety.[58] Nonetheless, critics point to three problems with this method: (1) developing a risk assessment instrument can be complicated and costly; (2) risk assessment is overly rigid; and (3) it is nearly impossible to predict the future behavior of individuals.[59] Indeed, in its inflexible formulation of a scored matrix, risk assessment seems to hearken back to indeterminate sentencing. The dangers of improper application only increase when parole boards are not permitted to exert any professional judgment to override the risk assessment evaluation.[60]

Despite these flaws and concerns, leading legal organizations that study the criminal legal system, such as the American Bar Association, the Vera Institute of Justice, and the JFA Institute, support the use of risk assessment tools in both sentencing and parole determinations, albeit conditionally.[61] The JFA Institute cautions that "[t]here must be an opportunity to depart from scored risk levels" based on professional judgments and that "no system should rely exclusively on scored risk assessment to make a final risk determination."[62] Many states already employ a risk assessment tool in parole determinations, and others are developing such instruments.[63]

IV. New York's Safe Parole Act

The New York State Division of Parole was established in 1930 with authority granted to the Parole Board to make decisions regarding parole releases from prison.[64] In 1977, the Division of Parole adopted formal release guidelines to ensure evenhanded decision-making.[65] Eighteen years later, Governor George Pataki

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57 Austin, *supra* note 43, at 2.

58 *Id.* at 3.

59 *Id.*

60 *Id.*

61 *Id.* at 3–4; Am. Bar Ass'n., ABA Urges States to Increase the Use of Parole and Probation, Along with Graduated Sanctions for Violations, to Decrease Incarceration Rates, Improve Public Safety, and Save Money (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/SPIP_overview.authcheckdam.pdf.

62 Austin, *supra* note 43, at 5.

63 Nat'l. Inst. of Corrs. Info. Ctr., Use of Risk Assessment for Parole Release Consideration (2001), *available at* http://nicic.gov/Library/017178.

64 N.Y. State Div. of Parole, *supra* note 31, at 5.

65 *Id.*

signed into law the Sentencing Reform Act of 1995, which restructured sentencing guidelines and sharply curtailed parole eligibility by eliminating parole release for second-time violent felony offenders.[66] Three years later, the sentencing laws were reformed once again through the Sentencing Reform Act of 1998 (known as "Jenna's Law"), which eliminated discretionary parole release for all people convicted of violent felonies.[67]

Currently, in the face of budgetary woes and a declining prison population,[68] New York has been especially aggressive in restructuring its correctional system.[69] First, New York merged the Department of Correctional Services and the Division of Parole to create the State Department of Corrections and Community Supervision ("DOCCS"), which was estimated to provide savings of $17 million in fiscal year 2011–12.[70] Second, in June of 2011, Governor Cuomo announced the closure of seven New York State prison facilities.[71] Third, New York amended one of its laws to require that the Board establish written procedures incorporating "risk and needs principles to measure the rehabilitation of persons appearing before the board," and "the likelihood of success of such persons upon release" in order to assist the parole board in its decision-making.[72] Prior to the amendment of the law, application of such principles was purely discretionary;[73] they are now mandatory. Finally, a risk assessment system was recently imple-

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66 Edward R. Hammock & James F. Seelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT 527, 527 (1999).

67 N.Y. STATE DIV. OF PAROLE, *supra* note 31, at 5.

68 JUDITH GREENE & MARC MAUER, SENTENCING PROJECT, JUSTICE STRATEGIES, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 5 (2010) (calculating a 20% reduction from 72,899 to 58,456 from 1999 to 2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf.

69 *See, e.g.,* Mann, *supra* note 47; Thomas Kaplan, *Cuomo Administration Closing 7 Prisons, 2 in New York City*, N.Y. TIMES, June 30, 2011, *available at* http://www.nytimes.com/2011/07/01/nyregion/following-through-on-budget-state-will-close-seven-prisons.html; Jon Alexander, *Cuomo Grants North Country Clemency on Prison Closures*, THE POST-STAR, June 30, 2011, *available at* http://poststar.com/news/local/article_61171aee-a358-11e0-adab-001cc4c002e0.html.

70 *Factsheet: Merger of Department of Correctional Services and Division of Parole*, DEP'T OF CORR. & CMTY. SUPERVISION (2011), http://www.doccs.ny.gov/FactSheets/DOCS-Parole-Merger.html.

71 Press Release, Governor's Press Office, Governor Cuomo Announces Closure of Seven State Prison Facilities (June 30, 2011), *available at* http://www.governor.ny.gov/press/06302011ClosureOfSevenStatePrisonFacilities.

72 N.Y. EXEC. LAW § 259-c (4) (effective Oct. 1, 2011) (West, Westlaw through 2011).

73 N.Y. EXEC. LAW § 259-c (4) (effective June 22, 2010) *amended by* N.Y. EXEC. LAW § 259-c (4) (effective Mar. 31, 2011 to Sept. 30, 2011) (West, Westlaw through 2011).

mented in New York.[74] Through these actions, New York has acted as a leader in the field of progressive criminal justice reform (even if such reforms are financially motivated). New York has the potential to be at the forefront of innovative, forward-thinking parole legislation that properly values a prisoner's rehabilitative efforts if it passes the SAFE Parole Act.

The SAFE Parole Act, a proposed bill in both houses of the New York legislature, was introduced in mid-May 2011 in the New York State Senate by Tom Duane and in the New York State Assembly by Jeffrion Aubry.[75] At the end of the Legislative Session that concluded in June 2011, the bill had three additional Senate sponsors—Velmanette Montgomery, Bill Perkins, and Gustavo Rivera—and five additional Assembly sponsors—Andrew Hevesi, Eric A. Stevenson, Herman D. Farrell, Jr., Richard N. Gottfried and John J. McEneny.[76] Since 2011, several additional sponsors have signed on, in both the Senate and Assembly.[77] The Act's primary goal is to modernize the procedures required of the parole hearing process.[78] To accomplish this, the Act proposes to modify the criteria by which parole applicants are evaluated during hearings. The legislation would require the Board to focus on what the parole applicant has done since the time of his or her incarceration to rehabilitate himself or herself, rather than on his or her past deeds. Current New York law provides:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the procedures adopted [. . .] shall require that the following be considered:

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74 John Caher, *Effect of Risk Assessment Rule on Parole Decisions Is Unclear*, N.Y.L.J., Apr. 30, 2012 (reporting that early attempts to implement a risk assessment tool have faced resistance from Board members and parole officers); Brendan J. Lyons, *State Tells Parole Officers To Surrender Guns*, TIMES UNION, Feb. 24, 2012, *available at* http://www.timesunion.com/local/article/State-tells-parole-officers-to-surrender-guns-3357602.php#ixzz2Rr6zsqNX; John Caher, *Law Requires Board to Assess Rehabilitation in Parole Rulings*, N.Y.L.J., Sept. 30, 2011, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202517412972&slreturn=1.

75 SAFE Parole Act, S. 1128/A. 4108, Reg. Sess. (N.Y. 2013).

76 *September 2011*, PRISON ACTION NETWORK (Sept. 15, 2011), http://prisonaction.blogspot.com/2011/09/september-2011.html.

77 *See generally* PAROLE NEWS, parolenews.blogspot.com.

78 *Id.*

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii) performance, if any, as a participant in a temporary release program;
>
> (iii) release plans including community resources, employment, education and training and support services available to the inmate;
>
> (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department [. . .];
>
> (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
>
> (vi) the length of the determinate sentence to which the inmate would be subject had he or she received [such a sentence];
>
> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.[79]

The relevant portion of the SAFE Parole Act provides the following (proposed new statutory text is in capital letters):

> Discretionary release on parole shall be granted for good conduct AND efficient performance of duties while confined, AND FOR PREPAREDNESS FOR REENTRY AND REINTEGRATION INTO SOCIETY, THEREBY PROVIDING A REASONABLE BASIS TO CONCLUDE that, if such PERSON is released, he OR SHE will live and remain at liberty without violating the law, and THEREFORE that his OR HER release is not incompatible with the welfare of society. In making the parole release decision, the procedures adopted [. . .] shall require that the DECISION BE BASED UPON THE FOLLOWING CONSIDERATIONS:
>
> (A) PREPAREDNESS FOR REENTRY AND REINTEGRATION AS EVIDENCED BY THE APPLICANT'S INSTITUTIONAL RE-

79 N.Y. EXEC. LAW § 259-i §2 (c)(A) (West, Westlaw through 2011).

CORD PERTAINING TO PROGRAM GOALS AND ACCOMPLISHMENTS AS STATED IN THE FACILITY PERFORMANCE REPORTS, ACADEMIC ACHIEVEMENTS, VOCATIONAL EDUCATION, TRAINING OR WORK ASSIGNMENTS, THERAPY AND INTERACTIONS WITH STAFF AND OTHER SENTENCED PERSONS, AND OTHER INDICATIONS OF PRO-SOCIAL ACTIVITY, CHANGE AND TRANSFORMATION;

(B) performance, if any, as a participant in a temporary release program;

(C) release plans including community resources, employment, education and training and support services available to the PAROLE APPLICANT;

(D) any deportation order issued by the federal government against the PAROLE APPLICANT while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;

(E) any statement, WHETHER SUPPORTIVE OR CRITICAL, made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated, TO ASSIST THE BOARD IN DETERMINING WHETHER AT THIS TIME THERE IS REASONABLE CAUSE TO BELIEVE THAT THE RELEASE OF THE PAROLE APPLICANT WOULD CREATE A PRESENT DANGER TO THE VICTIM OR THE VICTIM'S REPRESENTATIVE, OR THE EXTENT OF THE PAROLE APPLICANT'S PREPAREDNESS FOR REENTRY AND REINTEGRATION AS SET FORTH IN CLAUSE (A);

(F) the length of the determinate sentence to which the inmate would be subject had he or she received a [such a sentence];

(G) PARTICIPATION AND PERFORMANCE, IF ANY, IN A RECONCILIATION / RESTORATIVE JUSTICE-TYPE CONFERENCE WITH THE VICTIM OR VICTIM'S REPRESENTATIVES;

(H) THE PROGRESS MADE TOWARDS THE COMPLETION OF THE SPECIFIC REQUIREMENTS PREVIOUSLY SET FORTH BY THE BOARD FOR THE PAROLE APPLICANT, IN THE CASE OF A REAPPEARANCE; AND

(I) THE PROGRESS MADE TOWARDS ACHIEVING THE PROGRAMMING AND TREATMENT NEEDS DEVELOPED IN THE TRANSITIONAL ACCOUNTABILITY PLAN.

Although many of the individual factors remain largely unchanged, the modifications are important for several reasons. First,

the proposed Act shifts the overall focus of the parole hearing to evaluation of a prisoner's preparedness for reentry and reintegration. Second, the Act would create the presumption of parole by replacing negative phrasing ("shall not") to positive language ("shall"). Third, it replaces the term "inmate" with the more accurate "parole applicant" as an attempt to remove the stigma of dehumanization of a criminal conviction.[80] Fourth, the number of factors considered is increased from eight to nine, allowing for a more holistic view of the applicant. Fifth, the nature of the crime and the prisoner's prior convictions are eliminated from the list of factors because these two facts are already considered by the sentencing judge in rendering an indeterminate sentence[81] and they cannot be changed, no matter how brutal the crime or how numerous the prior convictions. Finally, the Act provides the Board with more specific, unambiguous criteria by which to determine the parole applicant's probability of successful reentry if released. One of the effects the Act should have is to place a heavier burden on the Board to establish it has performed more than a mere cursory review of the criteria.[82] Opponents to the Act and to parole reform generally point to public safety concerns and the political unpopularity of prisoner advocacy.[83]

V. Findings From Fifty-State Survey

In order to assess the SAFE Parole Act's strengths, weaknesses, and perhaps its likelihood of passage, it is instructive to compare it with other state parole laws. The following analysis attempts to categorize parole laws and regulations from across the fifty states in order to contextualize the proposed changes to New York's law. Statutory schemes on parole can be extraordinarily complicated, with post-release provisions that vary based on the offense, along with a series of other factors, or can be straightforward and nearly mechanical. Each state is unique in the way it devises its parole laws. For the purposes of this Note, the research focused on two pieces of information: (1) whether states consider the seriousness

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80 Sam Spokony, *As Parole Reform Looms, Trouble Lingers at Bayview*, Chelsea Now, June 15, 2011 (quoting Judith Brink, Director of Prison Action Network).

81 *See* N.Y. Penal Law § 70.06 (West, Westlaw through 2011).

82 SAFE Parole Act, S. 5374 (May 13, 2011); *see also* Caher, *Law Requires Board to Assess Rehabilitation in Parole Rulings*, *supra* note 74.

83 *See, e.g.*, Sam Spokony, *SAFE Parole Act Backed by Correctional Association of NY*, Chelsea Now, July 13, 2011 (quoting J. Soffiyah Elijah, Executive Director of the Correctional Association of New York, who notes the fear among politicians that prisoner advocacy might harm their careers).

of the offense and prior convictions as criteria for deciding parole; and (2) the overall methodology utilized by states to determine parole. Specifically, given that New York recently amended its laws to provide for the utilization of a risk assessment instrument and the use of such a device is underway, the survey sought to assess how many states employ such a tool and how. Following a presentation of the survey data, the statutes are categorized into tiers, based on their use of parole guidelines and risk assessment devices, to evaluate the findings and to situate New York among its peers.

Many states do not provide the substantive or procedural rules within its statutes, but rather require that the state parole board publish such on its website or in guidance documents.[84] A small handful of states do not currently provide public access to parole guidelines and thus are not included in the statistical findings below. Statutory text, relevant court decisions, and information from parole board documents are provided in the Appendix. Where boxes are left empty in the chart, relevant or satisfactory information was unavailable to the general public.

Before the data is presented and analyzed, it is important to note that two states—New York and New Mexico—are not included in the analysis below. Because New York is the subject of this study and the purpose is to provide a comparative analysis to assess the strengths of the proposed Act, it is not included in the data. New Mexico is also not included because the publicly available data is insufficient to evaluate its parole guidelines. Laws and guidelines from both states are provided in the Appendix.

A. Data Presentation: Factors Considered and Use of Risk Assessment Devices

Thirty states consider the nature or the severity of the crime committed among its factors. Eighteen states do not consider this piece of information in their determinations. Although four of these states (Indiana, Ohio, Oregon, and Wisconsin) do not list the seriousness of the offense as an enumerated consideration, they maintain a catch-all provision in their statutes.[85] This type of vague

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84 *See, e.g.*, ALA. CODE § 15-22-24(e) (West, Westlaw through 2011) (providing that the Board may adopt policy and procedural guidelines for establishing parole consideration eligibility dockets).

85 *See* IND. CODE § 11-13-3-3 (West, Westlaw through 2011) (providing that "any relevant information submitted by or on behalf of the person being considered" may be evaluated, along with "such other relevant information"); OHIO ADMIN. CODE 5120:1-1-07 (West, Westlaw 2011); OR. REV. STAT. ANN. § 144.185 (West, Westlaw through 2011); WIS. ADMIN. CODE PAC § 1.06 (West, Westlaw through 2011).

statutory language may lead to a parole decision based on the severity of the offense or, worse, on an improper basis, such as personal animus or bias. Similarly, Iowa's parole law, which does not list any factors at all, poses the same risk.[86] Several states—including Kansas, Maryland, and North Dakota—consider the "circumstances" of the offense rather than the "nature" or "seriousness" of the offense.[87] This type of nuanced language is important because it demonstrates the state legislatures' recognition that the context of an offense is more than just its severity. If members of the New York legislature are unwilling to eliminate the "seriousness of the offense" as a factor entirely, they should at least consider replacing "seriousness" with "circumstances."

Thirty-three states consider the parole applicant's prior convictions in a determination of parole eligibility. Fourteen states do not list this as a consideration, although, again, a few states maintain a catch-all provision, which might allow for prior convictions to be considered.[88]

Twenty-four states utilize a risk assessment instrument in parole determinations. These devices vary in the way they are used and in the extent to which parole boards rely on them. By statute, only Nevada seems to rely exclusively on its risk assessment instrument in granting or denying parole.[89] The following section will analyze, broadly, how states utilize such a tool and whether the use is in conjunction with parole guidelines.

B. Data Analysis

Having provided an overview of the findings collected from the fifty-state survey, this Note will now group the states into tiers based on the way their parole laws function. It will begin with states that maintain determinate sentencing laws and thus do not employ parole decision-making procedures and will end with states that

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86 *See* IOWA ADMIN. CODE r. 205-8.1(906) (West, Westlaw through 2011).

87 *See, e.g.*, KAN. STAT. ANN. § 22-3717 (West, Westlaw through 2011) (providing that the "circumstances of the offense of the inmate" is one of the many pieces of "pertinent information" in making a decision regarding parole); MD. CODE ANN., CORR. SERVS. § 7-305 (West, Westlaw through 2011) (listing the "circumstances surrounding the crime" as one of ten factors it considers); N.D. CENT. CODE § 12-59-05 (West, Westlaw through 2011) (requiring that the board consider "the circumstances of the offense," along with eight other factors).

88 *See* IND. CODE § 11-13-3-3 (West, Westlaw through 2011); OHIO ADMIN. CODE 5120:1-1-07 (West, Westlaw through 2011); OR. REV. STAT. ANN. § 144.185 (West, Westlaw through 2011); WIS. ADMIN. CODE PAC § 1.06 (West, Westlaw through 2011).

89 *See* NEV. ADMIN. CODE § 213.514 (West, Westlaw through 2011).

employ a combination of dynamic and static factors, including a risk assessment tool, in reaching parole decisions.

1. Tier One: No Parole

Nationwide there appears to be a general trend toward increased individualization of parole decisions, and away from rigid sentencing guidelines and truth-in-sentencing laws that, although popular, do not allow decision-makers to individualize parole decisions. However, three states—Minnesota, North Carolina, and Oklahoma—have essentially abolished parole in that any post-conviction release is based purely on the date of conviction.[90] Prisoners are often classified along a sentencing grid based on the committed crime. Early release is not an option. These states continue to rely exclusively on such determinate sentencing laws that do not allow for any professional discretion.

2. Tier Two: Presumptive Parole

Several states, including Arizona, California, Florida, New Jersey, and West Virginia, have created presumptive parole by statute.[91] Presumptive parole is understood to mean that a parole applicant is entitled to the assumption that he or she has a legitimate expectation of release on the pre-determined eligibility date.[92] Upon preliminary examination, presumptive parole appears to be the process most likely to yield a fair release date for prisoners, particularly if the mandatory statutory language is construed to vest in the applicant a constitutionally protected liberty interest in release. However, this assumption of fairness may be somewhat misleading for the following reasons. First, presumptive parole statutes may accompany mandatory or determinate sentencing laws, which

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90 *See* MINN. SENTENCING GUIDELINES COMM'N., ADOPTED MODIFICATIONS TO THE MN SENTENCING GUIDELINES AND COMMENTARY, *available at* www.msgc.state.mn.us/guidelines/Adopted Modifications to the Sentencing Guidelines August 1 2011 .pdf; N.C. GEN. STAT. ANN. § 15A-1340.16 (West, Westlaw through 2011); OKLA. STAT. ANN. 57 § 332.7 (West, Westlaw through 2011).

91 *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-412 (West, Westlaw through 2011) (providing that board of executive clemency shall authorize the release of an eligible prisoner); CAL. PENAL CODE § 3041 (West, Westlaw through 2011) (providing that the California parole board shall set a release date); FLA. STAT. ANN. § 937.172 (establishing a presumptive parole release date); N.J. STAT. ANN. § 30:4-123.45 *et. seq.* (West, Westlaw through 2011) (establishing parole eligibility after a prisoner has served one-third of the sentence); W. VA. CODE § 62-12-13 (West, Westlaw through 2011) (providing that a prisoner shall be released on parole when it is in the best interest of the state).

92 N.J. STATE PAROLE BD., SENTENCING REFERENCE GUIDE 1 (2005), *available at* http://www.state.nj.us/parole/docs/RefGuide.pdf.

are necessarily more rigid than indeterminate sentencing schemes.[93] Second, mandatory parole statutes often contain clauses that vest sole discretion in the parole board to deny a presumptive release, potentially damaging the parole applicant's chances for release.[94] Further, because most presumptive statutes often do not delineate any discrete factors on which a decision might be based, the parole board's discretion is virtually unlimited. Given these realities, the parole applicant may be rendered virtually powerless in the face of a mandatory release date that is then altered based on a parole board's discretion. Of the five aforementioned presumptive parole laws, New Jersey's statutory scheme is unique and exemplary in that it provides unambiguous factors on which the decision-maker may base his or her decision to parole.[95]

3. Tier Three: Use of Risk Assessment in Parole Determinations

Only one state—Nevada—relies exclusively on a risk assessment instrument to determine parole.[96] The Nevada Division of Parole and Probation utilizes a sentencing matrix to determine parole. Whether the parole applicant has previously been convicted of a crime is an aggravating factor that is given less weight than the severity of the offense. The Nevada parole statutes provide that the parole board assigns each prisoner considered for parole a likely recidivism risk level—"high," "moderate," or "low"—based on a risk assessment tool.[97] Then, the Nevada Board applies the severity level of the offense for which the person is imprisoned, along with the established risk level to calculate the overall risk assessment.[98]

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93 *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-412 (West, Westlaw through 2011) (citing to ARIZ. REV. STAT. ANN. § 41-1604.09, the statute that governs parole eligibility).

94 *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-412 (West, Westlaw through 2011) (providing that parole shall only be granted to an eligible applicant if "it appears to the board, in its sole discretion, that there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state").

95 *See* N.J. ADMIN. CODE § 10A:71-3.11 (West, Westlaw through 2011) (listing twenty-three factors to be considered by the parole board).

96 *See* NEV. ADMIN. CODE § 213.514 (West, Westlaw through 2011); NEV. ADMIN. CODE § 213.516 (West, Westlaw through 2011). The Code states that after the "risk level" of each parole applicant is assessed and assigned, the Board will determine whether to grant parole by applying "the severity level of the crime for which parole is being considered . . . and the risk level assigned to the prisoner pursuant to NAC 213.514 to establish an initial assessment regarding whether to grant parole." NEV. ADMIN. CODE § 213.516.

97 NEV. ADMIN. CODE § 213.514 (West, Westlaw through 2011).

98 *Id.* at § 213.516.

No other considerations or factors are taken into account in this calculation.

Twenty-six states have not adopted risk assessment devices and thus do not use them at all when determining whether to release a parole applicant. Most states have struck a middle ground; they consider numerous factors, in addition to utilizing a risk assessment tools. Thus, they provide the combination advocated by JFA Associates. As the Colorado parole statute explicitly states: "Research demonstrates that . . . [t]he best [parole] outcomes are derived from a combination of empirically based actuarial tools and clinical judgment."[99] States that utilize a risk assessment tool, such as a matrix, often use it as one of several tools in making the final determination. In some states, such as Nebraska, the result from the risk assessment tool is one of many factors examined in a parole determination.[100]

Maryland, New Jersey, and Rhode Island provide strong examples of parole laws that incorporate the best practices in parole theory, with Maryland serving as perhaps the gold standard.[101] New York should look to these statutory schemes as models of progressive parole legislation and should aspire to match or exceed these models in its own parole laws. The parole laws of these three states share the following exemplary characteristics: (1) they provide specific and numerous guidelines for the parole board to consider; (2) the predominant focus of the factors is on the parole applicant's rehabilitation and progress during his or her incarceration; (3) they do not contain a catch-all provision that might allow the decision-maker to base his or her decision on an unenumerated factor; and (4) they utilize a risk assessment instrument, such as a matrix, yet this instrument does not limit the parole board's discretion. The guidelines thus allow for individualization in decision-making that can be based on consistent, forward-looking factors.

The mere presentation of a risk assessment tool, along with guidelines or factors, is not sufficient on its own. When legislatures provide multi-factored guidelines for determining parole, the considerations should be unambiguous. Nebulous factors such as "whether there is reasonable probability that such inmate will live and remain at liberty without violating the law" and whether the

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99 COLO. REV. STAT. ANN. § 17-22.5-404 (West, Westlaw through 2011).

100 *See* NEB. REV. ST. § 83-1,114 (West, Westlaw through 2011) and NEB. REV. ST. § 83-192 (West, Westlaw through 2011).

101 *See* MD CODE ANN. CORR. SERVS. § 7-305 (West, Westlaw through 2011); N.J. ADMIN. CODE § 10A:71-3.11 (West, Westlaw through 2011); R.I. GEN. LAWS ANN. § 13-8-14 (West, Westlaw through 2011).

release is in the best interests of the people of this state[102] are not instructive to decision-makers or to parole applicants because they do not provide substantive guidance against which to judge the applicant's preparedness for reentry. Statutes that rely on such factors to the exclusion of others may enable parole board members to exercise improper discretion. Thus, the risk assessment instrument is helpful in guiding the process but cannot and should not be relied on exclusively. One of the many advantages of the SAFE Parole Act over the current parole law is its presentation of unambiguous guidelines.

VI. Recommendations and Conclusion

The New York State Parole Board's discretion has been allowed to go unchecked for too long. New York parole laws are overdue for a change. In 1999, scholars advised that the Board "from time to time deviates from the Legislature's intent and sometimes even acts outside the scope of the Executive Law."[103] They noted that the Board "institutes its own brand of sentencing policy [. . .] under the guise of exercising its discretion as to whether or not to release the inmate to parole supervision or to hold him beyond the minimum term."[104]

New York's current parole law stands out in the Northeast and among its sister states as one of the most antiquated statutes. Rhode Island, New Jersey, and Maryland have far superior parole models. Fortunately, New York may soon be counted among the states with the most progressive parole laws. Passage of the SAFE Parole Act would make New York a leader nationwide for progressive parole legislation that actually advances the goal of rehabilitative punishment while also providing an accurate assessment of individual parole applicants.

The SAFE Parole Act should be passed in its entirety because it provides clear and fair grounds on which decisions may be based. Rather than attempting to abolish complete objectivity or total subjectivity in decision-making, which have demonstrably failed as goals, legislatures should provide unambiguous guidelines, along with a risk assessment tool, to those with discretion and power to

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102 *See, e.g.*, Conn. Gen. Stat. Ann. § 54-125a (West, Westlaw through 2011) (providing that a person eligible may be paroled if it appears "that there is a reasonable probability that such inmate will live and remain at liberty without violating the law" and that "such release is not incompatible with the welfare of society").

103 Hammock & Seelandt, *supra* note 66, at 529.

104 *Id.* at 531–32.

determine post-release supervision. Under Governor Andrew Cuomo, New York has made steady and impressive progress in its goal of reducing the prison population without threatening public safety; passing the SAFE Parole Act is the next logical step.

By clarifying the language of the law, humanizing the parole applicant, and removing the severity of the offense and the parole applicant's prior convictions from the list of factors considered by the parole board, the SAFE Parole Act shifts the focus from the applicant's past mistakes to his present rehabilitation and readiness. Not every eligible person will be granted parole, but people like George Cruz would be evaluated based on their progress, growth, and ability to contribute to their communities.

Appendix: Parole Laws & Guidelines from the Fifty States

State	Governing Body	Statute	Case Law	Manual, Policies, Procedures, or Any Other Guidance Document
AL	Board of Pardons and Paroles	(e) The board may adopt policy and procedural guidelines for establishing parole consideration eligibility dockets based on its evaluation of a prisoner's prior record, nature and severity of the present offense, potential for future violence, and community attitude toward the offender. Ala. Code § 15-22-24(e) (2012).		These Operating Procedures are not intended to, and do not, create any substantive legal rights for any person. Nothing in these Procedures shall be construed to create or recognize any liberty or property interest in an inmate's desire to be paroled. Ala. Bd. of Pardons and Paroles, Rules, Regulations, and Procedures, Preamble, *available at* http://www.pardons.state.al.us/alabpp/main/Rules.html#Article%20Six.
AK	DOC Parole Board	(a) A prisoner who is serving a term or terms of two years or more is eligible for mandatory parole. (b) A prisoner who is eligible under AS 33.16.090 may be granted discretionary parole by the board of parole. (c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment are two years or more. Alaska Stat. Ann. § 33.16.010 (Westlaw 2012).	When defendant's sentence is lengthy, law presumes that questions of discretionary release are better left to the Parole Board, since Board evaluates advisability of parole release in light of defendant's tested response to Department of Corrections' rehabilitative measures. Stern v. State, 827 P.2d 442, 450 (Alaska Ct. App. 1992).	Parole guidelines: a process used by the Board to determine a range of months a prisoner should serve. The guidelines are based on the prisoners' risk to the community and the seriousness of the current offense. Alaska Bd. of Parole, Parole Handbook 10 (2001). When making their determination, the Board considers the seriousness of the offense, the offender's criminal record, adjustment and treatment while incarcerated, and an offender's future plans. *Victim Resources FAQ,* Alaska Dep't of Corr., Prob., & Parole, http://www.correct.state.ak.us/corrections/communitycorr/offices/victimresources/faq.jsf (last visited Feb. 23, 2013).
AZ	Board of Executive Clemency	(A) If a prisoner is certified as eligible for parole pursuant to § 41-1604.09 the board of executive clemency	Statute requiring parole board to authorize release of parole applicant if it appears to board that applicant	

		shall authorize the release of the applicant on parole if the applicant has reached the applicant's earliest parole eligibility date pursuant to § 41-1604.09, subsection D and it appears to the board, in its sole discretion, that there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state. ARIZ. REV. STAT. ANN. § 31-412 (2012).	will remain at liberty without violating the law creates constitutionally protected liberty interest in parole release. Stewart v. Ariz. Bd. of Pardons and Paroles, 156 Ariz. 538, 542–43 (Ariz. Ct. App. 1988). The legislature intended to give the Board "sole discretion" to determine whether to grant or deny parole. Stinson v. Ariz. Bd. of Pardons and Paroles, 151 Ariz. 60, 61 (1986).	
AR	Parole Board	(a)(1)(A) An inmate under sentence for any felony, except those listed in subsection (b) of this section, shall be transferred from the Department of Correction to the Department of Community Correction, subject to rules promulgated by the Board of Corrections and conditions set by the Parole Board. (B) The determination under subdivision (a)(1)(A) of this section shall be made by reviewing information such as the result of the risk-needs assessment to inform the decision of whether to release a person on parole by quantifying that person's risk to reoffend. (b)(1) An inmate under sentence for one (1) of the following felonies shall be eligible for discretionary transfer to the Department of Community Correction by the Parole Board after having served one-third (1/3) or one-half (1/2) of his or her sentence, with credit for meritorious good time, depending on the seriousness de-		Release or discretionary transfer may be granted to an eligible person by the Board when, in its opinion, there is a reasonable probability that the person can be released without detriment to the community or him/herself. In making its determination regarding a inmate's release or discretionary transfer, the Board must consider the following factors:1. Institutional adjustment in general, including the nature of any disciplinary actions; 2. When considered necessary, an examination and opinion by a psychiatrist or psychologist can be requested and considered; 3. The record of previous criminal offenses (misdemeanors and felonies), the frequency of such offenses, and the nature thereof; 4. Conduct in any previous release program, such as probation, parole, work release, boot camp or alternative service; 5. Recommendations made by the Judge, Prosecuting Attorney, and Sheriff of the

		termination made by the Arkansas Sentencing Commission, or one-half (1/2) of the time to which his or her sentence is commuted by executive clemency, with credit for meritorious good time: (A) Any homicide - (H). (3)(A) Review of an inmate convicted of the enumerated offenses in subdivision (b)(1) of this section shall be based upon policies and procedures adopted by the Parole Board for the review, and the Parole Board shall conduct a risk-needs assessment review. ARK. CODE ANN. § 16-93-615 (Westlaw 2012).		county from which a person was sentenced, or other interested persons; 6. The nature of the release plan, including the type of community surroundings in the area the person plans to live and work; 7. The results of a validated risk/needs assessment 8. The inmate's employment record; 9. The inmate's susceptibility to drugs or alcohol; 10. The inmate's basic good physical and mental health; 11. The inmate's participation in institutional activities, such as, educational programs, rehabilitation programs, work programs, and leisure time activities; 12. The failure of an inmate incarcerated at the Varner Unit Super Max to attain Level 5; 13. When there is a detainer, the Board must pursue the basis of any such detainer and only release the inmate to a detainer where appropriate. A detainer must not be considered an automatic reason for denying parole. ARK. BD. OF PAROLE, POLICY MANUAL 7–8 (2001), *available at* http://paroleboard.arkansas.gov/AboutUs/Documents/policies/APBManual.pd.
CA	Board of Parole Hearings	(b) The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public	California's parole scheme gives rise to a cognizable liberty interest in release on parole. Paddock v. Mendoza-Powers, 674 F.Supp.2d 1123, 1129–30 (C.D. Cal. 2009).	

		safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. CAL. PENAL CODE § 3041 (Westlaw 2012).		
CO	The Division of Adult Parole, Community Corrections and YOS	(1) The general assembly hereby finds that: (a) The risk of reoffense shall be the central consideration by the state board of parole in making decisions related to the timing and conditions of release on parole; (b) Research demonstrates that actuarial risk assessment tools can predict the likelihood or risk of reoffense with significantly greater accuracy than professional judgment alone. Evidence-based correctional practices prioritize the use of actuarial risk assessment tools to promote public safety. The best outcomes are derived from a combination of empirically based actuarial tools and clinical judgment. (4)(a) In considering offenders for parole, the state board of parole shall consider the totality of the circumstances, which include, but need not be limited to, the following factors: (I) The testimony or written statement from the victim of the crime, or a relative of the victim, or a designee; (II) The actuarial risk of reoffense; (III) The offender's assessed criminogenic need level; (IV) The offender's program participation and progress; (V) The offender's institutional conduct; (VI) The adequacy of the offender's	Statutory scheme requiring the Board of Parole to consider general criteria in exercising its discretion with respect to grant or denial of parole does not create a constitutionally protected entitlement to, or liberty interest in, parole. Thompson v. Riveland, 714 P.2d 1338, 1340 (Colo. App. 1986). State parole board could properly consider nature of crime committed, psychological reports, presentence reports, postconviction behavior, sentence, amount of time already served, risk, efforts for self-improvement, resources available to inmate upon release, results of previous rehabilitation efforts, and whether inmate was available for interview. Schuemann v. Colo. State Bd. of Adult Parole, 624 F.2d 172, 173–74 (10th Cir. 1980).	

		parole plan; (VII) Whether the offender while under sentence has threatened or harassed the victim or the victim's family or has caused the victim or the victim's family to be threatened or harassed, either verbally or in writing; (VIII) Aggravating or mitigating factors from the criminal case; (IX) The testimony or written statement from a prospective parole sponsor, employer, or other person who would be available to assist the offender if released on parole; (X) Whether the offender had previously absconded or escaped or attempted to abscond or escape while on community supervision; and (XI) Whether the offender completed or worked toward completing a high school diploma, a general equivalency degree, or a college degree during his or her period of incarceration. (b) The state board of parole shall use the Colorado risk assessment scale that is developed by the division of criminal justice in the department of public safety pursuant to paragraph (a) of subsection (2) of this section in considering inmates for release on parole. COLO. REV. STAT. ANN. § 17-22.5-404 (West 2012)		
CT	Board of Pardons and Paroles	The Department of Correction, the Board of Pardons and Paroles and the Court Support Services Division of the Judicial Branch shall develop a risk assessment strategy for offenders committed to the custody of the	Prisoner failed to prove by a preponderance of the evidence, in his petition for habeas corpus alleging that board of pardons and paroles used quota system favoring black and Hispanic prisoners, that board illegally discrimi-	

		Commissioner of Correction that will (1) utilize a risk assessment tool that accurately rates an offender's likelihood to recidivate upon release from custody, and (2) identify the support programs that will best position the offender for successful reentry into the community. Such strategy shall incorporate use of both static and dynamic factors. CONN. GEN. STAT. ANN. § 18-81z (Westlaw 2012). (a) A person convicted of one or more crimes who is incarcerated on or after October 1, 1990, who received a definite sentence or aggregate sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the aggregate sentence. . .may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which the person is confined, if (1) it appears from all available information, including any reports from the Commissioner of Correction that the panel may require, that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society. At the discretion of the panel, and under the terms and conditions as may be prescribed by the panel including requiring the parolee to submit personal reports, the parolee shall be allowed to return to	nated against him because of his race when it denied his parole application; evidence showed that prisoner's lengthy criminal record, including serious offenses, poor performance in supervised release programs and probation, and a negative disciplinary record while incarcerated, all suggested a reasonable probability that the he would not be able to live at liberty without violating the law. Cook v. Warden, 915 A.2d 935, 940 (Conn. Super. Ct. 2005).		

		the parolee's home or to reside in a residential community center, or to go elsewhere. CONN. GEN. STAT. ANN. § 54-125a (Westlaw 2012).		
DE	Board of Parole	(c) A parole may be granted when in the opinion of the Board there is reasonable probability that the person can be released without detriment to the community or to person, and where, in the Board's opinion, parole supervision would be in the best interest of society and an aid to rehabilitation of the offender as a law-abiding citizen. A parole shall be ordered only in the best interest of society, not as an award of clemency, and shall not be considered as a reduction of sentence or a pardon. A person shall be placed on parole only when the Board believes that the person is able and willing to fulfill the obligations of a law-abiding citizen. Among the factors the Board shall consider when determining if a defendant shall be placed on parole are as follows: job skills, progress towards or achievement of a general equivalency diploma, substance abuse treatment and anger management and conflict resolution. DEL. CODE ANN. tit. 11, § 4347 (Westlaw 2012).	Release of an inmate on parole under statute governing eligibility for parole is a matter of discretion for the Parole Board; however, conditional release under statute governing release upon merit and good behavior credits is non-discretionary. Evans v. State, 872 A.2d 539, 554 (Del. 2005).	Risk assessment used in supervising parolees. *See* http://doc.delaware.gov/BOCC/BOCC.shtml (last visited December 31, 2011).
DC	United States Parole Commission	(a) Whenever it shall appear to the United States Parole Commission ("Commission") that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his or her release	Even though parole board's policy guidelines required board to have some basis for deviating from prescribed set-offs, board was not restricted to considering only enumerated factors, and therefore, guidelines vested sub-	Salient Factor Score, risk assessment device, examines all convictions, present and prior, and is applied to determine parole eligibility. *See* PETER B. HOFFMAN & JAMES L. BECK, U.S. DEP'T OF JUSTICE, U.S. PAROLE

		is not incompatible with the welfare of society, and that he or she has served the minimum sentence imposed or the prescribed portion of his or her sentence, as the case may be, the Commission may authorize his or her release on parole upon such terms and conditions as the Commission shall from time to time prescribe. D.C. CODE § 24-404 (2012).	stantial discretion in board to deviate; consequently, guidelines lacked substantial limitations on official discretion required for regulation to give rise to liberty interest protected under due process. Hall v. Henderson, 672 A.2d 1047, 1052–53 (D.C. 1996).	COMM'N, THE UNITED STATES PAROLE COMMISSION'S EXPEDITED REVOCATION PROCEDURE app. 1C (2004), *available at* www.justice.gov/uspc/commission_reports/expedited_apai1.pdf.
FL	Parole Commission	Objective Parole Guidelines Act of 1978 (1) The commission shall develop and implement objective parole guidelines which shall be the criteria upon which parole decisions are made. The objective parole guidelines shall be developed according to an acceptable research method and shall be based on the seriousness of offense and the likelihood of favorable parole outcome. The guidelines shall require the commission to aggravate or aggregate each consecutive sentence in establishing the presumptive parole release date. Factors used in arriving at the salient factor score and the severity of offense behavior category shall not be applied as aggravating circumstances. FLA. STAT. ANN. § 947.165 (Westlaw 2012). Establishment of Presumptive Parole Release Date. (1) The hearing examiner shall conduct an initial interview. This interview shall include introduction and explanation of the objective parole guidelines as they relate to presump-	One purpose for applying aggravating factors in determining presumptive parole release date is to permit parole and probation commission to reflect actual circumstances of the inmate's offense. Calloway v. Fla. Parole and Prob. Comm'n, 431 So.2d 300 (Fla. Dist. Ct. App. 1983). Prior aggravated convictions may be used as an aggravating factor. Ruzicka v. Fla. Parole and Prob. Comm'n, 480 So.2d 190, 191 (Fla. Dist. Ct. App. 1985).	

		tive and effective parole release dates and an explanation of the institutional conduct record and satisfactory release plan for parole supervision as each relates to parole release. FLA. STAT. ANN. § 947.172 (Westlaw 2012).		
GA	State Board of Pardons and Paroles	(c) Good conduct, achievement of a fifth-grade level or higher on standardized reading tests, and efficient performance of duties by an inmate shall be considered by the board in his favor and shall merit consideration of an application for pardon or parole. No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge. However, notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons. GA. CODE ANN. § 42-9-42 (Westlaw 2012).	Determination of Georgia Board of Pardons and Parole that Georgia parole system does not create liberty interest in parole because of discretion granted to the Board was reasonable and entitled to great deference. Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir. 1994). Parole Board is statutorily vested with much discretionary power and authority with respect to the grant of parole. Massey v. Ga. Bd. of Pardons and Paroles, 275 Ga. 127 (2002).	"[In addition to statutorily mandated guidelines], the Board has recently taken steps to have the newly revised Guidelines formally adopted as an agency rule pursuant to the Administrative Procedures Act." The Guidelines are comprised of three major components. The new risk instrument, formerly the success factor score, the Time to Serve GRID, and the offense crime severity levels. GA. STATE BD. OF PARDONS & PAROLES, GEORGIA PAROLE DECISIONS GUIDELINES 2 (2007).
HI	Paroling Authority	(8) The authority shall establish guidelines for the uniform determination of minimum sentences which shall take into account both	State paroling authority has broad discretion in establishing minimum terms of imprisonment. Williamson v. Hawai'i Paroling Auth., 35 P.3d	

		the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. The guidelines shall be public records and shall be made available to the prisoner and to the prosecuting attorney and other interested government agencies. HAW. REV. STAT. § 706-669(8) (Westlaw 2012).	210 (Haw. 2001).	
ID	Commission of Pardons and Parole	c. The commission allows for parole consideration criteria, but no prediction regarding the granting of parole can be based upon any hearing standard or criteria. (3-23-98) i. Seriousness and aggravation and/or mitigation involved in the crime. (3-23-98) ii. Prior criminal history of the inmate. (3-23-98) iii. Failure or success of past probation and parole. (3-23-98) iv. Institutional history to include conformance to established rules, involvement in programs and jobs custody level at time of the hearing, and overall behavior. (3-23-98) v. Evidence of the development of a positive social attitude and the willingness to fulfill the obligations of a good citizen. (3-23-98) vi. Information or reports regarding physical or psychological condition. (3-23-98) vii. The strength and stability of the proposed parole plan, including adequate home placement and employment or maintenance and care. (3-23-98) IDAHO ADMIN. CODE r. 50.01.01.250 (2012).		"Rules of the Commission of Pardons and Parole": 250.01. Parole Determination. Parole determination is at the complete discretion of the Commission. a. The Commission may release an inmate to parole on or after the date of parole eligibility, or not at all. b. Parole consideration is evaluated by the individual merits of each case. c. The Commission allows for parole consideration criteria, but no prediction regarding the granting of parole can be based upon any hearing standard or criteria. i. Seriousness and aggravation and/or mitigation involved in the crime. ii. Prior criminal history of the inmate. iii. Failure or success of past probation and parole. iv. Institutional history to include conformance to established rules, involvement in programs and jobs custody level at time of the hearing, and overall behavior. v. Evidence of the development of a positive social attitude and the willingness to fulfill the obligations of a good citizen. vi. Information or reports regarding physical

				or psychological condition. vii. The strength and stability of the proposed parole plan, including adequate home placement and employment or maintenance and care. 96-11 IDAHO ADMIN. BULL. 195 (1996).
IL	Prisoner Review Board	Hearing and Determination. (c) The Board shall not parole a person eligible for parole if it determines that: (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or (3) his release would have a substantially adverse effect on institutional discipline. 730 ILL. COMP. STAT. ANN. 5/3-3-5 (Westlaw 2012).	Prisoner Review Board's explanations for denying parole satisfied due process; Board indicated that it considered nature of murder offenses, length of sentences, escape convictions, previous criminal conduct, objections of state's attorney, and objections of other members of community. Goins v. Klincar, 167 Ill. Dec. 779 (Ill. App. Ct. 1992). Illinois' parole statute does not create a legitimate expectation of parole that would support due process claim, but instead vests complete discretion in parole board outside of those specified instances when denial of parole is mandatory. Heidelberg v. Ill. Prisoner Review Bd., 163 F.3d 1025 (7th Cir. 1998).	
IN	Parole Board	Sec. 3. (a) A person sentenced under IC 35-50 shall be released on parole or discharged from the person's term of imprisonment under IC 35-50 without a parole release hearing. (b) A person sentenced for an offense under laws other than IC 35-50 who is eligible for release on parole. . .shall, before the date of the person's parole eligibility, be granted a parole release hearing to determine whether parole will be granted or denied.	If an inmate in Indiana had any rights with regards to parole release, they must have emanated from the parole release statute itself; there is no constitutional or inherent right to parole release. Murphy v. Ind. Parole Bd., 397 N.E.2d 259 (Ind. 1979).	

		Before the hearing, the parole board shall order an investigation to include the collection and consideration of: (1) reports regarding the person's medical, psychological, educational, vocational, employment, economic, and social condition and history; (2) official reports of the person's history of criminality; (3) reports of earlier parole or probation experiences; (4) reports concerning the person's present commitment that are relevant to the parole release determination; (5) any relevant information submitted by or on behalf of the person being considered; and (6) such other relevant information concerning the person as may be reasonably available. IND. CODE ANN. § 11-13-3-3 (Westlaw 2012).		
IA	Board of Parole	The board shall determine whether there is reasonable probability that an inmate committed to the custody of the department of corrections who is eligible for parole or work release can be released without detriment to the community or the inmate. The board shall consider the best interests of society and shall not grant parole or work release as an award of clemency. IOWA ADMIN. CODE r. 205-8.1(906) (2012). The board of parole shall implement a risk assessment program which shall provide risk assessment analysis for the board. IOWA CODE ANN. § 904A.4(8) (Westlaw 2012).		
KS	Prisoner	(h) The Kansas parole	State law or regulations	

	Review Board	board shall hold a parole hearing at least the month prior to the month an inmate will be eligible for parole . . . At each parole hearing and, if parole is not granted, at such intervals thereafter as it determines appropriate, the Kansas parole board shall consider: (1) Whether the inmate has satisfactorily completed the programs required by any agreement entered under K.S.A. 75-5210a; and (2) all pertinent information regarding such inmate, including, but not limited to, the circumstances of the offense of the inmate; the presentence report; the previous social history and criminal record of the inmate; the conduct, employment, and attitude of the inmate in prison; the reports of such physical and mental examinations as have been made, including, but not limited to, risk factors revealed by any risk assessment of the inmate; comments of the victim and the victim's family including in person comments, contemporaneous comments and prerecorded comments made by any technological means; comments of the public; official comments; any recommendation by the staff of the facility where the inmate is incarcerated; proportionality of the time the inmate has served to the sentence a person would receive under the Kansas sentencing guidelines for the conduct that resulted in the inmate's incarceration; and capacity of state correctional insti-	create a liberty interest in parole only where they create a "legitimate expectation of release" or use "mandatory language which creates a liberty interest and places significant limits on the board's discretion . . . The Kansas statute presumes that the inmate will not be released unless the parole board makes certain affirmative findings. The statute provides that "the Kansas parole board may release on parole those persons . . . who are eligible for parole when: . . . the board believes that" certain requirements are met. Kan. Stat. Ann. § 22–3717 (Supp.2000) (emphasis added). It is hard to conceive how the statute could be more discretionary short of granting the board unbridled discretion." Crump v. Kansas, 143 F.Supp.2d 1256, 1261 (D. Kansas 2001).		

		tutions. KAN. STAT. ANN. § 22-3717 (Westlaw 2012).		
KY	Parole Board	The department shall: (1) Administer a validated risk and needs assessment to assess the criminal risk factors of all inmates who are eligible for parole, or a reassessment of a previously administered risk and needs assessment, before the case is considered by the board; (2) Provide the results of the most recent risk and needs assessment to the board before an inmate appears before the board; and (3) Incorporate information from an inmate's criminal risk and needs assessment into the development of his or her case plan. KY. REV. STAT. ANN. § 439.331 (Westlaw 2012).		Factors Considered When Granting Or Denying Parole: • Current offense – seriousness, violence, firearm • Prior record – juvenile, misdemeanor, felony • Institutional conduct / program involvement • Attitude toward authority – before and during incarceration • History of alcohol and drug involvement • Education and job skills • Employment history • Emotional stability • Mental capacities • Terminal illness • History of deviant behavior • Official and community attitudes • Input from victims and others • Review of parole plan – housing, employment, community resources available • Other factors relating to the inmate's need and public safety. 2001 KY. PAROLE BD. BIENNIAL REP. pt. 1, at 13. The Board plans to develop a set of objective based guidelines to use in their decision making process. These guidelines will contain an offense severity index along with a risk assessment component that will provide the Board with guidance as to what action should be taken in a particular case. Parole however will remain discretionary. *Id.* at 17.
LA	Board of Parole	(D): In accordance with the provisions of this Part, the committee on parole shall have the following pow-	State scheme regarding pardon and parole does not implicate due process rights of inmates incarcerated for	

		ers and duties: (6) To consider all pertinent information with respect to each prisoner who is incarcerated in any penal or correctional institution in this state at least one month prior to the parole eligible date and thereafter at such other intervals as it may determine, which information shall be a part of the inmate's consolidated summary record and which shall include: (a) The circumstances of his offense. (b) The reports filed under Articles 875 and 876 of the Louisiana Code of Criminal Procedure. (c) His previous social history and criminal record. (d) His conduct, employment, and attitude in prison. (e) His participation in vocational training, adult education, literacy, or reading programs. (f) Any reports of physical and mental examinations which have been made. LA. REV. STAT. ANN. § 15:574.2 (2012). C. (1) At such intervals as it determines, the committee or a member thereof shall consider all pertinent information with respect to each prisoner eligible for parole, including the nature and circumstances of the prisoner's offense, his prison records, the presentence investigation report, any recommendations of the chief probation and parole officer, and any information and reports of data supplied by the staff. A parole hearing	life, as parole statutes do not create expectancy of release or liberty interest; parole board has full discretion when passing on application for early release and scheme specifically excludes parole consideration for inmates serving uncommuted life sentences. Bosworth v. Whitley, 627 So.2d 629 (La. 1993).		

		shall be held if, after such consideration, the board determines that a parole hearing is appropriate or if such hearing is requested in writing by its staff. LA. REV. STAT. ANN. § 15:574.4(C) (2012). A. The Board of Parole shall establish a parole risk assessment pilot program which shall incorporate risk assessment analysis into the parole decision making process. The risk assessment analysis shall be designed to enhance objectivity and consistency in the parole decision making process. The program shall include the development of objective parole criteria consisting of statistical evaluation of the threat to society posed by parole candidates based on past patterns of recidivism. B. The board shall utilize in the program, an offender risk assessment scoring system designed to measure the threat of risk of new criminal activity in general and the specific threat of new violence. LA. REV. STAT. ANN. § 15:574.21 (2012).		
MA	Parole Board	No prisoner shall be granted a parole permit merely as a reward for good conduct but only if the parole board is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. Mass. Gen. Laws Ann., ch. 127, § 130 (Westlaw 2012). (1) In making a parole or re-parole determina-	" . . .a prisoner cannot prevent the board from considering the circumstances of the crime for which he is sentenced merely because he pleaded guilty to a lesser crime than that with which he was charged." Greenman v. Mass. Parole Bd., 540 N.E.2d 1309, 1312 (Mass. 1989).	[H]aving an offender's risk determined through the use of an objective instrument would appear to be most beneficial as a component of parole decision making. Presently, the COMPAS risk assessment tool is currently being piloted in collaboration with the Massachusetts Department of Correction. Over time, risk assessment tools will be developed, modified, and improved. In addition, the agency is piloting

		tion, the parole hearing panel may consider, if available and relevant, information such as: (a) reports and recommendations from parole staff; (b) official reports of the inmate's prior criminal record, including a report or record of earlier probation and parole experiences; (c) any pending cases; (d) presentence investigation reports; (e) official reports of the nature and circumstances of the offense including, but not limited to, police reports, grand jury minutes, decisions of the Massachusetts Appeals Court or the Supreme Judicial Court, and transcripts of the trial or of the sentencing hearing; (f) statements by any victim of the offense for which the offender is imprisoned about the financial, social, psychological, and emotional harm done to or loss suffered by such victim; (g) reports of physical, medical, mental, or psychiatric examination of the inmate; (h) any information that the inmate may wish to provide the parole hearing panel including letters of support from family, friends, community leaders, and parole release plans; and (i) information provided by the custodial authority, including, but not limited to, disciplinary reports, classification reports, work evaluations, and educational achievements. 120 Mass. Code Regs. § 300.05 (2012).		the use of the Static-99 risk assessment tool for sex offenders. JOSH WALL, PAROLE DECISION MAKING: THE POLICY OF THE MASSACHUSETTS PAROLE BOARD 17 (2006), *available at* http://www.mass.gov/eopss/docs/pb/paroledecision.pdf. Ultimately, the Board has discretion. *Id.* at 4.
ME	Parole Board	The board may grant a parole from a penal or		The Parole Board has discretionary authority

		correctional institution after the expiration of the period of confinement, less deductions for good behavior, or after compliance with conditions provided for in sections 5803 to 5805 applicable to the sentence being served by the prisoner or inmate. ME. REV. STAT. ANN. tit. 34-A, § 5802 (2012).		to grant or deny parole (34-A M.R.S.A. § 5211, § 5802). In making decisions, the Board attempts to balance the interests of society with the interests of the offender and, in each case, it must gauge the risk the granting of parole poses to the community. In evaluating an inmate's case, the Board considers, but is not limited to, the following factors: 1. Adequacy of the Parole Plan. 2. Personal History. The Board considers the inmate's education, vocational training, and other occupational skills, employment history, willingness to accept responsibility and history of drug, or excessive alcohol consumption. 3. Criminal History. The Board takes into account the seriousness of prior and instant criminal offenses, their frequency and time span and any pending charges. 4. Institutional Conduct. 5. Previous Probation or Parole. 6. Psychological Evaluations. 7. Recommendations Made by the Sentencing Court. The Board considers sentencing recommendations made by the court. 8. Recommendations and Field Observations. ME. STATE PAROLE BD., 03-208, RULES AND POLICY 4–5 (1996).
MD	Parole Commission	Each hearing examiner and commissioner determining whether an inmate is suitable for parole, and the Commission before entering into a predetermined	Statutory scheme governing the Maryland Parole Commission's (MPC) consideration of parole did not create a liberty interest protected by due process;	

		parole release agreement, shall consider: (1) the circumstances surrounding the crime; (2) the physical, mental, and moral qualifications of the inmate; (3) the progress of the inmate during confinement, including the academic progress of the inmate in the mandatory education program required under § 22-102 of the Education Article; (4) a report on a drug or alcohol evaluation that has been conducted on the inmate, including any recommendations concerning the inmate's amenability for treatment and the availability of an appropriate treatment program; (5) whether there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law; (6) whether release of the inmate on parole is compatible with the welfare of society; (7) an updated victim impact statement or recommendation prepared under § 7-801 of this title; (8) any recommendation made by the sentencing judge at the time of sentencing; (9) any information that is presented to a commissioner at a meeting with the victim; and (10) any testimony presented to the Commission by the victim or the victim's designated representative under § 7-801 of this title. MD. CODE ANN. CORR. SERVS. § 7-305 (Westlaw 2012).	terms "must" and "shall" in statutory scheme created only specific directives to consider the factors and to issue a written decision as prescribed, they did not constitute specific directives instructing the MPC as to when, exactly, it must or must not grant parole. McLaughlin-Cox v. Md. Parole Comm'n, 24 A.3d 235 (Md. Ct. Spec. App. 2011). Since Maryland Parole Commission guideline known as "matrix system" stated that nothing therein was meant to limit discretion of Parole Commission application of guideline in considering prisoners for parole release would not constitute a constitutional violation. Braxton v. Josey, 567 F.Supp. 1479 (D. Md. 1983).	

MI	Parole Board	Sec. 33. (1) The grant of a parole is subject to all of the following: (a) A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety MICH. COMP. LAWS. ANN. § 791.233 (Westlaw 2012).	In Michigan, a prisoner's release on parole is discretionary with the parole board. Lee v. Withrow, 76 F.Supp.2d 789 (E.D. Mich. 1999). Michigan parole statute does not create a right to be paroled. *Id.*	"The factors considered by the Parole Board in making parole decisions include the nature of the current offense, the prisoner's criminal history, prison behavior, program performance, age, parole guidelines score, risk as determined by various validated assessment instruments and information obtained during the prisoner's interview, if one is conducted . . . The Parole Board uses a numerical scoring system called the parole guidelines to apply objective criteria to the decision-making process. This tool is designed to reduce disparity in parole decisions and increase parole decision-making efficiency. " *The Parole Consideration Process*, MICH. DEP'T OF CORR., http://www.michigan.gov/corrections/0,4551,7-119-1384-22909—,00.html (last visited Mar. 13, 2013).
MN	Sentencing Guidelines Commission			"The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by locating the appropriate cell of the Sentencing Guidelines Grids. The grids represent the two dimensions most important in current sentencing and releasing decisions—offense severity and criminal history." MINN. SENTENCING GUIDELINES COMM'N, GUIDELINES AND COMMENTARY 2 (2011). "[T]he sentence is fixed and there is no parole board to grant early release. When a person receives a prison sentence, it consists of two parts: a term of

				imprisonment equal to two-thirds of the total sentence and a supervised release term equal to the remaining one-third. The amount of time the offender actually serves in prison may be extended by the Commissioner of Corrections if the offender violates disciplinary rules while in prison or violates conditions of supervised release." *Frequently Asked Questions*, MINN. SENTENCING GUIDELINES COMM'N, http://www.msgc.state.mn.us/msgc5/faqs.htm (last visited Mar. 13, 2013).
MS	The State Parole Board	(1) Every prisoner who has been convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi Department of Corrections for a definite term, or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the department, and who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole. . .. MISS. CODE ANN. § 47-7-3 (Westlaw 2012).	Denial of parole did not violate inmates's due process rights as inmate had no constitutionally recognized liberty interest in parole. Hopson v. Miss. State Parole Bd., 976 So.2d 973 (Miss. Ct. App. 2008).	Depending on various factors including an inmate's criminal history, crime, crime commit date, and sentence, some inmates may be eligible for parole consideration after serving a portion of their sentence. Although an inmate may be eligible for parole, it is not guaranteed that an inmate will be granted parole. Whether or not an inmate is released early to parole is within the complete discretion of the Mississippi State Parole Board. When considering whether to grant or deny parole the Board considers a multitude of factors including, but not limited to, the following: • Severity of offense • Number of offenses committed • Psychological and/or psychiatric history • Disciplinary action while incarcerated • Community Support or Opposition • Amount of Time Served • Prior misdemeanor or felony conviction(s)

				• Policy and/or juvenile record • History of drug or alcohol abuse • History of violence • Crimes committed while incarcerated • Escape history • Participation in rehabilitative programs • Arrangements for employment and/or residence • Whether the offender served in the U.S. Armed Forces and received an honorable discharge. Victims and family members of victims are allowed to make impact statements to the Parole Board. *Parole*, MISS. DEP'T OF CORR., http://www.mdoc.state.ms.us/parole1.htm (last visited Mar. 13, 2013).
MO	Board of Probation and Parole	1. The board of probation and parole shall be responsible for determining whether a person confined in the department shall be paroled or released conditionally as provided by section 558.011, RSMo. MO. ANN. STAT. § 217.655(1) (Westlaw 2012). 1. When in its opinion there is reasonable probability that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law. All paroles shall issue upon order of the board, duly adopted. MO. ANN. STAT. § 217.690(1) (Westlaw 2012).	While nothing in the statute governing parole determinations guarantees parole eligibility, the Board of Probation and Parole has discretion to determine whether release in the future would be appropriate, taking into consideration the seriousness of the crimes committed. Kaczynski v. Mo. Bd. of Prob. and Parole, 349 S.W.3d 354 (Mo. Ct. App. 2011). Sections 217.655 and 217.690 give Board of Probation and Parole almost unlimited discretion to make parole determinations and, thus, do not create a liberty interest protected by due process. Green v. Black, 755 F.2d 687, 688 (8th Cir. 1985). In determining whether to grant prison inmate parole, parole board could properly consider inmate's past convictions. Tomich v. Mo. Bd. of Prob. and Pa-	To establish a uniform parole policy, promote consistent exercise of discretion and equitable decision-making, without removing individual case consideration, the Board has adopted guidelines for parole release consideration, using a salient factor scale and time to be served matrices. These guidelines indicate the customary range of time to be served before release for various combinations of offender characteristics and sentence length. Mitigating or aggravating circumstances may warrant decisions outside the guidelines. MO. DEP'T OF CORR., PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASE ¶ 11 (2009), *available at* http://doc.mo.gov/Documents/prob/Blue%20Book.pdf.

			role, 585 F.Supp. 939, 941 (W.D. Mo. 1984).	
MT	Board of Pardons and Parole	(1) An eligible offender may apply and come before a board hearing panel or an out of state releasing authority for nonmedical parole consideration within two months of time fixed by law as calculated by the prison records department. During the parole hearing the hearing panel will consider all pertinent information regarding each eligible offender including: (a) the circumstances of the offender's current offense and any other offenses the offender has committed; (b) the offender's social history and criminal record; (c) the offender's prison record including disciplinary conduct, work history, treatment programs, classification and placement, and adjustment to prison; and (d) reports of any physical, psychological and mental health evaluations done on the offender. MONT. ADMIN. R. 20.25.401(1) (2012).		
NE	Board of Parole	(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his or her release unless it is of the opinion that his or her release should be deferred because: (a) There is a substantial risk that he or she will not conform to the conditions of parole; (b) His or her release would depreciate the seriousness of his or her crime or promote disrespect for law; (c) His or her release		

		would have a substantially adverse effect on institutional discipline; or (d) His or her continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his or her capacity to lead a law-abiding life when released at a later date. (2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors: (a) The offender's personality, including his or her maturity, stability, and sense of responsibility and any apparent development in his or her personality which may promote or hinder his or her conformity to law; (b) The adequacy of the offender's parole plan; (c) The offender's ability and readiness to assume obligations and undertake responsibilities; (d) The offender's intelligence and training; (e) The offender's family status and whether he or she has relatives who display an interest in him or her or whether he or she has other close and constructive associations in the community; (f) The offender's employment history, his or her occupational skills, and the stability of his or her past employment; (g) The type of residence, neighborhood, or community in which the offender plans to live; (h) The offender's past use of narcotics or past habitual and excessive use of alcohol; (i) The offender's mental or physical makeup, in-			

		cluding any disability or handicap which may affect his or her conformity to law; (j) The offender's prior criminal record, including the nature and circumstances, recency, and frequency of previous offenses; (k) The offender's attitude toward law and authority; (l) The offender's conduct in the facility, including particularly whether he or she has taken advantage of the opportunities for self-improvement, whether he or she has been punished for misconduct within six months prior to his or her hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration; (m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; (n) The risk and needs assessment completed pursuant to section 83-192; and (o) Any other factors the board determines to be relevant. NEB. REV. STAT. § 83-1,114 (Westlaw 2012).			
		(1) The Board of Parole shall: . . . (e) Within two years after July 1, 2006, implement the utilization of a validated risk and needs assessment in coordination with the Department of Correctional Services and the Office of Parole Administration. The assessment shall be prepared and completed by the department or the office for use by the board in			

		determining release on parole. NEB. REV. STAT. § 83-192 (Westlaw 2012).		
NV	Division of Parole and Probation	1. The Board will assign to each prisoner who is being considered for parole a risk level of "high," "moderate" or "low" according to the level of risk that the prisoner will commit a felony if released on parole. 2. To establish the risk level, the Board will conduct an objective risk assessment using a combination of risk factors that predict recidivism. NEV. ADMIN. CODE § 213.514 (2012). In determining whether to grant parole to a prisoner, the Board will apply the severity level of the crime for which parole is being considered as assigned pursuant to NAC 213.512 and the risk level assigned to the prisoner pursuant to NAC 213.514 to establish an initial assessment regarding whether to grant parole. NEV. ADMIN. CODE § 213.516 (2012).		
NH	Adult Parole Board	II. The board shall hold at least 24 parole hearings each year and may hold more hearings as necessary. Each parole hearing shall be held by a hearing panel consisting of exactly 3 members of the board. The board shall establish operating procedures which provide for rotation of board members among hearing panels. N.H. REV. STAT. ANN. § 651-A:3 (2012).	New Hampshire Adult Parole Board's discretion to deny parole is not limited by RSA chapter 651-A, or by its administrative rules. Knowles v. Warden, N.H. State Prison, 140 N.H. 387, 390 (1995).	Per phone conversation of August, 2011, considerations include: discipline history; attitude about the crime; severity of the offense. The Board may also consider priors depending on the crime.
NJ	State Parole Board	(a) Parole decisions shall be based on the aggregate of all pertinent factors, including material supplied by	Parole Act of 1979 shifts burden to state to prove that prisoner is recidivist and should not be released. Tranti-	Under New Jersey law, an inmate becomes eligible for parole consideration after serving one-third of his or her

		the inmate and reports and material which may be submitted by any persons or agencies which have knowledge of the inmate. (b) The hearing officer, Board panel or Board shall consider the following factors and, in addition, may consider any other factors deemed relevant: 1. Commission of an offense while incarcerated. 2. Commission of serious disciplinary infractions. 3. Nature and pattern of previous convictions. 4. Adjustment to previous probation, parole and incarceration. 5. Facts and circumstances of the offense. 6. Aggravating and mitigating factors surrounding the offense. 7. Pattern of less serious disciplinary infractions. 8. Participation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes, but is not limited to, participation in substance abuse programs, academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling. 9. Statements by institutional staff, with supporting documentation, that the inmate is likely to commit a crime if released; that the inmate has failed to cooperate in his or her own rehabilitation; or that there is a reasonable expectation that the inmate will violate conditions of parole.	no v. N.J. State Parole Bd., 166 N.J. 113 (2001).	prison sentence, with the exception of cases in which the offender was sentenced to a period of parole ineligibility. An inmate's eligibility for parole, however, does not mean the individual will automatically be granted release to parole supervision. Before a parole decision is made, the inmate must undergo the parole hearing process. The first step in this process is the initial hearing. Hearing officers in the Division of Release conduct this preliminary review of the inmate's appropriateness for parole release. The hearing officer reviews professional reports concerning the inmate's criminal history including the current offense, the inmate's social, physical, educational and psychological progress, and an objective social and psychological risk and needs assessment. The hearing officer then summarizes the case for the designated Board Members' review. *Hearings*, N.J. STATE PAROLE BD., http://www.state.nj.us/parole/hearings.html (last visited Dec. 31, 2011).

		10. Documented pattern or relationships with institutional staff or inmates. 11. Documented changes in attitude toward self or others. 12. Documentation reflecting personal goals, personal strengths or motivation for law-abiding behavior. 13. Mental and emotional health. 14. Parole plans and the investigation thereof. 15. Status of family or marital relationships at the time of eligibility. 16. Availability of community resources or support services for inmates who have a demonstrated need for same. 17. Statements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole. 18. History of employment, education and military service. 19. Family and marital history. 20. Statement by the court reflecting the reasons for the sentence imposed. 21. Statements or evidence presented by the appropriate prosecutor's office, the Office of the Attorney General, or any other criminal justice agency. 22. Statement or testimony of any victim or the nearest relative(s) of a murder/manslaughter victim. 23. The results of the objective risk assessment instrument. N.J.			

		ADMIN. CODE § 10A:71-3.11 (2012).		
NM	Corrections Department	D. The parole board shall adopt a written policy specifying the criteria to be considered by the board in determining whether to grant, deny or revoke parole or to discharge a parolee. N.M. STAT. ANN. § 31-21-25 (Westlaw 2012).	Release on parole is an act of clemency or grace resting entirely within discretion of parole board. Robinson v. Cox, 77 N.M. 55, 59 (1966).	
NY	Division of Parole	(2)(c)(A) Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order is-		

		sued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. N.Y. EXEC. LAW § 259-i (2)(c)(A) (Westlaw 2012).		
NC	Post-Release Supervision and Parole Commission	Structured Sentencing Act provides three separate sentence ranges in the felony punishment chart (aggravated range, presumptive range, and mitigated range). See N.C. GEN.	A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation. State v. Allen, 684	Structured Sentencing is the method of sentencing and punishing criminals in North Carolina. It classifies offenders on the basis of the severity of their crime and on the ex-

		STAT. ANN. § 15A-1340.16 (Westlaw 2012).	S.E.2d 526 (N.C. Ct. App. 2009).	tent and gravity of their prior criminal record. Based on these two factors, structured sentencing provides judges with sentencing options for the type and length of sentences which may be imposed. Under the law, there is no early parole release so the sentence is truthful. In addition, the law sets priorities for the use of correctional resources and balances sentencing policies with correctional capacity. N.C. SENTENCING AND POLICY ADVISORY COMM'N, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING 1 (2010).
ND	Parole Board	Applications for parole must be reviewed in accordance with the rules adopted by the parole board. The board shall consider all pertinent information regarding each applicant, including the circumstances of the offense, the presentence report, the applicant's family, educational, and social history and criminal record, the applicant's conduct, employment, participation in education and treatment programs while in the custody of the department of corrections and rehabilitation, and the applicant's medical and psychological records. N.D. CENT. CODE § 12-59-05 (Westlaw 2012)		
OH	Adult Parole Authority Board (APA Board)	(B) In considering the release of the inmate, the parole board shall consider the following: (1) Any reports prepared by any institutional staff member relating to the inmate's personality, social history, and adjustment to institutional programs and assignments;	Because neither statute nor regulation created the Ohio Adult Parole Authority's (OAPA) internal guidelines for parole decisions, OAPA need not follow them, they place no substantive limits on official discretion, and an inmate cannot claim any right to have any partic-	In 2006, DRC contracted with the University of Cincinnati, Center for Criminal Justice Research, to develop a universal Ohio-based assessment system that would be utilized at various points in the criminal justice system. This project was recently completed and is

		(2) Any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole; (3) Any presentence or postsentence report; (4) Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney, or defense counsel; (5) Any reports of physical, mental or psychiatric examination of the inmate; (6) Such other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under rule 5120-9-31 of the Administrative Code shall be considered; (7) Written or oral statements by the inmate. (8) The equivalent sentence range under Senate Bill 2, for the same offense of conviction if applicable. (9) The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs; (10) The inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association in the community; (11) The type of residence, neighborhood, or community in which the inmate plans to live; (12) The inmate's employment history and	ular set of guidelines apply. Thompson v. Ghee, 139 Ohio App.3d 195, 200 (Ohio Ct. App. 2000). RC 2967.03 creates no presumption that parole will be granted when designated findings are made. State ex rel. Ferguson v. Ohio Adult Parole Auth., 45 Ohio St.3d 355, 356 (1989).	called the Ohio Risk Assessment System (ORAS). The ORAS tools can be used at pretrial, prior to or while on community supervision, at prison intake, and in preparation for reentry just prior to release from prison. *Ohio Risk Assessment System*, OHIO DEP'T OF REHAB. AND CORR., http://drc.ohio.gov/web%5Coras.htm (last visited Dec. 31, 2011).

		his occupational skills; (13) The inmate's vocational, educational, and other training; (14) The adequacy of the inmate's plan or prospects on release; (15) The availability of community resources to assist the inmate; (16) The physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release; (17) The presence of outstanding detainers against the inmate; (18) Any other factors which the board determines to be relevant. (C) The consideration of any single factor, or any group of factors, shall not create a presumption of release on parole, or the presumption of continued incarceration. The parole decision need not expressly address any of the foregoing factors. OHIO ADMIN. CODE 5120:1-1-07 (2012).		
OK	Pardon and Parole Board	A. For a crime committed prior to July 1, 1998, any person in the custody of the Department of Corrections shall be eligible for consideration for parole at the earliest of the following dates: 1. Has completed serving one-third (1/3) of the sentence; 2. Has reached at least sixty (60) years of age and also has served at least fifty percent (50%) of the time of imprisonment that would have been imposed for that offense pursuant to the applicable Truth in Sentencing matrix; 3. Has reached eighty-five percent (85%) of the midpoint of the	Oklahoma Truth in Sentencing Act did not create due process liberty interest in recalculation of defendant's sentence, and thus defendant failed to make substantial showing of denial of constitutional right, as would entitle him to certificate of appealability to appeal from District Court's denial of his federal habeas corpus petition, where sole purpose of any recalculation under Act was to determine date upon which inmate becomes eligible for consideration for parole. Dugger v. Attorney Gen. of Okla., 27 Fed.Appx. 992, 994 (10th Cir. 2001).	

		time of imprisonment that would have been imposed for an offense that is listed in Schedule A, B, C, D, D-1, S-1, S-2 or S-3 of Section 6, Chapter 133, O.S.L. 1997; or 4. Has reached seventy-five percent (75%) of the midpoint of the time of imprisonment that would have been imposed for an offense that is listed in any other schedule, pursuant to the applicable matrix. B. For a crime committed on or after July 1, 1998, any person in the custody of the Department of Corrections shall be eligible for consideration for parole who has completed serving one-third (1/3) of the sentence; provided, however, no inmate serving a sentence of life imprisonment without parole shall be eligible to be considered for parole pursuant to this subsection. F. The Pardon and Parole Board shall promulgate rules for the implementation of subsections A, B and C of this section. OKLA. STAT. ANN., tit. 57, § 332.7 (Westlaw 2012).		
OR	Board of Parole and Post-Prison Supervision	Before making a determination regarding a prisoner's release on parole as provided by ORS 144.125, the State Board of Parole and Post-Prison Supervision may cause to be brought before it current records and information regarding the prisoner, including: (1) Any relevant information which may be submitted by the prisoner, the prisoner's attorney, the victim of the crime, the Depart-		

		ment of Corrections, or by other persons; (2) The presentence investigation report; (3) the reports of any physical, mental, and psychiatric examinations; (4) The prisoner's parole plan; and (5) Other relevant information concerning the prisoner as may be reasonably available. OR. REV. STAT. ANN. § 144.185 (Westlaw 2012). Information the Board Shall Consider (1) The Board Review Packet shall contain:(a) Inmate's notice of rights and notice of administrative appeal; (b) PSI, PAR, PSR or report of similar content; (c) Sentencing/judgement orders; (d) Face sheet; (e) Certification of time served credits; (f) Board Action Forms; (g) Information pursuant to Ballot Measure 10; (h) Material submitted by the inmate or representative relating to the calculation of the prison term; (i) Current psychological/psychiatric evaluations; (j) Other relevant material selected at the Board's discretion. (2) The Board may consider additional information and recommendations from those with a special interest in the case. If considered, the Board Review Packet shall include the information. OR. ADMIN. R. 255-030-0035 (2012).		
PA	Board of Probation and Parole	Parole Act of 1941. (e) Term of imprisonment—All sentences of imprisonment imposed under this chapter shall be for a definite term. 42 PA. CONS. STAT. ANN.	Only constraints placed on sentencing court's discretion are that sentence imposed must be within statutory limits, that record must show consideration of sentencing guidelines in	Prior to the parole interview, a case file must be prepared for the decision makers to review. Central office staff, institutional parole staff and DOC staff contribute to the effort to

		§ 9721 (Westlaw 2012).	light of public protection, gravity of offense, and rehabilitative needs of defendant, and that record must demonstrate contemporaneous statement of reasons for departure. Commonwealth v. Jones, 640 A.2d 914, 917 (Pa. Sup. Ct. 1994). In exercising discretion as to whether to impose sentence within aggravated range, sentencing judge should bear in mind that suggested sentencing ranges were painstakingly developed and take into consideration prior record, offense gravity, and statutory classification of crime. Commonwealth v. Duffy, 491 A.2d 230, 233 (Pa. Sup. Ct. 1985).	compile an accurate and complete case file. The file contains the following: • The nature and circumstances of the crime for which the offender was convicted, as well as his/her entire criminal history; • Information regarding the general character and background of the offender; • Notes of testimony of the sentencing hearing; • Emotional stability: physical, mental and behavioral condition and history of the offender; • History of family violence; • Adjustment to prison; • Recommendation of the sentencing judge and prosecuting attorney; • Input from the victim and the victim's family; • Recommendation from the warden or superintendent of the facility where the offender is incarcerated; and • Status of program completion. The Parole Decisional Instrument is used to guide consistency in decision making but does not replace professional discretion and does not bind the Board to grant or deny parole, or create a right, presumption or reasonable expectation that parole will be granted. *The Parole Process*, PA. BD. OF PROB. & PAROLE, http://pa.gov/portal/server.pt/community/understanding_pennsylvania_parole/5356/the_parole_process/504593 (last visited Mar. 13, 2013).
RI	Rhode Island Parole Board	(a) A permit shall not be issued to any prisoner under the authority	[W]e held not only that the Legislature intended the parole	Risk Assessment Instrument used as part of Parole Board Guide-

		of sections 13-8-9—13-8-13 unless it shall appear to the parole board: (1) That the prisoner has substantially observed the rules of the institution in which confined, as evidenced by reports submitted to the board by the director of the department of corrections, or his or her designated representatives, in a form to be prescribed by the director; (2) That release would not depreciate the seriousness of the prisoner's offense or promote disrespect for the law; (3) That there is a reasonable probability that the prisoner, if released, would live and remain at liberty without violating the law; (4) That the prisoner can properly assume a role in the city or town in which he or she is to reside. In assessing the prisoner's role in the community the board shall consider: (i) Whether or not the prisoner has employment; (ii) The location of his or her residence and place of employment; and (iii) The needs of the prisoner for special services, including but not limited to, specialized medical care and rehabilitative services. R.I. GEN. LAWS ANN. § 13-8-14 (Westlaw 2012).	board to have broad discretionary powers but also that the board may deviate from prescribed guidelines when a particular case warrants. State v. Tillinghast, 609 A.2d 217 (R.I. 1992).	lines. However, the Guidelines are not automatic nor is the parole risk score presumptive as to whether an offender will be paroled. Board members retain the discretion to vote outside the guidelines when the circumstances of an individual case merit. The Board will continue to consider factors such as those listed in RI General Laws § 13-8-14. R.I. PAROLE BD., GUIDELINES 2–3 (2011), *available at* http://www.paroleboard.ri.gov/documents/paroleguidelines2011.pdf.
SC	Board of Paroles and Pardons	The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a	If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty in-	The Parole Board considers several factors, such as: sentence date; present offense and prior criminal record; personal and social history; institutional experience, etc. and applies a set of criteria in making their sole judg-

		disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him. S.C. CODE ANN. §§ 24-21-640 & 24-21-640 (2012).	terest. Cooper v. S.C. Dept. of Prob., Parole and Pardon Servs., 377 S.C. 489 (2008).	ment. *FAQ,* S.C. DEP'T OF PROB., PAROLE, & PARDONS, http://www.dppps.sc.gov/ppp_faq.html (last visited Dec. 26, 2011).
SD	Board of Pardons and Parole	Pursuant to chapter 1-26, the Board of Pardons and Paroles may promulgate procedural rules for the effective enforcement of chapters 24-13 to 24-15, inclusive, and for the exercise of powers and duties conferred upon it. Additionally, the Board of Pardons and Paroles may utilize the following standards in granting or denying paroles or in assisting inmates in an assessment of their rehabilitation needs: (1) The inmate's personal and family history; (2) The inmate's attitude, character, capabilities, and habits; (3) The nature and circumstances of the inmate's offense; (4) The number, nature, and circumstances of the inmate's prior offenses; (5) The successful completion or revocation of previous probation or parole granted to the inmate; (6) The inmate's conduct in the institution, including efforts directed towards self-improvement; (7) The inmate's understanding of his or her own problems and the willingness to work towards overcoming them; (8) The inmate's	Parole, "an executive branch function" under SDCL 24–15–8, is a matter of grace, a conditional release. Bergee v. S.D. Bd. of Pardons and Paroles, 608 N.W.2d 636 (S.D. 2000).	

		total personality as it reflects on the possibility that the inmate will lead a law-abiding life without harm to society; (9) The inmate's family and marital circumstances and the willingness of the family and others to help the inmate upon release on parole from the institution; (10) The soundness of the parole program and whether it will promote the rehabilitation of the inmate; (11) The inmate's specific employment and plans for further formal education or training; (12) The inmate's plan for additional treatment and rehabilitation while on parole; (13) The effect of the inmate's release on the community; (14) The effect of the inmate's release on the administration of justice; and (15) The effect of the inmate's release on the victims of crimes committed by the inmate. Neither this section or its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest in any prisoner. S.D. CODIFIED LAWS § 24-13-7 (2012). When an inmate becomes eligible for consideration for parole, the inmate is entitled to a hearing with the Board of Pardons and Paroles to present the inmate's application for parole. An inmate may decline parole consideration and waive the right to a hearing. The board may issue an order to the Department of Corrections that the inmate shall be paroled if it is satisfied that:			

		(1) The inmate has been confined in the penitentiary for a sufficient length of time to accomplish the inmate's rehabilitation; (2) The inmate will be paroled under the supervision and restrictions provided by law for parolees, without danger to society; and (3) The inmate has secured suitable employment or beneficial occupation of the inmate's time likely to continue until the end of the period of the inmate's parole in some suitable place within or without the state where the inmate will be free from criminal influences. Neither this section nor its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest in any prisoner. S.D. CODIFIED LAWS § 24-15-8 (2012).		
TN	Board of Probation and Parole	(b) When acting pursuant to §§ 41-1-503 — 41-1-508, the board is empowered to: (1) Establish criteria by which prisoners shall be considered and selected for release; (2) Impose conditions or limitations upon the parole as it deems necessary; and (3) Authorize individual board members or parole hearing officers to conduct hearings, take testimony and make written proposed findings of fact and recommendations regarding the granting or denial of parole. The recommendations shall be adopted, modified or rejected by the concurrence of three (3) board members. TENN.		In making a parole hearing recommendation, the Hearings Officer reviews the offender's Board of Probation and Parole hearing file and institutional file, as well as other essential information that may impact the outcome of the hearing. This information may include but is not limited to: - Recommendations and statements from institutional staff, family members and members of the community in support or opposition; - Testimony of interested parties who are in support or opposition; - Proposed release plan and information provided by the offender; - Offender views on how he or she will be

		CODE ANN. § 41-1-505 (Westlaw 2012).		successful on parole supervision; - Social and criminal history; - Prior supervision history in the criminal justice system; - Circumstances of the current offense(s); - Institutional record and program participation; - Evidence and testimony pertaining to parole revocation; - Other information deemed relevant to the hearing. In addition to the information referenced above, Parole Hearings Officers utilize several advisory instruments in the parole hearing process. The risk assessment instrument is used as one means of assessing the risk level of offenders being considered for release. Other advisory instruments used are the Guidelines for Release and Revocation Guidelines. These instruments, although advisory, are critical to maintaining consistency and credibility in the parole hearing recommendation and decision-making process. Board Members review all recommendations made by the Hearings Officers and may adopt, modify or reject the recommendation. *Hearing Officers Division*, TENN. BD. OF PROB. & PAROLE, http://www.tn.gov/bopp/bopp_ho.htm (last visited Dec. 26, 2011).
TX	Board of Pardons and Paroles (BPP)	(a) The parole panels are vested with complete discretion in making parole decisions. (b) Parole guidelines have been adopted by the board to assist pa-		Parole panel members look at the circumstances and seriousness of the offense; prior prison commitments; relevant input from victims, family members,

		role panels in the selection of possible candidates for release. Parole guidelines are applied as a basis, but not as the exclusive criteria, upon which parole panels base release decisions. (1) The parole guidelines consist of a risk assessment instrument and an offense severity scale. Combined, these components serve as an instrument to guide parole release decisions. (2) The risk assessment instrument includes two sets of components, static and dynamic factors. (A) Static factors include: (i) Age at first admission to a juvenile or adult correctional facility; (ii) History of supervisory release revocations for felony offenses; (iii) Prior incarcerations; (iv) Employment history; and (v) The commitment offense. (B) Dynamic factors include: (i) The offender's current age; (ii) Whether the offender is a confirmed security threat group (gang) member; (iii) Education, vocational and certified on-the-job training programs completed during the present incarceration; (iv) Prison disciplinary conduct; and (v) Current prison custody level. (3) Scores from the risk assessment instrument are combined with an offense severity rating for the sentenced offense of record to determine a parole candidate's guidelines level. (c) The adoption and use of the parole guidelines does not imply the creation of any pa-		and trial officials; adjustment and attitude in prison; the offender's release plan; and factors such as alcohol or drug use, violent or assaultive behavior, deviant sexual behavior, use of a weapon in an offense, institutional adjustment, and emotional stability. Based on the entirety of the available information, the parole panel then determines whether the offender deserves the privilege of parole. TEX. BD. OF PARDONS & PAROLES, PAROLE IN TEXAS: ANSWERS TO COMMON QUESTIONS 41–42 (2008), *available at* http://www.tdcj.state.tx.us/bpp/publications/PIT_eng.pdf.

		role release formula, or a right or expectation by an offender to parole based upon the guidelines. The risk assessment instrument and the offense severity scale, while utilized for research and reporting, are not to be construed so as to mandate either a favorable or unfavorable parole decision. The parole guidelines serve as an aid in the parole decision process and the parole decision shall be at the discretion of the voting parole panel. 37 TEX. ADMIN. CODE § 145.2 (2012).		
UT	Board of Pardons and Parole	(1) The Board of Pardons and Parole shall determine within six months after the date of an offender's commitment to the custody of the Department of Corrections, for serving a sentence upon conviction of a felony or class A misdemeanor offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for a rehearing, and shall promptly notify the offender of the date. UTAH. CODE ANN. § 77-27-7 (Westlaw 2012).		The Utah Sentencing Commission, established by the Legislature, has developed non-binding, advisory sentencing guidelines for use by Courts and the Board. The guidelines do not have the force and effect of law, but provide only an estimate of the time an inmate may expect to be incarcerated, always subject, however, to the individual facts and circumstances of a case, the characteristics of an offender and the discretion of the Board. By employing a number of factors, such as the offender's criminal record, supervision history, nature and severity of the offense and other fact specific details, the Board calculates a sentence guideline, usually in terms of months, which provides a starting point for the Board in its determinations and decisions. The Board considers the nature and severity of the crime(s) committed, including the harm done to the victim and

				society, the continued risk posed by the inmate, and the inmate's behavior and programming efforts while incarcerated. *FAQ*, UTAH BD. OF PARDONS & PAROLE, http://bop.utah.gov/board-top-public-menu/organization/86-bop-faq-category.html (last visited Dec. 26, 2011).
VT	Vermont Parole Board	(a) The board shall interview each inmate eligible for parole consideration under section 501 of this title before ordering the inmate released on parole. The board shall consider all pertinent information regarding an inmate in order to determine the inmate's eligibility for parole. . .. VT. STAT. ANN. tit. 28, § 502 (Westlaw 2012).		The Board considers the following factors according to policy when making decisions concerning offenders eligible for parole: Seriousness of the crime committed. Danger to the public The offender's risk of re-offending. Any input given by the victim, including, but not limited to the emotional damage done to the victims and the victim's family. The offender's parole plan – including housing, employment, need for Community treatment and follow-up resources. Recommendation of the Department of Corrections. The Board may according to policy consider all pertinent information including the following factors: History of prior criminal activity. Prior history on probation, parole, or other form of supervised release. Abuse of drugs or alcohol. Poor institutional adjustment. Success or failure of treatment. Attitude toward authority - before and during incarceration. Comments from the prosecutor's office, the

				Office of the Attorney's General's Office, the judiciary or other criminal justice agency. Education and job skills. Employment history. Emotional stability. Mental status - capacity and stability. History of deviant behavior. Official and community attitudes toward accepting an inmate back into the community. Other factors involved that relate to public safety or the offender's needs. VT. PAROLE BD., 2009 ANN. REP. 6 (2009), *available at* http://www.doc.state.vt.us/about/parole-board/pb-annual-report. In 2007, Vermont successfully implemented a risk assessment tool. *Id.* at 3.
VA	Parole Board	In addition to the other powers and duties imposed upon the Board by this article, the Board shall: 1. Adopt, subject to approval by the Governor, general rules governing the granting of parole and eligibility requirements, which shall be published and posted for public review. VA. CODE ANN. § 53.1-136 (Westlaw 2012).	"[P]ursuant to Virginia law, the Parole Board is accorded the broadest discretion to grant or deny parole." Jennings v. Parole Bd. of Va., 61 F.Supp.2d 462, 465 (E.D. Va. 1999). "[T]he Parole Board is entitled to consider seriousness of the inmate's offense, the circumstances surrounding the crime of conviction, and the amount of time served relative to each offense in denying parole." *Id.* at 466.	
WA	Washington Department of Corrections Indeterminate Sentence Review Board	(3) the indeterminate sentence review board shall give public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole. WASH. REV. CODE ANN.	"The Court of Appeals found a liberty interest was created here by certain procedural regulations for parolability hearings. The court's reasoning was as follows: the Board's setting of Cashaw's minimum term to coincide with his maximum term was essentially a decision on Cashaw's paro-	Factors considered for Parole Decisions: - The original recommendation of the sentencing Judge and Prosecutor to the ISRB. - The length of time an offender has served so far. - Any aggravating or mitigating factors or circumstances relative to the crime of convic-

		§ 9.95.009 (Westlaw 2012).	lability; the Court of Appeals then noted that the Board's own rules (WAC 381–60–070 and –120) call for an in-person parolability hearing and detailed written notice as to the substance and procedures involved in that hearing; finally, the court held that these rules created for inmates a liberty interest, such that a failure to follow these procedures violates due process." Matter of Cashaw, 123 Wash.2d 138, 144 (1994).	tion. - The offender's entire criminal history. - All available information from the victim or the victim's family, including comments on the impact of the crime, concerns about the offender's potential release, and requests for conditions if the offender is released. - The offender's participation in or refusal to participate in available programs or resources designed to assist in reducing the risk of re-offense. - The risk to public safety. - Serious and repetitive disciplinary infractions during incarceration. - Evidence of the offender's continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, use of illegal substances.) - Statements or declarations that the offender made about intending to re-offend or not intending to comply with conditions of supervision. - Evidence that the offender presents a substantial danger to the community if released. *ISRB - Frequently Asked Questions*, WASH. STATE DEP'T OF CORR., http://www.doc.wa.gov/isrb/faq.asp (last visited Mar. 13, 2013).
WV	West Virginia Parole Board	(a) The board of parole, whenever it is of the opinion that the best interests of the state and of the inmate will be served, and subject to the limitations hereinafter provided, shall release any inmate on parole for terms and upon conditions as	"Our statute governing granting parole makes a prisoner eligible (with some exceptions) when he has served the minimum term of his indeterminate sentence or one-third of his definite term sentence, is not under punishment or in solitary confine-	

		are provided by this article. (b) Any inmate of a state correctional center is eligible for parole if he or she: (1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be; or (B) He or she: (i) Has applied for and been accepted by the Commissioner of Corrections into an accelerated parole program; (ii) Does not have a prior criminal conviction for a felony crime of violence against the person, a felony offense involving the use of a firearm, or a felony offense where the victim was a minor child; (iii) Has no record of institutional disciplinary rule violations for a period of one hundred twenty days prior to parole consideration unless the requirement is waived by the commissioner; (iv) Is not serving a sentence for a crime of violence against the person, or more than one felony for a controlled substance offense for which the inmate is serving a consecutive sentence, a felony offense involving the use of a firearm, or a felony offence where the victim was a minor child; and (v) Has successfully completed a rehabilitation treatment program created with the assistance of a standardized risk and needs assessment. W. VA. CODE ANN. § 62-12-13 (Westlaw 2012).	ment for any infraction of prison rules, has maintained a good conduct record for at least three months prior to his parole release, and has satisfied the board that he will act lawfully when released, and his release is compatible with the best interests and welfare of society. The first three criteria are objective. A prisoner knows whether he has or has not met those criteria. The last factor involves subjective, discretionary evaluation by the board, and due process rights, which attempt to limit malevolent, arbitrary or reckless decisions, apply. We hold that our parole statute creates a legitimate reasonable expectation that parole will be granted." Tasker v. Mohn, 267 S.E.2d 183, 187 (W. Va. 1980).	
WI	Wisconsin	(2)(b) Except as pro-	In general, Wisconsin's	

	Parole Commission	vided in s. 961.49(2), 1999 stats., sub. (1m), the parole commission may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in a county house of correction or a county reforestation camp, when he or she has served 25% of the sentence imposed for the offense, or 6 months, whichever is greater. WIS. STAT. ANN. § 304.06 (Westlaw 2012). (8) The commissioner's decision shall be based on information available, including file material, victim's statements if applicable, and any other relevant information. (16) A recommendation for a parole grant or release to extended supervision order may be made after consideration of all the following criteria: (a) The inmate has become parole or release to extended supervision eligible under s. 304.06, Stats., and s. PAC 1.05. (b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense. (c) The inmate has demonstrated satisfactory adjustment to the institution. (d) The inmate has not refused or neglected to perform required or assigned duties. (e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following: 1. The inmate has gained maximum bene-	parole system provides for a discretionary parole scheme4 and a mandatory parole scheme. Under the *Greenholtz* analysis, Wisconsin's discretionary parole scheme does not create a protectible liberty interest in parole. . . . On the other hand, Wisconsin's mandatory parole scheme does create a protectible liberty interest. Gendrich v. Litscher, 632 N.W.2d 878, 882 (Wis. Ct. App. 2001). The presumptive mandatory release scheme does not create a protectible expectation of parole for several reasons. First, in making the presumptive mandatory release determination, the Commission's discretion is virtually unlimited. Wisconsin Stat. § 302.11(1g)(b) explicitly requires the Commission to proceed under Wis. Stat. § 304.06(1), which grants the Commission discretionary powers to administer the parole scheme. Second, the statute uses discretionary language (e.g., "may deny presumptive mandatory release") rather than mandatory language (e.g., "shall") Id. at 824.		

		fit from programs. 2. The inmate can complete programming in the community without presenting an undue risk. 3. The inmate has not been able to gain entry into programming and release would not present an undue risk. (f) The inmate has developed an adequate release plan. (g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported. (h) The inmate has reached a point at which the commission concludes that release would not pose an unreasonable risk to the public and would be in the interests of justice. WIS. ADMIN. CODE WIS. PAROLE COMM'N § 1.06 (2012). (1) The warden or superintendent shall keep a record of the conduct of each inmate, specifying each infraction of the rules. Except as provided in subs. (1g), (1m), (1q), (1z), (7) and (10), each inmate is entitled to mandatory release on parole by the department. The mandatory release date is established at two-thirds of the sentence. WIS. STAT. ANN. § 302.11 (Westlaw 2012). (1) For an inmate who is subject to Presumptive Mandatory Release and who has been deferred to the mandatory release date of the PMR offense, a commissioner shall conduct a review two months prior to the mandatory release date. (7) The commissioner's decision shall be based on information available, including file material		

		and any other relevant information. WIS. ADMIN. CODE WIS. PAROLE COMM'N § 1.09 (2012).		
WY	Wyoming Board of Parole	(a) The board may grant a parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence, ordered by any district court of this state, provided the person has served the minimum term pronounced by the trial court less good time, if any, granted under rules promulgated pursuant to W.S. 7-13-420. WYO. STAT. ANN. § 7-13-402 (Westlaw 2012).	"The Due Process Clause applies to parole proceedings only when the state parole statute creates a legitimate expectation of release. . . . Wyoming's parole statute provides that the parole board "may grant parole to any person . . . provided the person has served the minimum term pronounced by the trial court less good time." Wyo. Stat. Ann. § 7-13-402(a) (emphasis added). Such permissive language does not give rise to a liberty interest protected by the Due Process Clause." Seavolt v. Escamilla, 17 Fed.Appx. 806, 807 2001 WL 815570, Unreported (10th Cir. 2001).	Parole Eligibility I. Policy Parole may be granted at the sole discretion of the Board when in the opinion of the Board there is a reasonable probability that an inmate of a correctional facility can be released without a detriment to the community or himself/herself. Parole shall be ordered only with the best interests of society being considered and not as an award of clemency; nor shall it be considered as a reduction in sentence or a pardon. II. Criteria: The inmate must have served his/her minimum term, less any special good time earned. The inmate must not be serving a life sentence or a death penalty sentence. The inmate will not be eligible for parole on the sentence from which he/she made an assault with a deadly weapon upon an officer, employee, or inmate of any institution. An inmate who has escaped, attempted to escape or assisted others to escape from an institution while on inmate status, on probation, on parole, or on pre-release status, will not be eligible for parole on the sentence from which he/she escaped, attempted to escape or assisted others to escape. When an inmate is unavailable for his/her annual review hearing due to escape status, the inmate auto-

				matically waives his/her right to a board appearance for that year. An inmate will not be granted parole to the street if he/she has had a major predatory disciplinary infraction as listed on page [38] within the year preceding the hearing, unless, on a case by case basis: 1. The inmate is paroled to his/her detainer; 2. The Board determines that extenuating or extraordinary circumstances exist regarding the major predatory disciplinary. For lesser disciplinaries the Board will use its discretion in reaching its decision on the appropriate impact of the behavior. The Board will consider whether there is a reasonable probability that the inmate is able and willing to fulfill obligations as a law abiding citizen. The inmate must submit a written parole plan prior to the hearing. This plan shall include living arrangements, employment opportunities, programming/treatment and medical considerations if applicable. WYO. BD. OF PAROLE, POLICY AND PROCEDURE MANUAL 36 (2011), *available at* http://boardofparole.wy.gov/pdf/Policy%20and%20Procedure%20Manual.pdf.

COMMON LAW'S LAWYERING MODEL: TRANSFORMING INDIVIDUAL CRISES INTO OPPORTUNITIES FOR COMMUNITY ORGANIZING

Karen Gargamelli and Jay Kim†

We are alumni of the City University of New York School of Law, Class ("CUNY Law") of 2007 and founders of Common Law,[1] *an organization that uses legal education and legal services to support and increase organizing and activism. We describe the origins of Common Law and our beginnings as an organization providing direct legal services to members of community organizing groups in Section I; the emergence of our unique legal clinic model supporting pro se (self-represented) litigants fighting foreclosure in Section II; and our challenges and hopes for the future in Section III.*

I. Introduction to Common Law

A. Common Law's Roots

In the fall of 2006, during our last year of law school, a wave of panic moved through the hallways of our Main Street, Flushing campus.[2] The bar exam came into view and the administration regularly reminded us that CUNY Law students were not likely to pass. The job market was only slightly less condemning. The whole scene was captured perfectly by one long look over the graveyard across from the school toward the illusive Manhattan skyline. We began to scramble, applying for jobs in each and every sector and in fields we never knew existed. Many believed such panic was pointless. Others could only panic about one matter at a time. Most distres-

† Graduates of the City University of New York School of Law ("CUNY Law") in 2007, Karen Gargamelli and Jay Kim are co-founders and staff attorneys at Common Law, a non-profit located in Woodside, Queens whose mission is "to make clients more powerful by demystifying the laws and policies that affect their lives and making it easy for clients to participate in organizing efforts." *About Us*, Common Law, http://commonlawnyc.org/?page_id=33 (last visited Feb. 2, 2013).

1 Common Law, http://www.commonlawnyc.org (last visited Feb. 24, 2013).

2 For nearly thirty years, CUNY Law was housed at 65-21 Main Street in Flushing, NY in a former junior high school. The school was also directly across from Mount Hebron Cemetery, making tombstones the only view from the street-facing windows. Despite isolation and meager funding, this location exuded warmth and community. *See* Paul Lin, *30 Years at 65-21 Main Street*, CUNY Law Mag.,cfn], Spring 2012, at 18–19, *available at* http://www.law.cuny.edu/magazine/archive/12-spring-cunylaw.pdf.

sing, however, was the knowledge that we were competing among our own CUNY Law community for our livelihood.

Unfortunately, the fierce competition for staff attorney positions was not the first clue that public interest lawyering was not going to be radical lawyering. There were other clues that public interest lawyers should not challenge or even question the strategies, effects, or funding of legal non-profits. During our internships and clinic placements at public interest organizations, we witnessed what we later recognized as the "non-profit industrial complex,"[3] or the ways that governments and foundations co-opt progressive movements. We observed that public interest lawyers were constantly engaged in the brutal hunt for grant support and were, therefore, focused on generating and reporting outcomes. The effect of this focus was that lawyers did not incorporate legal or political education into their services and that they did not consider the root causes of clients' struggles in their daily efforts to bring healing.

In November of 2006, our last year in school, a few of us from the Class of 2007 decided to meet for dinner to discuss our impending legal careers. Emails were sent and a potluck was organized. The potluck night finally arrived and there was a terrible storm. Rain poured for hours. The dinner party was at Jay's house in Jackson Heights, Queens. None of the Brooklyn folks made it. In fact, the only people who attended were Mike and the authors of this piece.[4] That night we wondered aloud, could we remove peace and justice work from the capitalist framework? Could we really use the privileges of the legal profession to support movements to dismantle our systems of economic, racial, and social inequality?

By the end of the evening, the three of us committed to developing a legal services model that was more humane and—to be honest—more joyful. We knew that the first step toward social change work and, consequently, away from charity work, was to prioritize people over success. That evening, we committed ourselves to the experiment of community. We began treating one another as family. We would not compete with one another for financial or professional gain. We would share our personal resources while

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[3] The "non-profit industrial complex" generally refers to state and corporate control of political dissent through the non-profit sector. THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 1, 8–9 (INCITE! Women of Color Against Violence ed., 2007).

[4] Mike Wang graduated from CUNY Law in 2007 and is a co-founder of Common Law. *Our Staff*, COMMON LAW, http://commonlawnyc.org/?page_id=36 (last visited Feb. 24, 2013).

learning to practice our profession together. Our shared goals as attorneys were to engage in social justice work and strive for personal and political transformation. We could not prioritize job security or even legal victories over these goals.

During the remainder of our third year of law school, we established only three principles for our collective. First, all members of the group would make the same amount of money, regardless of their job or degree. Second, we would only work with CUNY Law interns and graduates because of their generosity and commitment to others and because they are some of the most joyful people we know. Third, any one of us could, at any time, leave the collective if we were unhappy. This was not a job. We were in relationship with one another.

In those months before graduation we named ourselves the People's Lawyers Collective of Queens County ("PLC"). When we announced ourselves at school, responses varied from concerned to enthusiastic. Some cautioned against starting our own practice immediately out of law school. The old guard CUNY Law staff and professors, those who committed themselves to a young and scrappy law school, celebrated our decision to create a new organization. Dinesh Khosla[5] was thrilled. Frank Deale[6] encouraged us to hang a shingle. A classmate paid for our incorporation fee. Fred Rooney[7] gave us the opportunity to develop PLC in the newly opened Community Legal Resource Network[8] ("CLRN") Incubator

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5 Dinesh Khosla has been a professor at CUNY Law since its inception. A passionate devotee of civil disobedience, he spent months in Indian jails during the 1960s. He received his L.L.M. and J.S.D. from Yale Law School. His fields of interest and areas of publication include international law, contracts, civil disobedience, comparative law, law and aging, human rights, and economic and social development. *Dinesh Khosla*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/faculty/directory/khosla.html (last visited Feb. 24, 2013).

6 Frank Deale has been a professor at CUNY Law since 1989. Before joining the law school, he worked at the Center for Constitutional Rights where he served successively as Staff Attorney, Associate Legal Director, and Legal Director. He has published articles dealing with employment discrimination and international labor rights, including human rights, labor rights, and international trade. *Frank Deale*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/faculty/directory/deale.html (last visited Feb. 26, 2013).

7 Fred Rooney graduated from the first CUNY Law class in 1986 and is the Director of the Community Legal Resource Network ("CLRN"). Rooney pioneered "a new model of legal service delivery to achieve justice for the poor and powerless" through CLRN. Press Release, CUNY School of Law, CUNY Law's Fred Rooney Awarded the AALS Drinan Award (Dec. 11, 2009), *available at* http://www1.cuny.edu/mu/law/2009/12/11/cuny-laws-fred-rooney-director-of-cuny-laws-community-legal-resource-network-awarded-the-aals-drinan-award/ (citation omitted).

8 CLRN assists CUNY Law graduates in creating solo or small-group practices that are devoted to meeting the legal needs of underserved neighborhoods. CLRN facili-

for Justice[9]—an eighteen-month program supporting CUNY Law graduates starting their own small firms or non-profits.

At the CLRN Incubator for Justice, during our first year after graduation, we had the privilege of creating our organization alongside CUNY Law alumni launching their solo practices, and with the assistance of professor and practitioner Laura Gentile,[10] who gave us office space in midtown Manhattan. During our first year at the Incubator we spent most of our time talking and writing. We examined models and theories of political and legal education, economic models to support ourselves, and issues and topics that were important to us and pertinent to New Yorkers. We also met with hundreds of people—lawyers, activists, community organizers, and directors of non-profits. During this time of formation, we worked for other CLRN attorneys to gain experience, and at non-legal jobs to pay our bills.

It was during our time at the Incubator that we decided to focus our work on legal education. We desired to chip away at the barrier between non-lawyers and the courts, namely, the legal profession. Legal language and judicial processes should become more accessible to those seeking justice and relief as well as organizers and activists changing economic, social, and political systems. The information available to lawyers should be common knowledge to those in need of access to justice and those working for social justice. It was a fellow Incubator attorney who understood these desires and renamed us "Common Law."

We began our work slowly—crafting a single program over the course of months. For example, after we taught a "Know Your Rights" class or drafted even the simplest of advocacy letters, we would debrief for days. We critiqued our performance and work product. We considered the implications, consequences, outcomes, and impact of our work. In other words, we were careful.

In those early days, our slowness was often perceived as weak-

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tates this objective by providing training and mentoring support to new attorneys, and linking attorneys to one another to share resources. *Community Legal Resource Network*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/clrn.html (last visited Feb. 16, 2013).

9 The Incubator for Justice is a program created by CLRN in 2007 to help attorneys create their own law offices through trainings in the basic business issues necessary to create a small legal practice and in subjects related to their practice, such as immigration law. *Id.*

10 Laura Gentile, a 1987 graduate of CUNY Law, is a teacher in the CLRN Incubator for Justice program and has a small firm in Midtown Manhattan, where program participants pay a low monthly rent for office space and supplies. Jonathan D. Glater, *Lawyers Learn How to be Businesslike*, N.Y. TIMES, Jan. 9, 2008, at B6.

ness. How would we survive without taking on more projects, or applying for more grants? Why weren't we doing more? Even our biggest fans encouraged us to hustle. Without salary, without health insurance, when couch surfing, they nudged—maybe *now* is a good time to panic. But resistance to panic is a—if not *the*—founding principal of Common Law. We were undeterred from our process. We left the Incubator for Justice in April 2009, moved from Manhattan back to Queens and finally launched our new lawyering model.

B. The Evolution of Common Law's Lawyering Model

Common Law began—and continues to thrive—with a strong commitment to challenging the legal system and dismantling social injustices through organizing and political education. The way our lawyering model has reflected this commitment has evolved with time.

During law school, we decided to ground our work with a handful of rules we created for ourselves: lawyers should take a backseat in movement building; lawyers should do legal work, not organize; and organizers know best so they should lead the way. We wanted to use legal services as a political education tool to support organizing efforts already happening in New York City.

Once we were admitted into the New York Bar in the spring of 2008 and started working with individuals in crisis, we learned through experience that legal education, coupled with legal services, could lead to politicization. We found we could connect individual legal struggles to broader systemic injustices through legal education. For example, a food-vendor client's struggle to fight multiple $1,000 fines could be linked to New York City's low cap on vending permits. Common Law could highlight *why* the New York City Council has not increased the number of permits since 1979. We found that legal services without legal education led to dependency and lack of agency on behalf of our clients.

We also knew, however, that politicization wasn't quite enough to build power to create material changes in people's situations. We needed to connect individuals to organizing campaigns so that the process of politicization could be refined through action. Vendor-clients, therefore, should have the opportunity to join other vendors lobbying City Council for increased permits. We began partnering with membership-led community organizations ("community partners") as a way to connect individuals to ongoing or-

ganizing campaigns. We thought our partners could advertise legal services as a way to elicit new membership.

However, conversations with our community partners shed light on how difficult it was to retain existing members and get them involved in organizing efforts. We adapted our work to reflect this challenge of retaining members and involving them in organizing and developed the first incarnation of our community lawyering model. We began providing free legal services to all active members of our community partners, "active" being determined by our community partners. All active members were entitled to free legal services from Common Law as a benefit of their membership. This entitlement model, we believed, challenged notions of charity and deepened members' commitments to our community partners.

Providing free legal services to an entire membership base proved to be logistically challenging. Some of our partners had hundreds of members so it was impossible to address all of their needs. This model also proved ineffective because it perpetuated the separation between legal services and organizing. Legal services for individual members without the organizers present to speak about upcoming events and campaigns failed to spark involvement in the organization.

In response to these challenges, we adapted again by creating weekly legal clinics as a way to meet with members in a group setting. This was also an ideal setting for legal and political education. We began each legal clinic with legal education about the issues that affected everyone at the table, such as a violation for vending without a permit or a notice of eviction for a rent stabilized unit. The organizing staff of our community partners linked these shared, individual experiences to ongoing campaigns and reinforced the need to become or stay active in the organization. After the group legal and political education, Common Law met with individuals privately to address their specific issue, such as an upcoming hearing. However, it was the group setting that set our legal clinics apart from others: members sat around a large table together, shared their stories with each other, and engaged with each other's legal struggles.

Once this model was in place, our community partners began using free legal services from Common Law as the "carrot" to recruit new members and retain existing ones. Very few grassroots community organizations can offer free legal services as a benefit of membership. We were initially pleased because we believed the

strength of organizing efforts would grow as their memberships increased.

However, as a result of our legal clinics, we witnessed the gradual shift among our community partners from the focus on organizing and community power to direct services. Paid organizing staff stopped prioritizing our legal clinic as an opportunity to organize and were rarely present at our legal clinics to help connect individual legal issues to ongoing organizing campaigns. The organizers spent much of their time scheduling members to attend the clinic and only spoke of the clinic when recruiting members or collecting dues. We frequently found that we had to make the connections between the individuals and the organizing movement on behalf of the absent organizers. The legal clinic became more important than their organizing efforts.

In addition, we discovered that our model was only reinforcing the non-profit industrial complex instead of strengthening organizing efforts. Our community partners, entangled in fierce funding battles with other organizations, leveraged legal services from Common Law as a way to make themselves more competitive for funding. They also used our services as a way to lure members of other similar organizations to their own. The organizing campaigns seemed less and less important to those leading our community partners. Moreover, we discovered that the term "membership-led" was rarely practiced. The paid organizing staff, rather than the members, were often leading community partners by making important decisions about what campaigns to launch and what tactics to use.

Once we stepped back to reflect on our model, however, we learned that our mission and social justice goals were being actualized in our legal clinics themselves. Clinic participants were eager to learn more about their situations and to share information with us and with each other as they realized that they were not alone. They were becoming empowered by learning about the court process and about their legal defenses. They identified the root causes of their issues and brainstormed ways to address them. Community discussions about shared struggles, their root causes, and a common solution sparked activism.

We felt confident that we had the capacity to facilitate conversations about individual legal struggles with broader social justice goals. With more experience operating our legal clinics, we were empowered to work alongside other organizations rather than for them or under their leadership. We decreased our work with non-

profit organizations and began to work primarily with groups of individuals organizing together.

Using this sense of confidence and renewed vision, we honed our legal clinics and formed the model we use today: legal clinics practiced in a group setting that focus on legal education, story sharing, individualized legal support, and organizing. Legal education is given texture by clinic participants who share their personal stories of struggle. Hearing personal stories helps us craft stronger legal documents and legal advocacy. Shared legal experiences help connect individuals to each other and become the foundation for a new community. Building community leads to increased support and politicization, which then turns our legal clinics into transformative, organizing spaces.

II. Common Law's Legal Clinic Model Supporting Pro Se (Self-Represented) Litigants Fighting Foreclosure

A. The Development of Common Law's Foreclosure Defense Legal Clinic

Common Law has been working with homeowners fighting back against mortgage foreclosure[11] for the past five years. Through conversations with CUNY Law professors, legal services attorneys, and organizers, foreclosure work seemed like a natural fit for a small, emerging organization. In 2008, 90% of homeowners in foreclosure received default judgments against them.[12] This was a problem that we felt we could address with legal education and pro se support. The number of foreclosure defense attorneys at legal services organizations in New York City was extremely low, with less than fifteen in the City,[13] so experienced attorneys were eager to train us and share their resources since the need was overwhelming. And the foreclosure laws were changing quite fast, which allowed us to learn foreclosure laws at the same time as our experienced colleagues and adapt our programs to reflect the changing legal landscape.

We worked in tandem with housing organizers and launched our pro se legal clinic in March 2008. The legal clinic was designed to walk homeowners through the complicated foreclosure litiga-

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11 New York is a judicial foreclosure state where the lender must sue the borrower in state court to obtain a judgment and sheriff's sale. N.Y. Real Prop. Acts. Law §§ 1301–1391 (McKinney 2012).

12 Judith S. Kaye & Ann Pfau, *Residential Mortgage Foreclosures*, N.Y. State Unified Court Sys. 1 (June 2008), http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf.

13 Meeting between authors, other legal services attorneys, and the Neighborhood Economic Development Advocacy Project, Spring 2008.

tion process in New York State Supreme Court,[14] a process that can take anywhere between two to five years. We began working with pro se homeowners because the need was too great. Through individual representation, we could help only a handful of homeowners per year. But we could work with several pro se homeowners per week through our group legal clinics. We also knew that legal education was much more effective when homeowners experienced the court process on their own.

Our pro se legal clinic meets every Tuesday evening from 6:30 to 8:30 with four to six homeowners per week. The clinic is divided into three discrete sections: legal and political education, brief legal services, and building community power. We begin each clinic with legal and political education. We prioritize legal and political education as the most important tool for pro se homeowners fighting foreclosure. It is the first order of business at the clinic, and it is the foundation of our legal assistance and organizing initiatives.

B. The Legal Clinic's Group Setting

At the beginning of every clinic, participant homeowners gather at the table with their pens ready and notebooks open. From the start, homeowners are participants in a meeting, rather than passive receivers of a service. The very set-up of the room during our legal and political education programming—as a group, around a table—encourages participation. Homeowners and Common Law attorneys are learning, responding, reflecting, and sharing. Such active and participatory group learning transforms the traditional legal services model in three distinct ways.

First, the group setting shifts some of the power imbalance between attorney and client. In a traditional attorney-client relationship, where the attorney meets individually with her client, she holds a tremendous amount of power over her client. The client looks to the attorney to fix her problem, resolve her conflict, or relieve her suffering. When Common Law provides legal education to a group of homeowners in foreclosure, the role of lawyer shifts from "provider" to "community resource." The role of the attorney in legal and political education workshops is to share specialized information that is pertinent to everyone. The attorney no longer assumes the responsibility of managing someone's personal crisis; rather, the attorney has the responsibility to share information that

14 Supreme Courts are the highest trial courts for civil cases in New York State. *New York County–Civil Branch*, N.Y. STATE SUPREME COURT, http://www.nycourts.gov/supctmanh/ (last visited Feb. 24, 2013).

is critical but normally inaccessible. The attorney's work in legal education workshops is to demystify the judicial system and legislation, translating them into common, useful language. In this way, the group education setting begins to dismantle the wall our profession maintains between those seeking justice and the judicial system.

The second way that the group setting transforms the traditional legal services model is by emphasizing and valuing the homeowners' knowledge and experience. Homeowners' personal examples and practical questions guide the education programming. Homeowners and Common Law attorneys learn from the responses. For example, a Common Law attorney states that each courtroom or "part" is autonomous and that each part has its own rules and culture. A first-time homeowner then explains that he, personally, never saw a judge during his court appearance. He only spoke to the judge's law secretary and was required to describe each of his legal arguments and exhibits to the law secretary. A second homeowner then explains that she spoke directly to a judge and that the judge had already read her motion prior to her appearance. From such discussions, homeowners learn to adjust their advocacy based upon his or her particular judge. By sharing their experiences, clinic participants become the experts and the teachers.

The third way that the group setting transforms the traditional legal services model is by exposing the widespread nature of seemingly individual problems. Everyone in the room has the same frustration with banks and the courts. For example, *every* homeowner shares that they have submitted upwards of seven or eight loan modification applications to their lender or servicer. These applications are lengthy and personal—containing paystubs, bank statements, tax returns, credit reports, lease agreements, retirement accounts, and personal budgets to list a few. Some of these applications are lost or denied without any reason. Most often, however, lenders or servicers do not review these applications in a timely manner and then require homeowners to re-submit new applications with updated information. If a homeowner refuses, they are marked as "unresponsive" and "non-compliant." This struggle is daunting. Homeowners working in isolation to obtain a loan modification believe that they are to blame for their supposed failure: "I should have mailed it rather than faxing it." Others believe that if they keep trying, they will finally obtain a modification: "The bank will eventually reward me for my efforts." When homeowners hear

that others face the same obstacles, they recognize that the banks systemically treat borrowers a particular way. Homeowners no longer blame themselves as individuals for the system's failure. They no longer believe that the banking system compensates hardworking, honest individuals. This recognition sparks a sense of solidarity with other homeowners and a desire to find ways to fight back.

C. The Legal Education Curriculum

Our legal education curriculum covers three topics: (1) the judicial process and the judicial system, (2) homeowners' rights and options in foreclosure, and (3) the causes of the foreclosure crisis. Every week, Common Law begins the clinic with an overview of the foreclosure process in New York State. We draw on a whiteboard the path of a foreclosure action as it winds its way through New York State Supreme Court, from "Summons and Complaint"[15] to "Settlement Conferences"[16] through "Foreclosure Auction and Sale"[17] to "New York City Housing Court."[18] Each homeowner identifies their place in the foreclosure process. This orientation to the foreclosure process allows homeowners to first relax (there's time left!) and then gear up for a fight (there's work to do!) The orientation to the foreclosure process demonstrates visually that the homeowner is still in control of the property and can avoid a foreclosure auction and sale.

We then discuss the various ways that a homeowner can avoid a foreclosure auction and sale, i.e., their rights and options in foreclosure. Some resolutions involve the loss of the home, such as a short-sale,[19] and other resolutions allow homeowners to stay in the

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15 *See* N.Y. C.P.L.R. 3012 (McKinney 2012).

16 A settlement conference is a mandatory settlement discussion between the defendants and plaintiffs in a residential foreclosure action. In addition to determining the rights and obligations of the parties, the purpose of a settlement conference is to determine whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home. *Id.* 3408.

17 N.Y. Real Prop. Acts. Law § 1351 (McKinney 2012) (authorizing public sale of foreclosed property.)

18 After a property has been sold at sheriff's sale in New York City, the new owner may bring a summary proceeding in the New York City Civil Court Housing Part to gain possession. *See id.* § 713; *The New York City Civil Court Housing Part*, N.Y. State Unified Court Sys., http://www.courts.state.ny.us/courts/nyc/housing/general.shtml (last visited Feb. 24, 2013).

19 N.Y. State Bar Ass'n, Saving Your Home From Foreclosure 22 (2008), ("when the amount due on the loan is more than the value of the property, lenders will sometimes agree to accept a short sale. In a short sale, the homeowner sells the property to a third party at fair market value and the lender agrees to accept less than

home, such as a modification.[20] Homeowners ask questions about the benefits and detriments of each option, such as tax consequences and damage to one's credit report. Because of our "rights and options" conversation, homeowners are able to make an informed decision about their next steps. After the rights and options conversation, most homeowners reassert their commitment to obtaining a fair and affordable modification. Others, however, choose to move on from the home and begin anew somewhere else. Homeowners also prepare to pursue multiple resolutions, should their first choice prove difficult or unlikely. Regardless of the desired outcome, homeowners must raise legal defenses and file motions in order to gain leverage and build the bargaining power necessary to achieve their goal.

Finally, we discuss the root causes of the foreclosure crisis. We learn about the deregulation of the mortgage industry and the mass production of subprime and predatory loans.[21] We grapple with understanding the impractical and dangerous investing schemes that led to the packaging of subprime and predatory loans.[22] We, as a group, begin to understand that the foreclosure crisis was caused by reckless behavior and was wholly avoidable. This shared understanding, combined with the sight of so many others in the same communities, of the same color and class with upheaved lives, sparks solidarity and resistance against the banks.[23]

D. Brief Legal Services

In the next segment of the clinic, we meet with homeowners

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the full balance in satisfaction of the loan." *available at* http://www.courts.state.ny.us/courthelp/Booklets/MortgageForeclosure.pdf.

[20] A loan modification is "[a]n agreement between the lender and the borrower wherein one or more of the original terms of the mortgage is changed in order to make the mortgage more affordable to the borrower." *Id.* at 19.

[21] *See generally* KATHLEEN C. ENGLE & PATRICIA A. MCCORY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011).

[22] *See id.*; Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257 (2009); Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5 (2009).

[23] For a discussion of the impact of the foreclosure crisis on low-income communities and communities of color, see generally Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641 (2011); CAL. REINVESTMENT COAL., PAYING MORE FOR THE AMERICAN DREAM: THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES (2008), *available at* http://www.woodstockinst.org/publications/applied-research-reports/research-reports/10/20/; CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES (2011), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf.

individually to assist them in reaching their desired outcome. Our services are limited. Common Law attorneys provide support with discrete tasks, namely providing advice and consultation, drafting legal documents, preparing homeowners for court appearances, and making referrals to trustworthy brokers and other attorneys.

1. Advice and Consultation

We make time to meet with homeowners individually and privately to talk about personal information, such as finances or family dynamics. During this time, we ask homeowners questions to help them discern their next steps. It is an opportunity for homeowners to share personal concerns and for Common Law attorneys to offer advice and counseling. Because these conversations are between the homeowner and an attorney in private for the purpose of obtaining legal advice, these conversations are privileged. While the homeowners discuss general information (such as the New York State Supreme Court process) and public information (such as what happened at a homeowner's court appearance) during the group meeting, the individual conversations between attorney and homeowner are specific and personal. By holding private advice and consultation sessions, we honor the individual within a model that prioritizes community responses to the foreclosure crisis.

2. Drafting Legal Documents

Common Law attorneys draft documents such as answers, motions in opposition, and motions to dismiss. When "ghost writing" a legal document, we include a description of the Common Law legal clinic and the work Common Law has performed. In addition to document drafting, we review filing and service instructions and help homeowners complete affidavits of service. All legal documents are read aloud at the clinic so that homeowners fully understand and approve of the document they will submit. The oral presentation of the legal document also helps homeowners learn their strongest arguments in "legalese." Homeowners become powerful and even joyful as their story is wielded into a legal tool. There is palpable excitement when a homeowner hears words such as "fraud" or "deceptive practices" describing how homeowners were induced to drain their savings or take on second jobs to pay for loans they didn't agree to. The documents drafted at the legal clinic validate homeowners' experience of injustice, giving the injustice a name and the homeowners an opportunity to be heard.

3. Preparing for Court Appearances

Before each return date, clinic participants and Common Law attorneys engage in hearing preparation. Common Law attorneys prepare homeowners by mooting them, practicing legal arguments as well as tactics and techniques to communicate effectively with the judge and opposing counsel. Common Law attorneys pretend to be court personnel or opposing counsel and homeowners have the chance to respond. Together, attorney and homeowner identify any misunderstandings of law and prevent misstatements in court. Other clinic participants observe and provide feedback such as, "Your tone wasn't forceful enough," or, "Lead with the strongest argument, not the one that makes you most angry." Clinic participants also take turns mooting the homeowner. The experience is valuable for all participants. As Richard Ogust, a homeowner who has participated in several hearing preparation exercises, points out, "Hearing preparation is critical. You have to anticipate what they will throw at us, and have answers and responses ready." The homeowner attending the hearing has the opportunity to practice with many personalities and styles. The homeowners observing and role-playing become more familiar with the culture of court and share their expertise advocating for themselves in court. The process of hearing preparation reinforces the power of community support. Representing yourself in court is a truly terrifying experience. Hearing preparation at the clinic alleviates some of the burdens of isolation.

4. Trusted Referrals

Homeowners who choose to pursue foreclosure prevention resolutions that require them to vacate the home (those who choose to move on from the home and begin anew somewhere else) are referred to brokers or bankruptcy attorneys. Although a referral may appear to be a small service, a trusted referral is critical in a real estate industry wrought with scam companies and a legal profession crawling with dishonest people.[24] It is common for homeowners to pay thousands of dollars to companies that promise loan modifications or lawyers that advertise foreclosure prevention experience only to discover, months later, that no work has been done on their case. When the homeowners call the company

[24] *See e.g.*, Andy Kroll, *Undercover in the Foreclosure Scamming Underworld*, MOTHER JONES (Mar. 25, 2010, 1:50am), http://www.motherjones.com/mojo/2010/03/undercover-foreclosure-relief-scam-ncrc-report-house-oversight-committee; Michael Powell, *Prosecutions Lag as N.Y. Foreclosure Frauds Surge*, N.Y. TIMES, Apr. 14, 2009, at A1.

or the attorney's office, the phone is either disconnected or they receive an unsatisfactory or confusing excuse. Common Law, therefore, vets brokers and lawyers for the homeowner and monitors all referrals. In this way, Common Law shares the privileges and resources of attorneys with those that do not have access to legal and real estate communities.

E. Building Community Power: Acts of Solidarity and Resistance

Homeowners in foreclosure often tell us that they were overwhelmed with feelings of shame and isolation prior to attending our legal clinic. Foreclosure is a difficult issue to talk about, especially when homeowners are not part of a community where it is acceptable to talk openly about the challenges and fears of the process. Our legal clinics have become that community for many homeowners—a space where homeowners struggling through similar issues can share their experiences and build relationships with one another. Because our legal education emphasizes that individual legal battles will not be solved through individual action alone, the legal clinic nurtures the need for collective action to fight for justice.

Homeowners have strategized many different ways to support one another and build community power throughout the legal clinic's history. Mary Lee Ward, an eighty-two year-old great grandmother who was fighting for her home, believed nothing created community better than food. She took the initiative to bring home-cooked, fried shrimp balls and pasta salads to the legal clinic. Homeowners brought their friends and neighbors to listen to the legal education portion of the legal clinic. The legal clinic was so overcrowded at one point (forty people!) that we had to ask homeowners to tone down their outreach. Homeowners accompanied each other to court when filing motion papers and acted as each other's process servers. In recent weeks, homeowners have been bringing in pictures of their homes to the legal clinic so that, in homeowner Mr. Ogust's words, "we can see what we're fighting for."

Our most consistent and most powerful act of community organizing at our legal clinic is court support. The court system is intimidating and convoluted, especially for pro se litigants. Court support is an organizing strategy that makes community support visible for an individual interfacing with the court system. Court support is not a new concept; it is a time-tested way of demonstrating community power when activists stand alone in court. We be-

gan court support as a way to resist the idea that being in foreclosure has to be an isolating experience. Homeowners at our legal clinic have organized court support for one another with tremendous success.

When a homeowner has an upcoming court hearing, all former and current clinic participants are contacted and asked to attend court support. We meet a half hour before the appearance time outside the court and distribute large orange buttons that say "Court Support." The buttons make court support visible not only to the homeowner, but also to the judge, court personnel, and attorneys in the courtroom. This time is also an opportunity for the homeowner to review the purpose of the court hearing, the arguments that they want to make, and to discuss any questions or concerns that may have arisen.

We review the court support guidelines for all participants: (1) we move and act as one unit because collective power is our strength; (2) our actions can positively and negatively affect the outcome for the homeowner so we must be respectful, quiet, and composed; and (3) we are acting as emotional support for the homeowner—he or she is the only one who can make decisions about the case so we must be supportive of those decisions. Inside the courtroom, we sit together and patiently wait for the homeowner to be called for his or her hearing. Afterwards, we debrief in the hallway as a group to discuss what went well, what curveballs were thrown at the homeowner, what we observed as a group, and what next steps the homeowner needs to take.

Case Study: Court Support for Mr. Newkirk

On July 12, 2012, homeowner Daryl Newkirk had a hearing at Kings County Supreme Court.[25] With the legal clinic's help, Mr. Newkirk had filed a pro se order to show cause[26] to amend his answer to the summons and complaint. He had previously submitted a timely pro se answer but did not include legal defenses because he did not know what they were. He was now asking the court for the opportunity to amend his answer to include his strong legal defenses to the foreclosure action, and had also in-

[25] The Kings County Supreme Court, located in Brooklyn, is a trial court where civil actions are initially filed. *Kings County Brooklyn*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/2jd/index.shtml (last visited Feb. 5, 2013).

[26] A show-cause order is an "order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief." BLACK'S LAW DICTIONARY 948 (9th ed. 2009).

cluded a proposed amended answer (drafted by Common Law at the legal clinic) outlining those defenses. The morning of Mr. Newkirk's hearing, a group of ten homeowners from the legal clinic and Common Law (Karen, Jay, and two CUNY Law legal interns) gathered around the flagpole in front of the Supreme Court. We put on our court support buttons, debriefed the case, and made sure Mr. Newkirk felt supported by his community. We entered the courtroom together and took up the entire left side of the room. Several attorneys asked us what court support is (our buttons are very large and bright!) and when Matthew Bowen, a homeowner also fighting against foreclosure, responded, "We are the cavalry!" one attorney commented, "*I* need court support!"

Mr. Newkirk had done everything perfectly; he had filed his motion, picked up the signed order to show cause, had his friend serve opposing counsel with the copy of the signed order, filed the affidavit of service, and made copies of all of his paperwork. On the day of the hearing, however, opposing counsel claimed that she was never served with the copy of the signed order. The Judge did not have a copy of the affidavit of service in the file so she asked Mr. Newkirk if he had brought a copy. He had accidentally left it at home so the Judge put the case on for second call. Panicked, we all met outside in the hallway to strategize Mr. Newkirk's next step. Mr. Newkirk said he knew exactly where he had left his copy of the affidavit of service at home. One of the court supporters asked him how long it would take for him to take a cab and pick it up from his house. Mr. Newkirk said he could probably be back within an hour. At the urging of the court supporters, Mr. Newkirk asked the court clerk if he could have an hour to pick up his affidavit of service, and the clerk agreed.

An hour later, as all of the court supporters were still sitting outside of the courtroom, Mr. Newkirk came running down the hallway, waving the affidavit of service in his hand. We all cheered and clapped, and then we hugged him and each other. We all entered the courtroom again and Mr. Newkirk's case was immediately called. Once Mr. Newkirk was in front of the Judge, opposing counsel changed her position and claimed that she had actually received the signed order but not the proposed amended answer. Mr. Newkirk was unfazed and continued to make every single one of the arguments that he had prepared and practiced at the legal clinic. The Judge told opposing counsel that she could have an adjournment to submit opposition papers but also said, very clearly and loudly so the court supporters could hear, that she would most

likely grant Mr. Newkirk's motion on the return date. We all followed Mr. Newkirk outside into the hallway and exploded with applause. During our debrief and celebration together in the hallway, Mr. Newkirk thanked everyone for coming out for court support and reiterated over and over how much more confident he felt with our support.

Mr. Newkirk was able to address the surprises and challenges that arose during his court hearing because he had the support of a community. The homeowners who provided court support were able to share in Mr. Newkirk's victories and learn from his experiences. And collectively, we were able to take an active role in fighting back against foreclosures.

Court support provides a wide range of benefits for both homeowners being supported and the homeowners and allies who participate in court support. One obvious benefit is emotional support. Litigation is often an isolating and disempowering process and it can be comforting to go through it as a community. As Mr. Bowen says, "Court support is extremely important. Being together takes the nervous edge off. Having people there to support you is unbelievably helpful." Court support also provides practical help. The small details like checking in, announcing yourself during the calendar call, writing notes during the hearing, etc., are often intimidating in their own right. Having court supporters volunteer to help out with these small details can make a huge difference. For homeowners who have upcoming court hearings, court support provides another chance to engage with the court process, which helps demystify the court and helps homeowners feel more comfortable with both the court building and process.

This is also the case for law students. In the summer of 2012, Common Law had two CUNY Law interns: Em Lawler and Sarena Melchert. Their internship focused on supporting our legal clinic, with participation in court support as one of their responsibilities. Their experience with court support helped them learn to navigate the court system. Sarena explained to us, "This summer has been the first time I have ever spent so much time in a court house. I feel very comfortable now. A lot of this comfort is due to the fact that my experience in court has been in a group setting of support and advocacy." It was also a valuable learning experience for law students struggling to merge legal theory with practice. As Em shared, "As a law student, I appreciate court support because it shows the ways that interactions with the court are far more numerous than law school leads you to believe."

Court support will undoubtedly remain the core of our organizing work at our legal clinic for years to come. In the last month alone we saw court support swell to twenty people at one hearing! With the help of Molly Kafka, another CUNY Law intern, we were able to create a quarterly newsletter about court support's impact. We hope that it will continue to grow and inspire an increasing number of homeowners and allies to join the struggle for justice.

III. Challenges and Hopes for the Future

Our legal clinic is not without challenges and is a constant work-in-progress. One of the challenges of our legal clinic is supporting homeowners with a wide range of literacy and language skills. It is imperative that homeowners representing themselves understand the contents of their motions and all other litigation-related documents. Even individuals with strong literacy skills, however, struggle with written legal documents. This is exacerbated when homeowners have limited abilities to read and write and/or are not fluent in English. We read documents out loud and translate legalese into everyday language. But the time constraints of a legal clinic setting require homeowners to continue practicing their arguments on their own time. Those who are unable to reread the documents, therefore, receive less assistance.

As an under-resourced organization, we cannot provide interpreters at our legal clinic. We try our best to secure volunteer interpreters or ask homeowners to bring their own interpreters, all to varying degrees of success. Eventually, we hope to be able to create more visual materials to communicate legal concepts and processes to homeowners with limited proficiency in English. We also hope to obtain the financial resources to pay former clinic participants fluent in English and Spanish to work as interpreters at our legal clinic.

In addition, despite noticeable shifts in the traditional attorney-client relationship, Common Law has only *begun* to disturb the power imbalance between attorneys and those seeking justice and relief. We perceive small shifts in power when homeowners share their experience or strengthen one another during court support. We have built momentum for more shifts and hope the homeowners will take on new and more responsibilities, such as teaching others how to file and serve legal documents or orienting first-time participants to the clinic.

We hope that the legal clinic will continue to develop in ways

that truly make law common. Ultimately, we hope to see a horizontal movement of legal information so that homeowners are involved in all aspects of the legal clinic. Our legal clinics can become more like study sessions. We can teach homeowners how to research foreclosure-related topics. We can create space for homeowners to read and grapple with the text of news articles, legislation, or case law. In fact, as we write this, we plan to introduce at tonight's legal clinic excerpts from a recent case about banks' standing to foreclose. We have created a simplified statement of the facts and extracted the most important sections of the Judge's decision. We are excited to continue to work with the homeowners to deepen their understanding of the system of justice that controls their ability to secure affordable housing—and just about everything they care about and need to survive.

We also hope to vary our financial resources. We have not found a way to support ourselves without foundation and government support and are still searching for an alternative economic model that allows us to serve those with little or no resources.

As Common Law moves forward as an organization, we are hopeful about our ability to continue to resist the pressures and panic induced by the non-profit systems in which we work. We have remained small, avoiding growth for the sake of growth. We are not a machine; this is not an operation. Our programs, our curriculum, our daily schedules are shaped and re-shaped by the needs and talents of our community. We have retained self-determination over our work.

As we move and age and develop we are still driven by the simple but radical vision we articulated back in 2007 while still students at CUNY Law: "Legal knowledge should not be privileged discourse between lawyers, judges, law students, and law professors. We seek to dispel the notion that the law is for lawyers alone to understand. We believe that it is, instead, ordinary, everyday people that carry out the struggle for justice."