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UNIVERSITY OF
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CONTENTS

ARTICLES

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THE HIDDEN COSTS OF HABEAS DELAY

MARC D. FALKOFF *

Because habeas petitioners seek a court order for liberty rather than compensation, judges have a duty to decide habeas petitions promptly. But increasingly, the federal courts have fallen behind on their heavy habeas dockets, and many petitions—some of which are meritorious—remain undecided for years. First, this Article makes the normative and historical argument that speed must be, and always has been, central to the function of habeas. Second, it analyzes newly compiled Administrative Office of the United States Courts data on more than 200,000 habeas petitions and demonstrates empirically for the first time that there is a widespread and growing problem of delay in the resolution of habeas petitions in the federal courts. Third, this Article offers a specific and concrete remedy for the habeas delay problem, recommending that the Judicial Conference of the United States require judges to identify publicly all habeas petitions that have been pending in their chambers for more than six months, just as the Civil Justice Reform Act requires them to do for all other civil motions.

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INTRODUCTION

A prisoner seeking a writ of habeas corpus from a federal judge should have his petition decided quickly. The habeas petitioner, after all, contends that his detention is illegal and that every day he spends in prison is an incompensable injury.[1] Of course, unreasonable delay in *any* civil matter is an injustice.[2] Delay costs litigants time and money, and it undermines public confidence in the administration of our judicial system.[3] But habeas—in which the petitioner's very

1. *See Ex parte* Watkins, 28 U.S. 193, 202 (1830) (stating that "the great object" of the writ of habeas corpus "is the liberation of those who may be imprisoned without sufficient cause").

2. Federal habeas actions are categorized as civil matters, even though they frequently challenge detentions that are authorized by criminal convictions. *See* Woodford v. Ngo, 548 U.S. 81, 91 n.2 (2006); COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 12 (1976) ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.").

3. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 1 (2009) [hereinafter IAALS STUDY] ("[F]or the general public, extended cases epitomize government inefficiency and drive reduced public confidence in the judicial system."); TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS, at iii (RAND Corp. 1990) (same). Critiques of the slowness of the courts abound in popular literature.

liberty is at stake—is a special category of case for which prompt adjudication is, in a real sense, the *raison d'être* for the cause of action.[4]

Increasingly, however, habeas petitions have languished on the dockets of the federal courts, often for years.[5] This delay has been most striking in the highly publicized Guantánamo cases, which have remained on the D.C. district courts' dockets for nearly a decade.[6] There are, of course, unique explanations for the slow resolution in the Guantánamo cases—not least that Congress has twice sought to strip the federal courts of jurisdiction to hear them.[7] But what is less explicable, and

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For example, in his famous soliloquy, Hamlet asks not only why a sane person would "bear the whips and scorns of time," but also why he would brook "the law's delay" rather than just dispatch himself with his sword. WILLIAM SHAKESPEARE, THE TRAGICAL HISTORY OF HAMLET, PRINCE OF DENMARK act 3, sc. 1, ll. 69–71 (Ann Thomson & Neil Taylor eds., Arden Shakespeare Third Series 2006) (1604–05); *see also* CHARLES DICKENS, BLEAK HOUSE 8 (George Ford & Sylvère Monod eds., W.W. Norton & Co. 1977) (1853) (recounting the fictional case of *Jarndyce v. Jarndyce*, which "drags its dreary length before the court" for generations).

4. *See infra* Part I.A.

5. *See infra* pp. 378–86.

6. The first of the Guantánamo habeas petitions was filed on behalf of four detainees in February 2002, only about a month after Guantánamo was opened as a War on Terror prison. *See* Rasul v. Bush, 542 U.S. 466, 471–72 & n.1 (2004) (noting petitions filed by two British and two Australian detainees). But it was not until October 2008 that a federal judge first ruled on the merits of a Guantánamo habeas petition. *See In re* Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 34 (D.D.C. 2008) (holding the detention of seventeen Uighur nationals illegal).

7. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2006); Military Commissions Act of 2006, 10 U.S.C. § 948a (2006). The Guantánamo cases have raised threshold questions about the statutory availability of the writ. *See Rasul*, 542 U.S. at 484 (holding federal courts had jurisdiction to hear habeas petitions filed by Guantánamo prisoners pursuant to 28 U.S.C. § 2241). Guantánamo cases have also raised questions about the proper construction of congressional legislation designed to block the access of "enemy combatants" to the courts. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 582–83 (2006) (holding Congress did not intend the Detainee Treatment Act to bar federal courts from exercising jurisdiction over already pending habeas petitions filed by Guantánamo prisoners); Boumediene v. Bush, 553 U.S. 723, 795 (2008) (holding unconstitutional provisions of the Military Commission Act that stripped federal courts of jurisdiction to hear habeas petitions filed by Guantánamo prisoners). Additionally, the Guantánamo cases raised questions about the scope of the Suspension Clause of the U.S. Constitution. *Boumediene*, 553 U.S. at 795. Nonetheless, the slow pace of the litigation has not gone unnoticed by the judiciary. In *Boumediene*, Justice Kennedy wrote for the majority that "the costs of delay can no longer be borne by those who are held in custody." *Id.* Two years earlier, a district court judge refused a government motion to stay proceedings in a Guantánamo habeas case, stating that, "[i]t is often said that 'justice delayed is justice denied.' Nothing could be closer to the truth with reference to the

rarely discussed among scholars, is a pandemic of delay infecting ordinary habeas litigation throughout the entire federal judicial system.[8]

This Article analyzes, for the first time, raw data made available by the Administrative Office of the United States Courts (Administrative Office) regarding all of the more than 200,000 state-prisoner, non-capital habeas cases that appeared on the federal courts' dockets from 1996 to 2008[9] and reaches some disconcerting conclusions. Key findings include the following:

- The number of state-prisoner habeas applications that remain undecided by the federal district courts as of the end of every fiscal year is large and has increased annually from 1996 (when there were 9,086 such petitions) to 2008 (when there were 15,824)—a 74% increase.[10]
- The proportion of habeas petitions appearing on the district courts' dockets that remained undecided for at least three years increased from 2.7% as of the end of 1996 to 7.8% as of the end of 2008.[11]
- The proportion of petitions that remained undecided for at least two years also increased markedly, from only 8.5% of the courts' habeas docket as of the end of 1996 to 18.7% as of the end of 2008.[12]
- The proportion of state-prisoner habeas applications that remained undecided for at least one year has likewise increased annually, from 25.7% of the courts' docket as of the end of 1996, to 39.4% as of the end of 2008.[13]
- While some districts have kept disposition times for habeas applications relatively low, in the ten "slowest" districts (as measured by mean number of days pending for habeas applications filed between 1997 and 2006), fewer than one-third are decided within six months of filing (29.9%), fewer than half are decided within one

Guantánamo Bay cases." Razak v. Bush, No. 05-1601 (D.D.C. Dec. 1, 2006) (refusing a motion to stay proceedings in a habeas case).

8. *See infra* Part II.B–C.

9. These cases are filed in the district courts pursuant to 28 U.S.C. § 2254 (2006).

10. *See infra* p. 386.

11. *See infra* pp. 377–78, 385.

12. *See infra* pp. 379–80, 385.

13. *See infra* pp. 379–80, 385.

year of filing (49.2%) and nearly one-fifth require at least three years before decision (18.4%).[14]

This data reflect real suffering and injustice. It is a gruesome fact that some of these petitions become mooted because, after years of delay, the petitioner has died in prison before the judge has ruled on his habeas motion.[15] Equally disturbing are those instances in which a habeas petition, left undecided on a judge's desk for five or six years or more, is eventually granted, confirming that an already-unlawful imprisonment was extended by years due in part to the court's delay.[16] Granted, unlike in the Guantánamo context, where so far the success rate for habeas petitioners remains well over 50%,[17] the likelihood of a state prisoner winning the writ is quite small—certainly less than one in one hundred.[18] But even for the state prisoner who is destined to lose his habeas petition, inflicting years of uncertainty seems unnecessarily

14. *See infra* pp. 392–95.

15. *See, e.g.*, Judgment & Order at 1, Olivencia v. Berbarry, No. 99-CV-6415 (E.D.N.Y. May 20, 2003) (dismissing as moot a four-year-old habeas petition where the petitioner had died two years earlier).

16. In 2003, Senior Judge Jack B. Weinstein volunteered to clear a backlog of five hundred state-prisoner habeas applications that had remained pending in the district, often for years. *See* Order Withdrawing Power of Magistrates over Habeas Corpus Matters, *In re* Habeas Corpus Cases, 03-MISC-66 (May 9, 2003) (listing the five hundred 28 U.S.C. § 2254 cases reassigned to Judge Weinstein). Judge Weinstein granted the writ in nine cases, including three that had originally been filed about six years earlier. *See* Thomas v. Kuhlman, 255 F. Supp. 2d 99 (E.D.N.Y. 2003) (petition filed in 1997); Harris v. Artuz, 288 F. Supp. 2d 247 (E.D.N.Y. 2003) (same); Batten v. Greiner, Nos. 97-CV-2378, 2003 U.S. Dist. LEXIS 16923 (E.D.N.Y. Aug. 26, 2003) (same). Judge Weinstein also granted the writ in another case that had been pending for more than four years. *See* Benn v. Griener, 275 F. Supp. 2d 371 (E.D.N.Y. 2003) (petition filed in 1998). For synopses of these cases, *see* JACK B. WEINSTEIN, *IN RE* HABEAS CORPUS CASES: REPORT ON 500 HABEAS CASES, at 6–14 (2003) [hereinafter WEINSTEIN REPORT].

17. Of the sixty-one habeas applications decided through September 2011 by the D.C. district courts, the Guantánamo petitioners prevailed in thirty-eight of them, for a 62% success rate. The D.C. Court of Appeals subsequently reversed three of the grants and remanded with orders to deny the writ, reversed three of the grants and remanded with orders to reconsider, and reversed two of the denials and remanded with orders to reconsider. After taking account of this appellate action, the petitioners have succeeded in thirty-two of the fifty-seven petitions to have been decided on the merits, for a 56% success rate. (These numbers do not take into account petitions that became moot after the government released a detainee before being ordered to do so by the court.)

18. *See* NANCY J. KING ET. AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 58 & n.109 (Aug. 21, 2007) [hereinafter KING REPORT] (noting that non-capital state-prisoner habeas cases in her sample had a success rate of about 1 in 257).

cruel and suggests a kind of systemic contempt for the plight of petitioners who seek the court's protection.

It is all too easy to uncover anecdotal evidence of injustices caused by delay in federal habeas matters. Floyd Batten, for example, was serving a twenty-year sentence in a New York prison for the second-degree murder of a furniture store owner.[19] He learned, from a Freedom of Information Law Request,[20] that the prosecution in his case had never revealed to the defense a police report detailing their interviews with another suspect (an employee of the murder victim who had previously solicited help in robbing the store).[21] Batten filed a federal habeas petition in April 1997, alleging that the failure to provide these reports was a violation of the *Brady v. Maryland* requirement that the state turn over material evidence to a defendant.[22] It was not until December 2003, however, that he received a merits decision granting the writ.[23] Batten's order for a release from state prison did not come until *six years* after he first asked a federal court for help.[24]

To be sure, Batten's is an extreme case. Six years is an unusually long time for a habeas petition to be pending in a district court.[25] But increasingly, applicants across the country are facing multi-year delays before a federal district court decides their federal habeas petitions.[26] Quantifying the full sweep of this delay problem is critical, in particular because those charged with the functioning of the federal courts are not even sure there is a problem at all. Indeed, in opposing legislation that was designed to streamline the resolution of

19. *Batten*, 2003 U.S. Dist. LEXIS 16923, at *8.

20. Freedom of Information Law, N.Y. Pub. Off. § 84–90 (2008).

21. The police reports also indicated that this suspect was deported after the police alerted immigration authorities about him. *Batten*, 2003 U.S. Dist. LEXIS 16923, at *45.

22. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

23. *Batten*, 2003 U.S. Dist. LEXIS 16923, at *45 (holding there was "a reasonable probability that, had [the police reports] been disclosed to the defense, the result of the proceeding would have been different").

24. After losing its appeal, the State of New York chose not to retry Batten. *See* Denise Buffa, *"Bum Rap" Suit—"Wrong Killer" $laps City in '83 Bust*, N.Y. POST, Dec. 31, 2004, at 23. Batten's habeas case was one of the five hundred that were backlogged in the Eastern District of New York and subsequently transferred in 2003 to Judge Jack B. Weinstein for disposition. *See supra* note 16.

25. *See infra* p. 380 (noting that only 10% of petitions filed from 1997 to 2006 required 2.3 years or more to be decided).

26. *See infra* pp. 377–80.

habeas cases, the Secretary of the Judicial Conference of the United States (Judicial Conference) has suggested it is unclear "*whether* there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners."[27] If the federal judiciary is unaware that the problem exists, it is not likely to adopt any internal reforms to address the problem.[28]

A failure to address habeas delay disregards the historic office of the writ. Since the Parliament of England's statutory efforts in the seventeenth century to establish strict time deadlines for the processing of habeas matters,[29] judges have been required to act promptly on habeas petitions in order to safeguard the liberty of the subject.[30] Indeed, the original purpose of habeas was at least as much to eliminate delay in resolving a prisoner's status as it was to determine the legality of detention.[31] At its root, habeas corpus is fundamentally a process for ensuring a speedy trial (in the case of a criminal suspect) or a speedy hearing (in the case of non-judicial executive detention).[32] Coke and Blackstone both acknowledged the centrality of this principle[33] and, as is

27. Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Hon. Arlen Specter, Chairman, Comm. on the Judiciary, U.S. Senate 1 (Sept. 26, 2005) (emphasis added); *see also id.* at 2 (stating that in 2004 the total number of non-capital habeas terminations was about the same as the number of such petitions filed by state prisoners annually, that median disposition times had remained constant since 1998 (at about six months), and that therefore "the statistics appear to indicate that the district . . . courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously").

28. *Cf.* THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 5 (1978) ("If any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem.").

29. *See* Habeas Corpus Act, 1640, 16 Car., c. 10 (Eng.); Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), discussed *infra* Part I.A.

30. *See infra* Part I.A.

31. *See infra* Part I.A.

32. *See infra* Part I.A.

33. *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 42 (Brooke, 5th ed. 1797) (English judges "have not suffered the prisoner to be long detained, but at their next comming have given the prisoner *full and speedy justice* . . . without detaining him long in prison.") (emphasis added); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (Neill H. Alford, Jr., et al. eds., The Legal Classics Library 1983) (1768) ("And by [the Habeas Corpus Act of 1679], the methods are so plainly pointed out and enforced, that, so long as this statute remains unimpeded, no subject of England can long be detained in prison . . . .").

discussed below, in the United States our statutes, court rules, and case law all pay homage to it.[34]

Why then do federal judges seem to give such low priority to habeas petitions pending on their dockets? As is suggested in the last part of this Article, at least part of the explanation is, ironically, a provision of the Civil Justice Reform Act of 1990 (CJRA) that was intended to speed the resolution of civil matters generally. Section 476 of the CJRA requires judges to publish semi-annually a list of all motions appearing on their dockets that have been unresolved for six months or more.[35] The provision was designed to incentivize judges to resolve motions more promptly or face public shaming for failure to manage their dockets efficiently.[36]

Section 476 is one of the few reform measures instituted by the CJRA that seems to have worked to make the courts function more efficiently, and it is the only provision of the Act that Congress subsequently renewed.[37] But habeas is a glaring exception. The Judicial Conference has construed section 476 to exempt habeas petitions from the six-month reporting requirement[38]—with the result that habeas motions are sent to the back of the judges' to-do lists, even though by statute and rule they should be near the front. Recognizing this strange fact, this Article proposes a simple, effective, and low-cost reform for ameliorating the habeas delay problem: The Judicial Conference should reconsider its interpretation of section 476 of the CJRA and require district court judges to include habeas motions in their six-month reports to the public. Incentives matter, and even small and inexpensive changes can generate a large payback.

Part I below reviews the common law history of habeas and its ancient function as a kind of speedy trial analogue. It also surveys American statutes, rules, and decisional law to

34. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 399–409 (1963) (noting that habeas provides "a swift and imperative remedy in all cases of illegal restraint or confinement") (quoting Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.)).

35. 28 U.S.C. § 476(a) (2006).

36. *See infra* Part III.A.

37. *See infra* notes 172–80 and accompanying text.

38. *See* 18 ADMIN. OFFICE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 540.70 [hereinafter ADMINISTRATIVE OFFICE, POLICY GUIDE] (reflecting Judicial Conference policy to exclude from the CJRA semi-annual reporting requirement § 2254 habeas applications that have been pending more than six months, but making six-month-old "secondary" motions and any pending three-year-old § 2254 cases reportable).

show that, as a formal matter, our civil justice system is expected to move habeas petitions to the front of the courts' dockets for prompt action. Part II establishes empirically that swift resolution of habeas petitions is happening less and less often for thousands of state-prisoner applications nationwide and that delay is particularly pronounced in several problem districts. Part III proposes alleviating the delay problem through adoption of the same publication requirements to which judges must adhere for all other civil motions.

I. HABEAS AND THE ROOTS OF THE SPEEDINESS REQUIREMENT

Speed has always been of the essence in habeas matters. Since at least the seventeenth century, a crucial function of the writ has been to assure that the courts promptly address prisoners' claims of illegal detention.[39] The Habeas Corpus Act of 1679—the English statute that provided the foundation for the right to habeas corpus enshrined in Article I of the U.S. Constitution[40]—was designed not only to address delaying tactics deployed by the King and his councilors, but also to mandate that the courts address habeas petitions immediately, with fines specified for judges who failed to act with dispatch.[41] Delay, in short, was one of the chief evils against which habeas historically was directed.

The first Section, below, briefly reviews the history of habeas corpus in England in the seventeenth century, explaining how the writ evolved into a set of procedures designed to ensure prompt review of allegedly illegal detentions. The next Section turns to the American context, showing that the same concern for assuring swift judicial review of detentions has served as a guiding principle for the courts throughout the evolution of habeas jurisprudence in America. The third Section reviews statutes and rules that have been authorized by Congress to assure that habeas petitions receive prompt attention from the federal district courts. The final Section observes that, notwithstanding the

39. *See infra* notes 69–77 and accompanying text.

40. *See* THE FEDERALIST NO. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (discussing the importance of protecting habeas in the Constitution by quoting Blackstone's encomiums to the Habeas Corpus Act of 1679); U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

41. *See infra* notes 69–77 and accompanying text.

history, case law, statutes, and rules previously discussed, the courts have been reluctant to honor these provisions in practice, due at least in part to their heavy dockets.

A. English Roots of Habeas and the Speed Requirement

The deep roots of habeas corpus lie in Magna Carta's thirteenth century promise that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law of the land."[42] This provision famously struck against the arbitrary exercise of the King's power to deprive British subjects of their liberty, and it was the foundation on which the rule of law in England was built. The "law of the land" provision was not, however, self-interpreting or self-effectuating. Who, for example, was to determine whether a detention ordered by the King or his councilors was in accord with law of the land—the King himself or the King's Bench, the court that in theory derived its power from the monarch?[43]

Bringing the promise of Magna Carta to fruition has required centuries of grappling with questions large and small, ranging from the authority of the King's Bench and other courts to oversee executive detentions[44] to the technical wording of the writs that commanded jailers to explain why they were detaining a prisoner.[45] Eight centuries later, we are still wrestling with many of these same issues.[46]

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42. Magna Carta, cl. 39 (England 1215) ("Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre."), *photograph of original document available at* http://www.archives.gov/exhibits/featured_documents/magna_carta/images/magna_carta.jpg, *Latin transcript available at* http://www.thelatinlibrary.com/magnacarta.html, and *English translation available at* http://www.law.ou.edu/ushistory/magnacarta.shtml.

43. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 75 (2010) ("If the king had a unique interest in his subjects' bodies, it stood to reason that enacting that interest when he no longer sat in court himself should become the function of the court claiming to be so close to his person that it was the king himself. Or so many thought . . . .").

44. *See id.* at 11–38 (discussing jurisdictional battles); R.J. SHARPE, THE LAW OF HABEAS CORPUS 4–15 (1976) (same).

45. HALLIDAY, *supra* note 43, at 51–53 (discussing modifications in language of the writ).

46. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 739 (2008) (recognizing the need to begin to determine the extraterritorial scope of the writ).

While this Article does not describe the ancient history of the writ of habeas corpus,[47] the battles among Parliament, the King, and the courts in the politically tumultuous seventeenth century are worth briefly revisiting for what they reveal about the importance of speed in the habeas process. On the eve of Parliament's passage of the first Habeas Corpus Acts, the power of the courts to check royal power over detention decisions was contested and tenuous. The common law writ of habeas corpus *ad subjiciendum* (the direct ancestor of what we now commonly refer to as the writ of habeas corpus) had only recently been developed by the King's Bench to review the legality of imprisonments ordered by the King and his councilors,[48] and the Crown's efforts to avoid judicial oversight were frequent.[49] The King, of course, did not want his powers circumscribed by the King's Bench any more than modern presidents want their wartime detention decisions to be reviewable by the federal courts. It was common in the sixteenth and seventeenth centuries, for example, for the King's Bench to order a jailer to explain on what grounds he was detaining a prisoner, only to be told that the prisoner was being detained on order of the King or his Privy Council, and that therefore the detention was *per se* legal.[50]

Two separate attempts were made by Parliament, in 1593 and 1621, to legislate executive compliance with the writ, but both were unsuccessful.[51] A constitutional crisis soon ensued, precipitated by the infamous *Darnel's Case* (also known as the

47. For a fresh perspective on the history of the Writ, see generally HALLIDAY, *supra* note 43. For a discussion of the history of habeas in the executive detention context, see JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11, at 81–100 (2011); Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 966–88 (2009).

48. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 126 (2d ed. 1979) (describing the rise of this form of the writ in the sixteenth century). There were a number of distinct writs with different names. As cataloged by Blackstone, these included *ad respondendum* (for removing a prisoner from confinement to answer a complaint brought against him), *ad satisfaciendum* (for bringing a prisoner to a superior court for execution of a judgment), *ad prosequendum* (for bringing a prisoner to be prosecuted), *ad testificandum* (for bringing a prisoner to testify), and *ad deliberandum* (for bringing a prisoner into the proper jurisdiction for trial). 1 BLACKSTONE, *supra* note 33, at 129–30.

49. *See* HALLIDAY, *supra* note 43, at 159.

50. For a full discussion of the development of the Writ's "return" requirement (the obligation of the jailer to provide a full factual and legal justification for the detention of a subject), *see* Falkoff, *supra* note 47, at 967–72.

51. *See* SHARPE, *supra* note 44, at 9 n.3 (noting the defeat of such bills in 1593 and 1621).

Five Knights' Case) in 1627.[52] Charles I sought to raise revenue by demanding, without sanction from Parliament, a forced loan from his subjects. Five knights refused to make the loans and were arrested by Charles' agents. The knights sought a writ of habeas corpus, claiming that their detention was illegal.[53] The King's response was that if the King does it, then it's not illegal.[54] The King's Bench accepted this answer and held that the prisoners could not be bailed.[55]

Parliament was more successful in its legislative response in the aftermath of *Darnel's Case*. Later in 1627 it passed the Petition of Right, a declaration of grievances against Charles I. In the Petition, Parliament noted that subjects had been imprisoned "without any cause showed" and complained that the only answer the King had given to habeas corpus writs was that the prisoners were detained by his "special command."[56]

The King consented to the Petition, but he apparently did so only after concluding that his power to detain his subjects could not, as a result, be circumscribed by the King's Bench.[57] Indeed, in fundamental ways, the King subsequently refused to honor the Petition of Right in practice by deploying a host of strategies to avoid judicial oversight of detention decisions.[58] The King's Bench, in turn, sought to avoid confrontation with the executive by deploying habeas writs sparingly and thus delaying determination of the status of prisoners.[59]

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52. 3 St. Tr. 1, 31 (1627) (Doderidge, J.).

53. SHARPE, *supra* note 44, at 9.

54. The Executive's return stated only that the men were being detained "*per speciale mandatum domini regis*," or by special order of the King. Counsel for the prisoners argued, as per Magna Carta, that no detention was legal except "*per legem terre*," or by the law of the land. In response, the Attorney General noted that Magna Carta did not define "*legem terre*" and that the law of the land was that the King could detain his subjects without giving an accounting of why to the courts. *Darnel's Case*, 3 St. Tr. at 31.

55. *Id.*

56. 3 Car., c. 1 (1627).

57. *See* SHARPE, *supra* note 44, at 14 n.2 (noting that, before consenting to the Petition, Charles I had sought assurances from the King's Bench judges that it would not restrain his powers); *id.* at 13–15 (quoting Six Members' Case, 3 St. Tr. 235, 281 (1629)) (discussing legal arguments propounded by Charles I in the immediate aftermath of the Petition, including that he had "granted no new, but only confirmed the ancient liberties of my subjects").

58. *See id.* at 13–15.

59. *See* HALLIDAY, *supra* note 43, at 160 (noting that release rates on habeas corpus "plunged" during the reign of Charles I, and were not affected by the Petition of Right); *id.* at 223 (stating that "the Petition did little to change judicial work in the years immediately following" its passage).

An infamous example of abusive delay tactics that were countenanced by the King's Bench involved the case of John Selden, who was a Member of Parliament, one of the lawyers in the *Five Knights' Case*, and a moving force behind the drafting of the Petition of Right. In March 1629, Selden led a group in the House of Commons that held the speaker in his chair in an attempt to prevent the dissolution of Parliament, which Charles I had ordered.[60] Selden and the others were arrested on the King's command and charged with "notable contempte . . . and for stirreing up sedition against us."[61] The King refused to offer the King's Bench a particularized justification for the imprisonment, seemingly to test the limits of his detention powers under the Petition of Right,[62] and the King's Bench largely acquiesced. As Blackstone described it, the judges in Selden's case "delayed for two terms (including also the long vacation)"[63]—about six months from the time of his arrest[64]—"to deliver an opinion how far such a charge was bailable."[65]

Blackstone wrote that it was such "pitiful evasions" that gave rise to Parliament's passage of the Habeas Corpus Act of 1640,[66] which sought to strengthen the court's review power over executive detentions by requiring speedy compliance with the writ.[67] As Blackstone summarized the Act, any person committed by the King's order "shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*," and the judges were to "examine and determine the legality of such commitment, and do what to

60. *Id.* at 224.

61. John Reeve, *The Arguments in the King's Bench in 1629 Concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. BRIT. STUD. 264, 269 (1986).

62. *See* PAUL CHRISTIANSON, DISCOURSE ON HISTORY, LAW AND GOVERNANCE IN THE PUBLIC CAREER OF JOHN SELDEN, 1610–1635, at 182 (1996).

63. 3 BLACKSTONE, *supra* note 33, at 134.

64. Selden was arrested on March 3, 1629, before the start of Easter Term. CHRISTIANSON, *supra* note 62, at 180. He applied for a writ of habeas corpus on May 6, and the King's "return" to the writ was filed on May 7. *Id.* at 182. Selden's arguments for bail were heard before the King's Bench about a month later, on June 5, during Trinity Term, *id.* at 182–84; the King's arguments were heard on June 13, *id.* at 187. The King's Bench was set to issue its bail decision on June 24, but the day before the King removed Selden to the Tower of London, leaving the court unable to render its bail decision. *Id.* at 190. The court went on vacation during the summer and did not issue their decision—that Selden should be bailed—until the opening of Michaelmas Term, in October. *Id.* at 190–91.

65. 3 BLACKSTONE, *supra* note 33, at 134.

66. *Id.*

67. 16 Car., c. 10 (1640).

justice shall appertain, in delivering, bailing, or remanding such prisoner" within three days of the return of the writ.[68]

It soon became clear, however, that even this statutory supplement to the common law powers of the King's Bench was not completely effective. It was disputed, for example, whether the writ could be awarded while the courts were in vacation—a practice that had led to lengthy detentions.[69] Abuses continued, including the movement of prisoners from jail to jail to avoid the writ, or transportation to Scotland or other areas where the writ in theory might not reach.[70] The King, in short, deployed a series of delay tactics in an attempt to undermine the effectiveness of the writ and its promise of court supervision over his detention decisions, and the courts were complicit to the degree that they countenanced tactics of delay and avoidance.

Parliament sought to cure such problems once and for all through passage of the Habeas Corpus Act of 1679.[71] As the preamble to the Act states, it was designed to combat the "great delays" that jailers had made by refusing to answer habeas writs until they had been reissued multiple times, and "by other shifts to avoid their yeilding [o]bedience to such Writts, . . . whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation."[72]

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68. 3 BLACKSTONE, *supra* note 33, at 135. Blackstone went on to note that "[o]ther abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries,* were issued, before he produced the party: and many other vexatious shifts were practiced to detain state prisoners in custody." *Id.*

69. As Paul Halliday has explained, prior to the mid-seventeenth century, the King's Bench would in fact frequently issue a writ of habeas corpus during the court's vacation, either with the actual *teste* date on it or by backdating it to the last day of the previous term. HALLIDAY, *supra* note 43, at 56. Confusion about whether the writ was available during vacation was sown by dictum from Sir Edward Coke, who in his *Institutes* wrote that "neither the King's Bench nor Common Pleas can grant [the habeas] writ but in the term time." *Id.* (quoting Coke). Coke's dictum nonetheless led to the belief that, during the latter half of the seventeenth century, the writ had not been available during vacation. *See id.* at 236–37.

70. SHARPE, *supra* note 44, at 17.

71. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

72. *Id.* Thus, the Act "contained provisions which were designed to ensure that even where a prisoner was not entitled to immediate release, he would be brought to trial with as little delay as possible." SHARPE, *supra* note 44, at 19 (citing §§ 6, 17, 18); *see also id.* at 133 ("[T]he most neglected aspect of habeas

The Act itself is lengthy and detailed, providing a series of particularized requirements, including specific timing provisions for, and penalties to be assessed against, both jailers and justices who failed to comply with the Act's requirements. These requirements included, for "the more speedy [relief] of all persons imprisoned" on criminal matters, that jailers "shall within [t]hree days after the [s]ervice" of a habeas corpus upon them "make [return] of such [writ]" (with longer periods allowed for imprisonments that are far from the court).[73] Failure to return the writ within these time periods made the jailers liable to the prisoner for one hundred pounds for a first offense and two hundred pounds for a second offense.[74] Any person who was detained "in the Vacation time and out of Terme" of the courts was explicitly entitled to apply for habeas corpus to any of the justices of the court; the justices were authorized to grant habeas corpus during this period and to require that the jailer provide an "*immediate*" return (that is, an explanation of the cause of detention).[75] The failure of a justice to issue the writ during vacation time when it was "required to be granted" by the Act made the justice liable to the prisoner for five hundred pounds.[76]

As these strict time deadlines suggest, combating delay was a chief purpose of the Act—the "very hub of the design."[77] After passage of the Act, no person could be held for more than two terms without trial or release.[78] At least for those prisoners detained on suspicion of having committed a crime, the Habeas Corpus Act of 1679 thus functioned, in short, much like the

corpus has been its use as a device to secure the right of accused persons, detained pending their trial, to be either tried quickly or released.").

73. Habeas Corpus Act, 1679, 31 Car. 2, c. 2, ¶ 1 (Eng.).

74. *Id.* ¶ 4.

75. *Id.* ¶ 2 (emphasis added).

76. *Id.*

77. SHARPE, *supra* note 44, at 133. *See also* 1 J. CHITTY, CRIMINAL LAW 130–31 (1816) ("But the principal ground for bailing upon habeas corpus, and indeed the evil the writ was chiefly intended to remedy, is the *neglect* of the accuser to prosecute in due time.").

78. The "design of the Act," according to one English judge, "was to prevent a man's lying under an accusation for treason, &c. above two terms." Crosby's Case, [1694] 12 Eng. Rep. 66 (P.C.). According to another judge, its object "was to provide against delays in bringing persons to trial, who were committed for criminal matters." *Ex parte* Beeching, [1825] 107 Eng. Rep. 1010 (P.C.); 4 B. & C. 137. A third explained that the Act "was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial." *In re* Hastings, [1959] 1 Q.B. 358, at 369 (U.K.).

modern speedy trial right.[79] It is unsurprising, given this history, that expeditious access to the habeas courts would be recognized in the American context as crucial to protecting the individual's liberty.

B. Habeas and Speed in the American Context

Judicial protection of a citizen's liberty by the writ of habeas corpus was part of America's patrimony from England. The framers of the Constitution knew the history leading up to Parliament's passage of the Habeas Corpus Act of 1679,[80] and they understood that prompt judicial review was integral to the functioning of the writ, since habeas was "the great remedy . . . by which the judicial power speedily and effectually protects the personal liberty of every individual."[81]

Indeed, the first draft of the Suspension Clause, as proposed by Charles Pinckney of Virginia, made the importance of speed explicit: "The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding___ months."[82] The first Congress immediately authorized the federal courts to issue the writ for federal prisoners in the Judiciary Act of 1789.[83] And, as Joseph Story explained, the

79. *See generally* SHARPE, *supra* note 44, at 133–40 (discussing the derivation of the speedy trial right from habeas). By its terms the Habeas Corpus Act regulated only criminal detentions, and the protections of the writ of habeas corpus were not extended *by statute* to non-criminal detainees in England until the Habeas Corpus Act, 1816, 56 Geo. 3, c. 100 (Eng.). In practice, however, the procedural protections of the Habeas Corpus Act of 1679 were extended by judges to prisoners in non-criminal cases. *See* ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 219 & n.2 (London, Macmillan & Co. 4th ed. 1893).

80. *See* Boumediene v. Bush, 553 U.S 723, 739–40 (2008).

81. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 117 (photo. reprint 2003) (2d ed. 1829). *See also Ex parte* Randolph, 20 F. Cas. 242, 252–53 (C.C.D. Va. 1833) (discussing the "celebrated habeas corpus act of 31 Charles II., . . . which, in practice, by reason of its valuable provisions for insuring speedy action, has almost superseded the common law").

82. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334 (Max Farrand ed., Yale University Press 1911). The provision was modified and came out of the Committee of Style as, "[t]he privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it." *Id.* at 435. The word *where* would be changed to *when* in the ratified version of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2.

83. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

Act was, "in substance, incorporated into the jurisprudence of every state in the Union; and the right to it has been secured in most, if not in all, of the state constitutions by a provision, similar to that existing in the constitution of the United States."[84]

Praise for habeas as a guarantor of speedy justice is common in our early decisional law. As Chief Justice Taney stated, the "great and inestimable value" of our habeas corpus inheritance in America was that it "compel[led] courts and judges, and all parties concerned, to perform their duties promptly."[85] Other courts noted that there was "no other remedy known to the law, which is so speedy and effectual,"[86] and even that the liberty of the people depended on the courts' insistence on "ready compliance" with the writ.[87]

Until after the Civil War, the writ was available only for federal prisoners.[88] Congress did not give the federal courts statutory authority to grant the writ to state prisoners until it passed the Habeas Corpus Act of 1867, which in modern form

84. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335 (1833) (footnote omitted). The Massachusetts Constitution, for example, stated that the "privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner." MASS. CONST. chp. VI, art. VII. *See also* N.H. CONST. of 1784, *in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2469 (Francis Newton Thorpe ed. 1909); VT. CONST. of 1793 § 41 (as amended through 2002) (stating that the legislature shall assure the writ provides "a speedy and effectual remedy in all cases proper therefor"); Act of Dec. 12, 1712, 2 S.C. STAT. 399-401 (adopting Habeas Corpus Act of 1679).

85. *Ex parte* Merryman, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (Taney, C.J.).

86. Norris v. Newton, 18 F. Cas. 322, 324 (C.C.D. Ind. 1850).

87. *In re* Stacy, 10 Johns. 328, 332 (N.Y. 1813) (*quoting* King v. Winton, 5 Term. R. 89 (1792)) ("[T]he courts always looked with a watchful eye at the returns to writs of *habeas corpus*; that the liberty of the subject essentially depended on a ready compliance with the requisitions of the writ . . . .").

88. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing that "writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States."); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (stating that unless Congress had passed a statute authorizing the federal courts to grant the writ, "the privilege itself would be lost, although no law for its suspension should be enacted"). *But see* Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So:* Ex Parte *Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 537 (2000) (arguing that the federal courts had common law power to issue the writ for state prisoners).

has been codified in 28 U.S.C. § 2254.[89] Nonetheless, whenever the federal courts have reflected on their authority to determine the legality of a state prisoner's detention, they have acknowledged a correlate responsibility to exercise their duties expeditiously. Habeas applications challenging illegal detention, after all, are concerned with the arbitrariness of any kind of detention, whether authorized by the executive solely or by another judicial body.[90]

Thus, in case after case filed by state prisoners under section 2254, the Supreme Court has emphasized that the chief value of habeas is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints,"[91] and that the state prisoner seeking federal court protection must be afforded "a swift and imperative remedy in all cases of illegal restraint upon personal liberty."[92] The Court has said, "time and again, that prompt resolution of prisoners' claims is a principal function of habeas."[93]

Accordingly, the lower federal courts have recognized that section 2254 cases must (at least in theory) jump to the front of the courts' dockets.[94] As the Court of Appeals for the Ninth Circuit has stated, an "application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him."[95]

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89. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (2006)).

90. CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 165 (Robert J. Spitzer ed., 2006) (noting, in discussion of habeas as a way to challenge both executive detentions and court-authorized detentions, that "there is no real divergence in either habeas' goal of freeing the unlawfully detained").

91. Fay v. Noia, 372 U.S. 391, 401–02 (1963).

92. Price v. Johnson, 334 U.S. 266, 283 (1948); s*ee also Fay*, 372 U.S. at 400 (using same "swift and imperative" language); Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (purpose of 28 U.S.C. § 2254 "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person") (citation omitted).

93. Chatman-Bey v. Thornburgh, 864 F.2d 804, 814 (D.C. Cir. 1988) (citing Rose v. Lundy, 455 U.S. 509, 520 (1981); Braden v. 30th Jud. Circuit Court of Ky., 410 U.S. 484 (1973)).

94. *See* Post v. Gilmore, 111 F.3d 556, 557 (7th Cir. 1997); *Chatman-Bey*, 864 F.2d at 814 ("Delay is undesirable in all aspects of our justice system, but it is especially to be avoided in the sensitive context of habeas corpus.").

95. Ruby v. United States, 341 F.2d 585, 587 (9th Cir. 1965); *see also* Yong v. INS, 208 F.3d 1116, 1120 (9th Cir. 2000) (noting, in denying a government request for a stay in a habeas deportation case, that "[s]pecial solicitude is required because the writ is intended to be a 'swift and imperative remedy in all cases of illegal restraint or confinement' ") (quoting *Fay*, 372 U.S. at 400 (1963)); Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (holding that fourteen-month

C. Speed Required by Statute and Rule

Speedy disposition of state-prisoner habeas applications is mandated by both statute and rule. Most importantly, 28 U.S.C. § 1657 requires the federal courts to expedite habeas petitions: "Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 . . . ."[96] As the Court of Appeals for the Seventh Circuit has explained, "[l]iberty's priority over compensation is why 28 U.S.C. § 1657 specifies that requests for collateral relief go to the head of the queue."[97]

In addition to section 1657, the habeas statute itself sets strict time limits for the processing of habeas petitions. Pursuant to 28 U.S.C. § 2243, a court entertaining an application for a writ of habeas corpus must "*forthwith* award the writ or issue an order directing the respondent to show cause why the writ should not be granted."[98] The prisoner's custodian must then respond to the petition "within three days unless for good cause additional time, *not exceeding twenty days*, is allowed."[99] Upon receiving the return certifying the cause of the prisoner's detention, the court must set a date for hearing "*not more than five days* after the return unless for

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delay in deciding habeas petition denied state prisoner due process, and stating that "[t]he writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time") (footnote omitted).

96. 28 U.S.C. § 1657(a) (2006). Chapter 153 consists of the habeas provisions that have been codified at 28 U.S.C. § 2241, *et seq.* Section 1657 also requires expedited consideration of actions brought under "section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown."

97. *Post*, 111 F. 3d at 557; *see also Ruby*, 341 F.2d at 587 ("The ordinary rules of civil procedure are not intended to apply thereto, at least in the initial, emergency attention given as prescribed by statute to the application for the writ."); Van Buskirk v. Wilkinson, 216 F.2d 735, 737–38 (9th Cir. 1954) (finding habeas is "a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination"); McClellan v. Young, 421 F.2d 690, 691 (6th Cir. 1970) (same); Fischer v. Ozaukee Cnty. Circuit Court, 741 F. Supp. 2d 944, 962 (E.D. Wis. 2010) (rejecting state's motion to reconsider grant of habeas petition on the grounds that the court acted *too* swiftly, and "remind[ing] the respondent that in the context of petitions for writs of habeas corpus, courts are explicitly required by law to expedite the consideration of these cases. *See* 28 U.S.C. § 1657(a)").

98. 28 U.S.C. § 2243 (2006) (emphasis added).

99. *Id.* (emphasis added).

good cause additional time is allowed."[100] These specific deadlines recall, of course, those of the Habeas Corpus Act of 1679 itself.

Notwithstanding this specificity, the district courts routinely ignore the deadlines set forth by 28 U.S.C. § 2243.[101] District court judges rely instead on Rule 4 of the Rules Governing Section 2254 Cases, which has been assumed to supplant the statutory deadlines.[102] Rule 4 replaces the strict time limits of section 2243 with discretionary language:

> The original petition shall be presented *promptly* to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined *promptly* by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading *within the period of time fixed by the court* or to take such other action as the judge deems appropriate.[103]

The Advisory Committee Notes to Rule 4 state that the rule was designed to give the district courts "greater flexibility than under § 2243 in determining within what time period an answer must be made."[104] There is a strong argument to be made that Rule 4 should not be read as a license to district courts to ignore the time limitations of section 2243.[105]

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100. *Id.* (emphasis added); *see also* Glynn v. Donnelly, 470 F.2d 95, 99 (1st Cir. 1972) (stating that, in general, 28 U.S.C. § 2243 manifests policy that habeas petitions are to be heard promptly).

101. Senior Judge Jack B. Weinstein of the Eastern District of New York has made similar observations. *See, e.g.*, Mem. to Special Master Respecting Timeliness of Decisions on Petitions of Persons in State Custody, *In re* Habeas Corpus Cases, 216 F.R.D. 52, 53 (E.D.N.Y. 2003).

102. *See, e.g.*, Kramer v. Jenkins, 108 F.R.D. 429, 431 (N.D. Ill. 1985).

103. 28 U.S.C. § 2254 (Rules Governing § 2254. Rule 4. Preliminary Consideration by Judge) (1976) (emphasis added).

104. 28 U.S.C.A. § 2254 advisory committee's note (Rule 4. Preliminary Review; Serving the Petition and Order) (2006).

105. Congress's authorization to the Supreme Court to promulgate rules is restricted to "the power to prescribe general rules of practice and procedure" that "shall not abridge, enlarge or modify any substantive right" so that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072 (2006). As Judge Weinstein has observed, the Advisory Committee (and the district courts that have followed the Advisory Committee's commentary) must have understood Rule 4 to be in conflict with, and

Nonetheless, whether the courts should be obliged to follow the explicit time limits in section 2243, or instead to respect the more general language requiring that judges act on habeas petitions "promptly," it is clear that section 1657, section 2243, and the Rules Governing Section 2254 Cases, taken together, indicate that Congress intended that the federal courts decide habeas petitions in a speedy manner, consistent with historical practice.

D. Busy Court Dockets Trump Statute and Rule

The Judicial Conference, at least, believes that these rules and statutory provisions are sufficient to ensure that the federal courts act with disposition on habeas matters.[106] And, occasionally, the federal appellate courts have cited section 1657 when ordering district court judges to decide individual petitions that have been pending for lengthy periods.[107]

But, by and large, the federal courts have been unsympathetic to arguments from habeas petitioners that their applications should move to the front of the line for decision. The reason is a practical one—the district court judges believe

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thus to supplant, the stricter time limits of § 2243. *See In re* Habeas Corpus Cases, 216 F.R.D. at 54 (citing Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001); Wyant v. Edwards, 952 F. Supp. 348, 352–53 (S.D.W. Va. 1997)). It is, however, not clear that the rule and the statute are necessarily in conflict. *See id.* at 53 (noting that Rule 4's requirement that respondent file an answer "within the period of time fixed by the court" is compatible with section 2243, allowing the district court to use its discretion to set a response date, but only up to 20 days from issuance of the court's order to show cause).

106. *See* Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. 1 (2005) (letter from Leonidas Ralph Mecham, Sec'y, to F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary) (objecting to provision in the proposed Streamlined Procedures Act of 2005 that would have required the circuit courts to decide habeas appeals within 300 days of the conclusion of briefing, by noting that "Section 1657 already requires courts, both trial and appellate, to expedite consideration of any action brought under chapter 153 [of Title 28, United States Code], which includes habeas corpus proceedings") (internal quotation marks omitted).

107. The Court of Appeals for the Fourth Circuit, for example, granted a petition for a writ of mandamus to a section 2255 habeas petitioner whose application had been pending without action in the district court for more than three years. *In re* Hicks, 118 F. App'x 778, 778 (4th Cir. 2005). Ordering the district court to decide the motion within sixty days, the Fourth Circuit noted that "[w]rits of habeas corpus are intended to afford a speedy remedy to those illegally restrained," and that "[p]ursuant to 28 U.S.C. § 1657(a) (2000), the district court must give priority to habeas corpus cases over other civil cases." *Id.* (citation omitted).

they are simply overwhelmed with habeas applications. In *Marutz v. United States*, for example, a judge from the Eastern District of California expressed (understandable) exasperation with a petitioner who was expressing his own (understandable) frustration with the failure of the magistrate in his case to decide his habeas petition, which had been pending for more than two years without decision. The judge explained,

> [T]his court faces an unprecedented backlog of habeas applications, all but a fraction of which are from prisoners proceeding without counsel. From January 1, 2004, through December 31, 2007, California prisoners commenced more than 2,600 actions seeking habeas corpus relief from the Sacramento Division of the United States District Court for the Eastern District of California. Thus, while the court is aware that movant's application has been submitted for some time now, others have been submitted longer. This court's general policy is to resolve habeas petitions in the order in which they were submitted for decision, regardless of whether the movant is represented by counsel. Counsel cites no precedent or rule which requires the court to permit a later-submitted habeas petition to usurp its attention from that of an earlier one . . . . There is no question that this court is not staffed adequately to resolve all, or even most, of the submitted habeas actions within 60, 90 or even 120 days.[108]

Heavy habeas dockets similarly led the Court of Appeals for the Fifth Circuit to dismiss a petitioner's argument that delay in deciding his section 2255 motion (the analogue for federal prisoners of a section 2254 petition) violated section 1657, stating that while "28 U.S.C. § 1657 requires that courts expedite such actions," the "requirement is relative, not specific," and the petitioner had failed to show that resolution of his petition "was delayed beyond the requirements of the court's docket."[109]

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108. Marutz v. United States, No. Cr. S-93-0016, 2008 U.S. Dist LEXIS 46890, at *5–6 (E.D. Cal. May 27, 2008) (footnotes omitted) (discussing a § 2255 habeas application).

109. United States v. Samples, 897 F.2d 193, 195 (5th Cir. 1990); *cf. In re* Gates, No. 92-3179, 1992 WL 403016, at *1 (D.C. Cir. Dec. 30, 1992) (denying mandamus petition filed by a section 2255 petitioner, stating that he had failed to show that "the district court has unduly delayed acting on his motion to vacate sentence," but noting also that "[i]n light of 28 U.S.C. § 1657(a) (requiring expedition of actions brought under 28 U.S.C. § 2255), however, we are confident that the district court will promptly dispose of Gates's motion"); Hale v. Lockhart,

Other appellate courts have been less forgiving of the "busy court dockets" rationale for failing to decide habeas petitions promptly.[110] In 1990, the Court of Appeals for the Tenth Circuit found that a fourteen-month delay in the processing of a habeas application was a due process violation, and held the district court's backlog and heavy caseload were unjustified, because if such delay were acceptable, "the function of the Great Writ would be eviscerated."[111]

As discussed below, however, fourteen-month delays in the resolution of habeas petitions have now become the norm rather than the exception.

II. EMPIRICAL EVIDENCE OF HABEAS DELAY

The following Sections quantify the scope of habeas delay in the federal courts. Although by statute and rule, the district courts must accord priority treatment to habeas matters, from 1996 (the year that the Antiterrorism and Effective Death Penalty Act, or "AEDPA," was passed into law) to 2008 (the last year for which the Administrative Office has made full civil case processing data available), an increasing proportion of the petitions on the courts' habeas dockets have required one, two, three, or more years before decision.[112] During this same period, there has been a decreasing proportion of petitions terminated within six months of filing[113]—an amount of time that this Article will later suggest is reasonable for deciding a habeas petition (except in extraordinary cases) and that should serve as an appropriate benchmark for measuring the courts' efficiency.[114] The increasing proportion of "aged" petitions is even more acute in certain districts, where a habeas petition will likely require more than a year to be decided.[115] This Part

903 F.2d 545, 547–48 (8th Cir. 1990) (no due process violation where three years elapsed between filing of habeas petition and decision by the district court).

110. *See, e.g.*, Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (holding that fourteen-month delay in processing of habeas petition was due process violation, and refusing to accept "busy court dockets" as a justification for the delay).

111. Johnson v. Rogers, 917 F.2d 1283, 1284 (10th Cir. 1990). The *Rogers* court further stated, "[i]t may be that the district court will need to seek additional resources or reallocate its existing resources to enable it more promptly to resolve the large number of petitions for writ of habeas corpus pending on its docket." *Id.* at 1285.

112. *See infra* pp. 378–86.

113. *See infra* pp. 383–85.

114. *See infra* Part III.C.

115. *See infra* Part II.C.

will fully discuss these and other observations about the lengthy delays in the resolution of habeas matters.

The first Section below describes the design of the study. The second Section looks at the state of the nationwide district court habeas docket as a whole. The third Section turns to individual districts with particularly fast and slow mean disposition times for habeas matters and highlights the depth of the delay problem in the "slowest" districts.

A. Study Design

This study is the first to gather and analyze information about the entire population of non-capital federal habeas applications filed by state prisoners between fiscal years 1996 and 2008.[116] It is not a sampling study; instead, it describes

116. Scholars have, of course, published empirical work on federal habeas before now. Among the earliest was a study of all federal habeas petitions filed in Massachusetts between 1970 and 1972, which concluded that the district was managing its habeas docket efficiently. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 332, 333 tbl.III (1973) (finding that most of the 353 petitions had been decided "in a relatively short time," with a median disposition time "somewhat less than one month," with only eight petitions requiring more than one year to decide). In 1979, Paul H. Robinson reviewed all habeas petitions filed from 1975 to 1977 in six district courts, and found that the mean disposition time for the 1899 petitions was only about four and one half months. PAUL H. ROBINSON, FEDERAL JUSTICE RESEARCH PROGRAM, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 5, 42 (1979); *see also id.* 4(b) (observing that more than half of the petitions were dismissed quickly on procedural grounds, and concluding the "data support the beliefs that the actual processing of most petitions is performed with less investment of judicial time and resources than would be required in a traditional lawsuit, but that the sheer act of processing such a large number of complaints has impact upon courts"); Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 704 (1982) (reviewing Robinson's data and noting that mean disposition time was markedly different across districts, ranging from 99 to 227 days). A 1995 study produced for the Bureau of Justice Statistics ("BJS") sampled eighteen federal district courts and found that the fastest ten percent of state-prisoner habeas petitions were decided in less than a month, while the slowest ten percent took on average more than two years to be decided. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS, at v (1995). Another BJS study from 1996 discussed disposition times for all petitions that were terminated by the courts in 1995, and found that for this limited population the mean processing time was about 293 days, with the fastest ten percent decided within 20 days, and the slowest ten percent within 735 days. JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 7 (1997); *see also* JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002) [hereinafter SCALIA, 1980–2000 REPORT] (not

and analyzes information about all of the 207,308 habeas applications filed in the federal district courts during this period, in part to document the absolute number of state-prisoner habeas petitions that have appeared on the courts' dockets since 1996.

This Article uses data sets compiled by the Administrative Office, made available for researchers at the website for the Inter-University Consortium for Political and Social Research.[117] There are two reasons 1996 was selected as the start date. First, 1996 was the year Congress passed AEDPA into law,[118] and information about cases appearing on the courts' docket in this year thus provides a useful baseline for assessing the state of the courts' docket in the wake of the profound procedural and substantive changes in habeas jurisprudence initiated by AEDPA. Second, as a practical matter, 1996 was the earliest year for inclusion in the study because it was the first year in which the Administrative Office gathered case-processing data that allowed a researcher to distinguish state-prisoner, non-capital habeas petitions from other types of habeas cases.[119] The study ends with 2008

addressing disposition times). In 2006, a Congressional Research Service Report, relying on Administrative Office summaries of its civil processing data, compared median processing times for a set of non-capital habeas petitions filed pre-AEDPA (between 1990 and 1996) and post-AEDPA (1997 to 2004), and concluded that the median disposition time had remained steady over these periods. *See* LISA M. SEGHETTI & NATHAN JAMES, CONG. RESEARCH SERV., RL 33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 2 (2006) (finding median disposition time pre-AEDPA ranged from low of 5.6 months in 1995 to high of 6.6 months in 1992, with median disposition time post-AEDPA ranging from low of 5.2 months in 2000 to high of 6.9 months in 2002). But in 2007, an in-depth empirical study of federal habeas matters found that the mean processing time of a nationwide sample of cases filed in 2003 and 2004 was 11.5 months, with a median of 8.1 months, leading the authors to conclude that the overall disposition time per case had increased on average since the passage of AEDPA. *See* KING REPORT, *supra* note 18, at 43 (concluding, from their sample of 2384 noncapital federal habeas petitions filed by state prisoners, that post-AEDPA the fastest ten percent of cases were terminated more quickly, but that the slowest twenty-five percent took a month longer on average than before passage of AEDPA, with all non-capital petitions averaging at least a year in federal court before they were decided). The King Report, though it samples only cases that were initiated in fiscal years 2003 and 2004, provides a wealth of information about the processing of habeas cases post-AEDPA. *See id.* at 15.

117. The ICPSR website is http://www.icpsr.umich.edu.

118. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18, 21 U.S.C. (2006)).

119. Unless otherwise noted, all references to years in the remainder of the Article should be understood to mean fiscal years (ending September 30) rather than calendar years.

because, as of the drafting of this Article, that is the last year for which the Administrative Office has made complete data available.[120]

The Administrative Office annually releases two sets of data on civil caseloads in the federal courts. The first includes information about all cases "terminated" in the fiscal year; the second includes information about all cases that remained pending on the courts' dockets (that is, appeared on the courts' dockets but were not terminated) as of the end of the fiscal year.[121] In order to paint a full portrait of the courts' dockets, the annual data sets for "terminated" petitions from 1996 to 2008 were merged, along with the "pending" data set from 2008.[122] Only civil cases that were coded as 28 U.S.C. § 2254 petitions were retained for this study.[123] The information

120. The Administrative Office makes summary statistical tables about civil case data available to the general public annually on its website, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx. As of the publishing of this Article, those summary tables are current through 2010, but, as noted above, the data sets from which the Administrative Office derived their tables have not been released to the ICPSR website. For a mild critique of the manner in which the Administrative Office makes statistical information available in a timely manner to the public, see Rebecca Love Kourlis & Pamela A. Gagel, *Reinstalling the Courthouse Windows: Using Statistical Data to Promote Judicial Transparency and Accountability in Federal and State Courts*, 53 VILL. L. REV. 951, 954–60 (2008) (noting that the information collected by the government "only scratch[es] the surface of federal statistical and case management data" and that a wealth of information is potentially available from PACER and the CM/ECF systems, but that "[u]nfortunately, the information available to the general public, court observers and academicians is not yet comprehensive and lacks some functionality"). *See also infra* note 200 (discussing the historic difficulty of accessing CJRA semi-annual reports on district court dockets).

121. *See, e.g.*, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE 2008 iii–iv (2009). For 2008, however, the Administrative Office released "pending" data that was collected for the calendar year (ending December 31, 2008) rather than the fiscal year (ending September 30, 2008). The Administrative Office has released a data set for "terminated" cases for fiscal year 2009, but has not released an updated "pending" dataset for fiscal year 2009.

122. *See* John Shapard, How Caseload Statistics Deceive 1 (Aug. 9, 1991) (unpublished manuscript) (on file with the *University of Colorado Law Review*) (explaining that "terminated cases are not representative of the court's caseload"). Because "pending" data for 2009 has not been released yet, petitions initiated in 2009 could not be included in this study.

123. Typically, cases were retained for the study as 28 U.S.C. § 2254 applications if they were coded by the Administrative Office as NOS=530, TITL=28, and SECTION=2254. For 2000, however, the Administrative Office's raw data contained a (readily identifiable) coding error: a subset of cases that were coded as NOS=530 were also coded as TITL=282 and SECTION=254, and no

gathered includes filing and termination dates for each petition, as well as the identity of the district court in which the petition was filed.

The habeas petitions analyzed here do not include any filed by federal prisoners,[124] by detainees seeking to avoid deportation,[125] or by alleged "enemy combatants" challenging the legality of their war-time detentions.[126] Instead, this study focuses entirely on section 2254 petitions, where the applicant's imprisonment has already been authorized by the state court after a criminal trial and appellate process.

Section 2254 applications may only be granted for violations of federal law, and the violations must not have been harmless.[127] In addition, pursuant to AEDPA,[128] an applicant may be granted relief pursuant to section 2254 only if he has "exhausted" all of his claims in the state courts before presenting them to a federal judge,[129] has not procedurally defaulted on those claims in state court,[130] and has proven to the federal judge that the state court's ruling on the federal claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

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cases were coded as TITL=28 and SECTION=2254. Cases that were coded in this manner were retained for the study.

124. Federal prisoner petitions are filed pursuant to 28 U.S.C. § 2255 (2006).

125. Challenges to avoid deportation are typically filed pursuant to 28 U.S.C. § 2241 (2008). *See* INS v. St. Cyr, 533 U.S. 289, 306–08 (2001).

126. Challenges to executive detentions during the War on Terror are properly raised through 28 U.S.C. § 2241. *See* Rasul v. Bush, 542 U.S. 466, 484 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739; Boumediene v. Bush, 553 U.S. 723, 799 (2008) (Souter, J., concurring).

127. 28 U.S.C. § 2254(a) (2006) (courts may entertain applications for writ from state prisoners only if the allegation is that the custody is "in violation of the Constitution or laws or treaties of the United States"); Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993) (stating that habeas relief is available only where "constitutional error of the trial type" resulted in "actual prejudice" to defendant).

128. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18, 21 U.S.C. (2006)).

129. 28 U.S.C. § 2254(b)(1)(A) (2006). The exhaustion requirement in the statute was previously recognized in decisional law in *Rose v. Lundy*, 455 U.S. 509, 522 (1982), *superseded by statute*, 28 U.S.C. 2254(c).

130. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

by the Supreme Court of the United States."[131] The procedural obstacles the state prisoner must navigate are many, and the standards for obtaining the writ—and retrial or release from state prison—are difficult to meet. In addition, AEDPA introduced a one-year filing deadline (from the date that the criminal conviction becomes final) for state prisoners who wish to petition the federal courts for the writ.[132]

At the time of AEDPA's passage in April 1996, the number of section 2254 petitions filed annually was impressive. More than 10,000 petitions had been initiated each year during the early 1990s, which was up from roughly 7000 to 9000 annually during the 1970s and 1980s.[133] Back in the early 1960s, fewer than 2000 such petitions were filed annually,[134] which in retrospect seems an almost trivial number. But everything is relative: In 1944, federal judges were complaining about an "avalanche" and "deluge" of 605 petitions that had been filed in total in the federal courts that year.[135]

If Congress's ambition in passing AEDPA was to reduce the number of petitions filed in the federal courts, its goal was not met.[136] The one-year filing deadline (predictably) led to a spike in the number of habeas filings in the year following AEDPA's effective date—from 12,276 in 1996 to 17,015 in 1997.[137] But since then, the filing rate has (less predictably)

131. 28 U.S.C. § 2254(d)(1) (2006).

132. *Id.* State prisoners whose convictions became final prior to passage of AEDPA (on April 24, 1996) were given a one-year grace period in which to file a habeas petition (that is, until April 24, 1997). *See* Carey v. Saffold, 536 U.S. 214, 216–17 (2002).

133. VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 14 tbl.1 (1994).

134. *See id.*

135. *See id.* at 9.

136. *Habeas Reform: The Streamlined Procedures Act of 2005: Hearing on S. 1088 Before the S. Comm. on the Judiciary*, 109th Cong. 71-72 (2005), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10cdeda&wit_id=e655f9e2809e5476862f735da10cdeda-1-1 (testimony of Ronald Eisenberg, Deputy Dist. Att'y, Phila., Pa.) [hereinafter *Eisenberg Testimony*] ("The Administrative Office points with apparent pride to its claim that disposition time for non-capital cases has remained relatively constant [over the last six years] . . . . [But] AEDPA was supposed to speed things up. Significant new provisions like the time bar, if honestly applied, should have reduced disposition times, especially for non-capital cases. If, as the Administrative Office says, we are seeing at best a holding action for non-capital cases . . . then there can be no clearer proof that habeas reform, as interpreted by the federal courts, has not succeeded." (emphasis omitted)).

137. State prisoners whose convictions were final before passage of AEDPA had until April 24, 1997, to file a habeas petition without running afoul of AEDPA's one-year filing deadline. *Carey*, 536 U.S. at 216–17.

remained steady at the elevated level, never returning anywhere close to pre-AEDPA rates.[138] In a word, since the passage of AEDPA, the federal district courts have simply been inundated with newly filed habeas petitions.[139]

How well have the federal district courts responded to the modern "avalanche" and "deluge" of section 2254 petitions? To the degree the courts have decided roughly as many habeas motions as are filed each year, has the mean or median age of the cases appearing on the courts' dockets increased, decreased, or remained steady? Does the disposition rate remain uniform across the country, or all other things being equal, does the length of time that a petition remains open depend on the district in which it was filed? Absent a comprehensive study like the one presented here, it is impossible to gauge whether the courts are keeping current with their habeas caseloads.[140]

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138. *See infra* notes 141–43 and accompanying text.

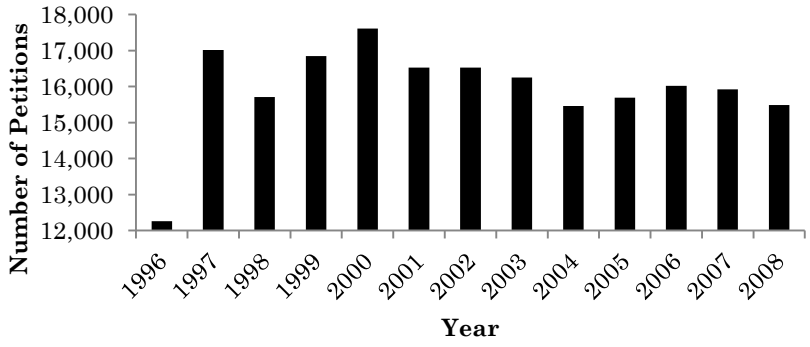
139. An analysis by John Scalia of the Department of Justice's Bureau of Justice Statistics showed that both AEDPA and an increasing prison population had statistically significant effects on the number of habeas petitions filed between 1996 and 2000. *See* SCALIA, 1980–2000 REPORT, *supra* note 116, at 6–7 (estimating that between 1996 and 2000, an additional 18,000 habeas petitions were filed by state prisoners as a result of enactment of AEDPA, and that an additional 5,900 petitions were filed as a result of a 160,000-inmate increase in the state prison population during this period).

140. While the judiciary has registered uncertainty about whether the district courts are keeping abreast of their habeas dockets, *see supra* note 27 and accompanying text, some politicians perceive a delay problem. Senator Jon Kyl proposed legislation, called the Streamlined Procedures Act of 2005, S. 1088, H.R. 3035, 109th Cong. (2005), which would have imposed an enhanced series of limitations on the availability of the writ (including hard deadlines for the circuit courts to resolve habeas appeals) in part because of the perception that habeas petitioners were content to allow the courts to "drag out the [habeas] litigation for years." *Eisenberg Testimony*, *supra* note 136, at 66–67. But unlike petitioners facing execution, non-capital petitioners have every incentive to proceed expeditiously in order to cut short the sentences they are serving. *See, e.g.*, *Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 65 (2005) (Statement of Ruth E. Friedman) ("Ninety-nine percent of state prisoners are serving prison sentences they hope to cut short by winning federal habeas corpus relief."); *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 386 (2005) (Testimony of John Pressley Todd, Esq., Assistant Att'y Gen., Ariz. Att'y Gen.'s Office) ("Unlike the non-capital defendant who is serving his sentence during the habeas process and has every incentive to proceed as quickly as possible to have a federal court vindicate a constitutional claim that the state courts wrongly decided, the capital defendant is not serving his sentence. [Rather,] he is avoiding it.").

B. The Big Picture: Delay Across the Nation

Annual Filings Surge, Steady, Then Ease. The number of habeas petitions that the federal courts must deal with every year is stunning. In 1996, the year that Congress passed AEDPA, state prisoners filed just over 12,000 noncapital habeas petitions.[141] The next year, the number of petitions jumped to just over 17,000. The spike was an expected consequence of AEDPA's new one-year filing deadline, which would have closed off access to the district courthouse forever for state prisoners whose convictions became final before passage of AEDPA and who did not file within one year of AEDPA's effective date.[142] More surprising than the one-year jump, however, has been the fact that the annual number of habeas filings has remained elevated, never dipping below 15,000 through 2008. See Figure 1, below.

Figure 1. Annual Number of Habeas Petitions Filed in All Districts



Note: Figure 1 shows the number of state-prisoner federal habeas petitions initiated nationwide each year by state prisoners. The jump in filings in 1997 coincides with AEDPA's new one-year deadline for filing petitions.

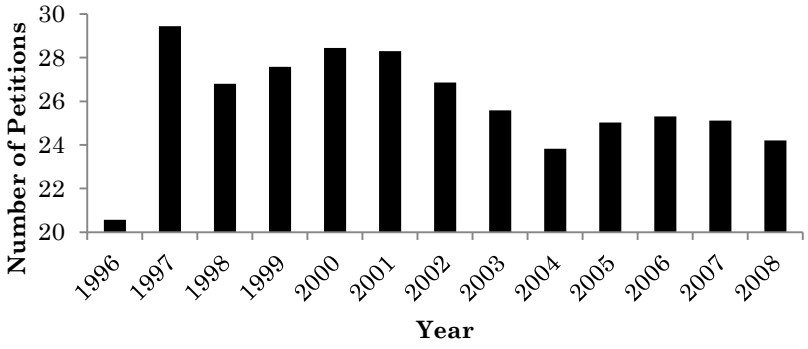
141. Unless otherwise noted, all of the statistics cited in the remainder of Parts II.B and II.C represent conclusions drawn from the descriptive statistical analysis described in Part II.A, *supra*.

142. The effective date of AEDPA was April 24, 1996, and the filing deadline for state prisoners whose convictions were final before that date was one year later, on April 24, 1997. *Carey*, 536 U.S. at 216–17.

That said, while the number of petitions filed annually has never come close to diminishing to pre-AEDPA levels, the trend since 2000 has been downward, from 17,610 in that year to 15,704 in 2008.[143]

The same spike and downward trend holds true with respect to the average annual number of new habeas filings per district court judgeship over this period. Figure 2, below, shows that there has not been a rise in the number of petitions filed annually per judge, which in theory might have been the case due to large numbers of judicial vacancies.

Figure 2. Annual Number of Habeas Petitions Filed per Judgeship in All Districts



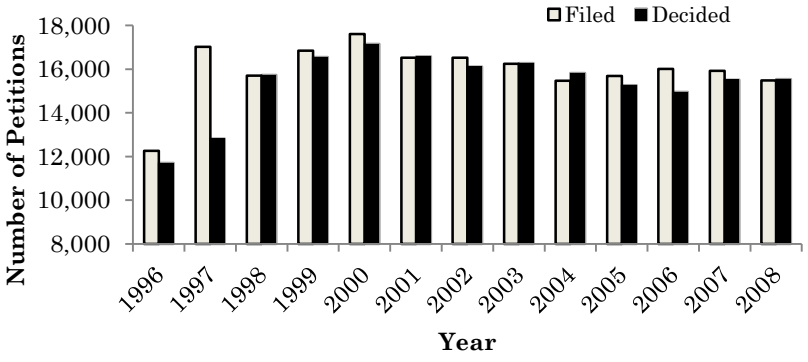
Note: Figure 2 shows the number of annual filings per district court judgeship nationwide (excluding senior judges).[144]

143. The largest number of petitions (17,610) was filed in 2000. From 2001 to 2003, the annual number of filings ranged from 16,247 to 16,258. From 2004 onward, the number of filings dropped, only once topping 16,000 (in 2006, when 16,015 petitions were filed). The year 2008 saw the second lowest number of habeas filings (15,488) since 1998, when 15,704 petitions were filed.

144. The number of "active" judgeships is necessarily imprecise, since vacancies are continuously created and filled over the course of a year. This estimate is, however, more useful than simply relying on the number of "authorized" judgeships, since many districts have vacancies authorized that have remained unfilled for years. The figures used here were derived from Administrative Office lists of judgeships and of judicial vacancies. The number of "active" judgeships was calculated by starting with the number of "authorized" judgeships for a district annually, and subtracting from that number any vacancy in that district that was reported as of the last day of the fiscal year. Senior judges and magistrates were not included in the calculation.

Terminations Almost Keep Pace with Filings. One intuitive way to assess whether the district courts, as a whole, are keeping up with their habeas caseload is to gauge whether they are deciding as many cases each year as are being filed. For reasons discussed below, that kind of assessment paints an incomplete portrait of the scope and nature of the delay problem, but it serves as a useful starting point for the analysis. Viewed from a nationwide perspective, the federal courts appear—more or less—to have kept pace with new habeas filings since 1998. See Figure 3, below.

Figure 3. Annual Number of Habeas Petitions Filed and Decided in All Districts



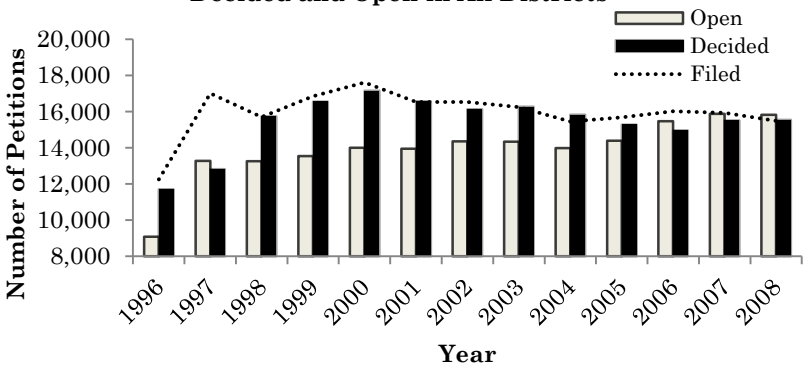
Note: Figure 3 shows the annual number of state-prisoner federal habeas petitions filed each year and the number of such petitions terminated each year by the district courts.

In 1997, the number of petitions filed by state prisoners far outnumbered the number of petitions terminated by the federal district courts (17,015 filed, compared with 12,820 terminated). This differential clearly was an artifact of AEDPA's new one-year filing deadline. Since 1998, however, the courts have been remarkably consistent in "keeping up" with the new filings (that is, deciding *almost* as many cases annually as are initiated). In every year except 2006, the number of new habeas filings exceeded the number of district court terminations by no more than 1,000 petitions, and in four years (1998, 2001, 2003, and 2004), the district courts actually decided more petitions than were filed. But, as explained below, the courts are not

"keeping current" with their habeas dockets, because the proportion of aging cases is likewise increasing annually.

Number and Percentage of Undecided Cases Increases. While the district courts seem to be treading water by deciding roughly as many cases as are filed annually, closer inspection reveals that an increasing proportion of all cases appearing on the docket remain undecided each year. The number of undecided (or "open") cases on the federal courts' dockets (determined by taking a statistical "snapshot" of the docket as of the September 30 reporting date for the year) has been trending upward since 1998. As shown by Figure 4, below, from 1998 to 2001, the number of open petitions ranged from 13,249 (in 1998) to exactly 14,000 (in 2000). From 2002 to 2005, the number of open cases had increased, ranging from a low of 13,974 (in 2004) to a high of 14,396 (in 2005). And from 2006 to 2008, the number of open cases ranged from a low of 15,461 (in 2006) to a high of 15,875 (in 2007).

Figure 4. Annual Number of Habeas Petitions Filed, Decided and Open in All Districts



Note: Figure 4 shows three things: the annual number of state-prisoner federal habeas petitions filed each year (the dotted line), the number of petitions terminated each year by the district courts, and the number of petitions left undecided on the courts' dockets as of the September 30 reporting date for each year. This figure does not provide information about the age of the "open" petitions as of the September 30 reporting date.

Thus, although the federal courts over this period were deciding *nearly* as many cases as were being filed annually, the

number of cases that remained open on their dockets continued to increase, as did the proportion of undecided cases on the dockets. Indeed, by 2008, more petitions remained open on the district courts' dockets than were either filed or terminated in that year. As Figure 4 shows, although the number of annual habeas filings has been trending downward, the number of undecided petitions on the dockets each year has been trending upward.

Age of Undecided Cases Increases. The mere fact that an increasing number of habeas petitions remain undecided on district court dockets as of the end of each fiscal year does not, in itself, tell us whether the state of the courts' habeas dockets is healthy. Certainly, the fact that the number of undecided petitions has increased from 13,249 in 1998, to 14,335 in 2003, to 15,824 in 2008, suggests that the courts are not, in fact, keeping up with their habeas caseload. Nonetheless, until we get a sense of the age of these open petitions, we cannot determine how serious a problem the courts have. Assume, for argument's sake, that the filing dates of petitions initiated in 2008 were heavily skewed toward the end of the reporting year. (Perhaps, for example, 15,000 of the 15,824 "open" petitions were filed within a month of September 30, 2008, when the Administrative Office took its statistical snapshot of the courts' dockets.) On this hypothetical, the average age of the undecided petitions for 2008 would in fact be quite low, and might not reflect poorly on the overall health of the district courts' dockets.

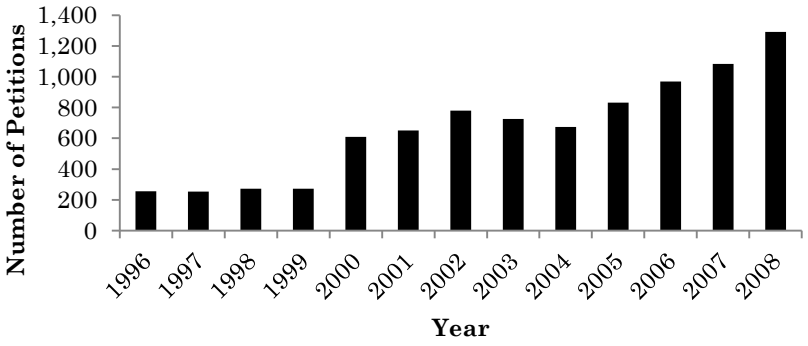
If, however, we found that the open petitions as of September 30 were on average much older, we might conclude that the district courts were adept at terminating a significant proportion of newly filed petitions, but at the same time, were struggling to dispose of older cases. There might, in other words, be a real delay problem in the district courts' docket that remains obscured by the relatively positive filing-to-termination ratio.

In fact, the age of the open petitions is rising, and many of the petitions that remain pending on the district courts' dockets annually have been there for years.[145] For example,

145. Multiple factors may contribute to the increasing age of open habeas petitions. For example, because habeas filing rates per judgeship differ across districts, some of the delay in disposition may be due to high concentrations of petitions in several "problem" districts. *See infra* Part II.C. Identifying the full panoply of reasons for the habeas delay problem is beyond the scope of this

Figure 5 shows that the number of open petitions on the courts' dockets (that is, the number of petitions that remained undecided as of the September 30 reporting date for the fiscal year) that were at least three years old has trended upward since 1996, and was more than five times as large in 2008 (1,291 petitions) as in 1996 (only 255 petitions). The nature of the increase remains dramatic even after we take into account the surge in filings that resulted from AEDPA's one-year filing deadline in 1997, which was reflected three years later (in 2000) in the jump in the number of three-year-old undecided petitions to more than 600.

Figure 5. Annual Number of Open Habeas Petitions Pending for Three or More Years in All Districts



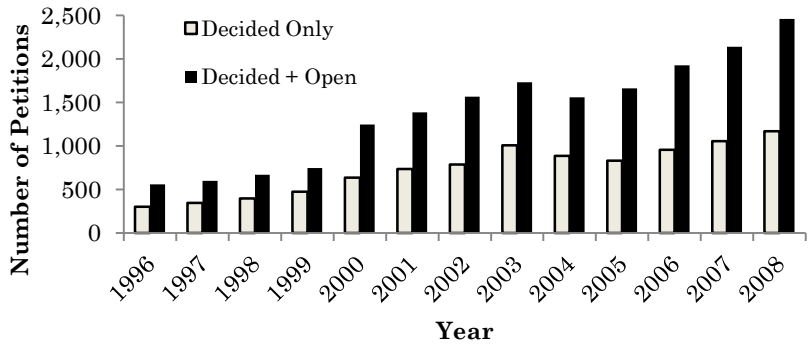
Note: Figure 5 shows the number of state-prisoner federal habeas petitions nationwide that remained open annually on the courts' dockets and that had been pending for at least three years as of the September 30 reporting date. The number of three-year-old petitions remained steady from 1996 to 1999, but jumped markedly in 2000. This increase in 2000 is an effect we might expect as a result of the spike in filings three years earlier, in 1997, when the AEDPA one-year filing deadline expired.

Number of All Cases Pending at Least Three Years Increases. As of the end of 2008, more than 1,200 habeas petitions that had been pending for three years or more

Article, but this Article suggests below that a significant factor causing the delay is the refusal of the federal courts to publicly report on the status of six-month-or-older habeas petitions in the same manner that other civil motions are reported, pursuant to the Civil Justice Reform Act of 1990. *See infra* Part III.

remained undecided. But the increasing number of undecided petitions that have remained on the dockets for at least three years does not begin to capture the depth of the delay problem, because an almost equal number of the petitions that are terminated each year were likewise on the dockets for at least three years before being decided. As Figure 6 shows, when the numbers of terminated and open petitions that have been pending for at least three years are summed, we find a steady increase in the number of three-year-old petitions—from 558 in 1996, to 1,247 in 2000, to 1,559 in 2004, to 2,460 in 2008. There has, in short, been an almost five-fold increase since 1996 in the number of petitions appearing on the courts' dockets that were aged at least three years.

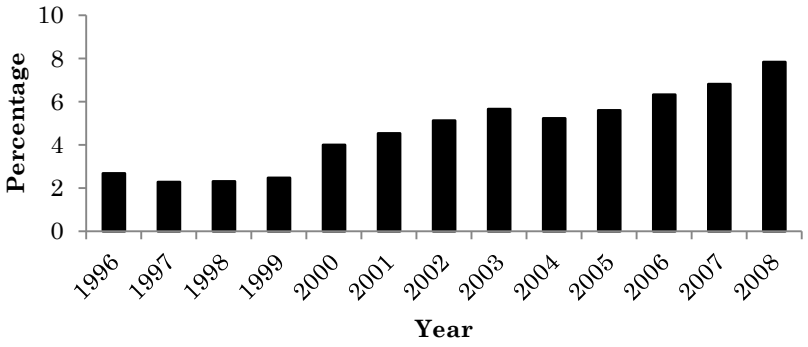
Figure 6. Annual Number of Habeas Petitions Aged Three Years or More in All Districts



Note: Figure 6 shows two things: (1) the number of state-prisoner federal habeas petitions nationwide that were decided in the fiscal year and that had also been on the courts' dockets at least three years before decision, and (2) the full number of all three-year-old petitions that appeared annually on the courts' dockets (that is, the number of cases that were decided in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year). By including decided petitions in the calculation of the number of three-year-old petitions, this Figure shows that since 2000 there have been at least one thousand petitions that remained undecided for at least three years, and that the number of such petitions has increased markedly since then.

Just as the number of terminated and open petitions appearing on the courts' dockets each year that have aged to at least three years has risen, so has the proportion of such petitions of all habeas cases appearing on the dockets. As Figure 7 shows, in 1996 fewer than 3% of all petitions had aged to at least three years, with that percentage rising to 4% in 2000, more than 5% in 2002, more than 6% in 2006, and nearly 8% in 2008.

Figure 7. Annual Percentage of Habeas Petitions Aged Three Years or More in All Districts



Note: Figure 7 shows the proportion of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that had been pending for at least three years. Since 1999, the percentage of petitions three years old or more has increased from under 3% to nearly 8% in 2008.

Number of One-Year-Old and Two-Year-Old Petitions Pending Increases. The increasing number of petitions that take three years or more to decide is large, but these petitions represent a relatively small (albeit growing) proportion of all petitions appearing annually on the courts' dockets.[146] More

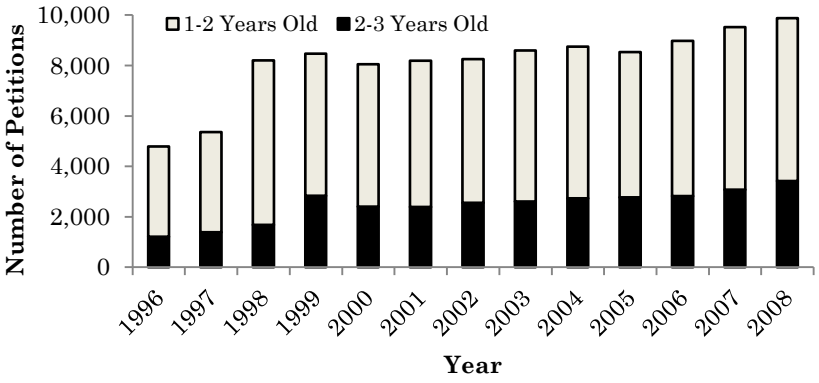
146. A plausible explanation for this population of petitions is that they are on the dockets for so long because they are particularly knotty cases that, notwithstanding appropriate judicial attention, simply cannot be resolved quickly. The evidence discussed in this study is not adequate to draw conclusions about this hypothesis, but it should be noted that it may well not be valid. In 2003,

concerning is the growing number of petitions that remain open for slightly less time, but that still are not being resolved promptly.

Figure 8 shows that the number of "one-year-old" petitions on the courts' dockets annually (that is, those pending for at least a year but less than two years), and the number of "two-year-old" petitions (that is, those pending for more than two but less than three years) has been growing at a rapid pace over the past dozen years. In 1996, there were only about 1,200 two-year-old petitions, but by 2008 there were more than 3,400. Similarly striking, in 1996 there were just under 3,600 one-year-old petitions, but by 2008 there were more than 6,400. The total number of one-year-old and two-year-old petitions rose from just under 5,000 in 1996 to just under 10,000 in 2008.

Judge Jack B. Weinstein of the Eastern District of New York agreed to resolve a 500-petition backlog in the district. As of May 9, 2003, when he took control of the habeas petitions, 170 of the 500 petitions had already been pending for more than three years. Nonetheless, each of those petitions was resolved, along with the balance of the 500, by Judge Weinstein by December 2003. *See* WEINSTEIN REPORT, *supra* note 16, at 6.

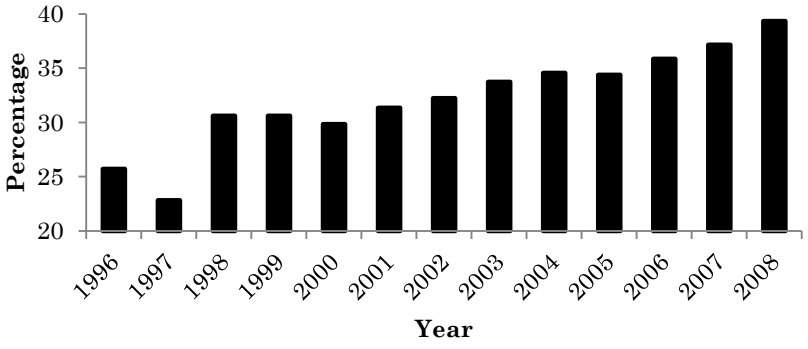
Figure 8. Annual Number of Habeas Petitions Aged 1-2 Years and 2-3 Years in All Districts



Note: Figure 8 shows the number of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained undecided for one to two years (more precisely, 365 to 729 days, which I refer to as "one-year-old" petitions here) and for two-to-three years (730 to 1094 days, which I refer to as "two-year-old" petitions). The values for each set of petitions are graphed here in a stacked manner so that the full height of each column represents the cumulative number of petitions that remained undecided for between one and three years.

The *proportion* of cases on the docket that were undecided for at least one year has likewise increased steadily, as shown in Figure 9. In 1996, just over one quarter of all cases appearing on the courts' dockets had been pending at least one year. By 2000, the proportion of such cases had risen to almost 30%, and by 2008 the proportion was just shy of 40%. Stated simply, since the passage of AEDPA, the proportion of aging cases on the docket has grown steadily.

Figure 9. Annual Percentage of Habeas Petitions Requiring One Year or More to Decide in All Districts



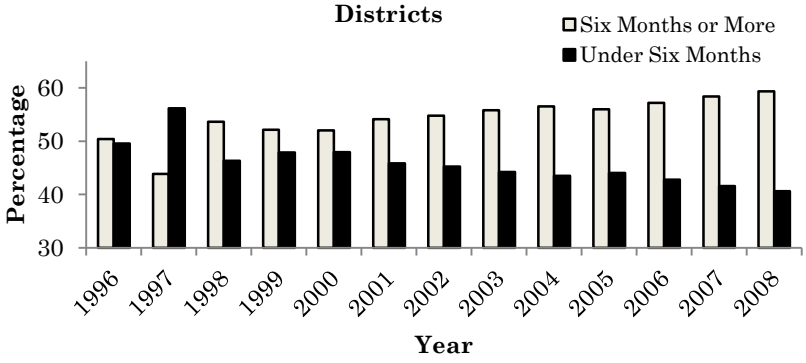
Note: Figure 9 shows the percentage of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained undecided for at least one year. In 1997, the proportion of such cases fell below 25%, in part because of the huge spike in the filing of habeas petitions that year that corresponded to AEDPA's filing deadline. (By definition, none of the petitions filed in that year could have been pending for at least one year as of September 30, 1997.) The number of petitions requiring at least one year to terminate rose steadily thereafter, from about 30% in 2000 to almost 40% in 2008.

Proportion of Petitions Decided in Less Than Six Months Plummets. Another measure of the relative health of the district courts' habeas dockets is the proportion of petitions appearing annually on the dockets that are aged less than six months. As Figure 10 shows, in 1996, almost exactly half of the petitions remained open on the courts' dockets for less than six months. In 1997, the proportion of such petitions jumped to 56.2%. On first glance, 1997 looks like it was an efficient one for the district courts. Upon reflection though, we can see that the reason for the high proportion of petitions aged less than six months is not that the courts were deciding more petitions promptly, but rather, that the huge number of petitions filed in the latter half of 1997 (as a consequence of the April 24, 1997 filing deadline for prisoners whose convictions became final

before the effective date of AEDPA) had by and large not been on the dockets long enough to have aged to six months.

By 1998, when one would first expect to see the effects of the AEDPA filing deadline on the age of undecided petitions, there were significantly more petitions remaining on the dockets for six months or more (53.7%) than for less than six months (46.3%). The proportion of petitions pending for six months or more trends upwards thereafter, reaching 54.1% in 2001, 56.5% in 2004, and 59.4% in 2008. These numbers are of particular interest if we assume, as this Article suggests we should, that six months is a presumptively reasonable amount of time for a district court to take to resolve a state-prisoner habeas application.[147]

Figure 10. Proportion of Habeas Petitions Pending Less than Six Months and Six Months or More in All Districts



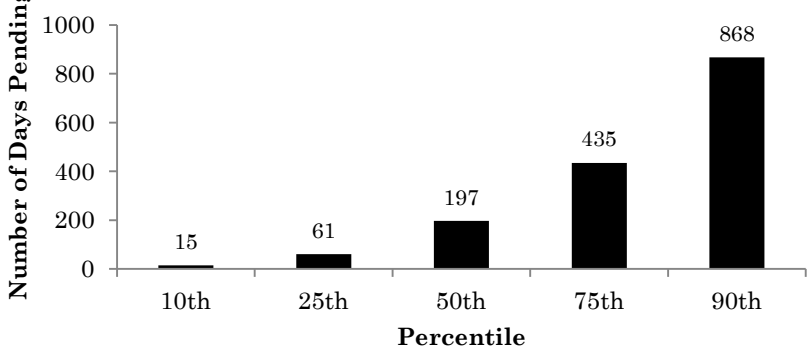
Note: Figure 10 shows the proportion of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained on the dockets for less than six months, and the number of such petitions that remained on the dockets at least six months. In 1996, roughly half the petitions appearing on the docket had aged to six months or more. By 1998, when we would first expect to see the effect of the 1997 AEDPA filing deadline that had led to a jump in the number of habeas filings that year, 54% of the petitions had been pending for six months or more. The proportion of

147. *See infra* Part III.

cases that remained undecided on the courts' dockets increased steadily from 2000 (52%) to 2008 (59.4%).

National Disposition Times Show Many Petitions Decided Quickly, but Many Require Years. A final measure of the health of the federal district courts' habeas dockets is the distribution of the actual disposition time of petitions. On the positive side, Figure 11 shows that for all petitions initiated between fiscal years 1997 and 2006, fully 10% were terminated within 15 days of filing, and 25% within 61 days, with a median disposition time for all petitions of 197 days, or just over six months. The federal courts, in other words, dispatched a great many of the petitions filed over this decade relatively promptly. More problematic, though, are the numbers on the other side of the chart. Only 75% of the petitions were terminated within 435 days of filing, and fully 10% remained pending for more than 868 days (or about 2.4 years).

Figure 11. Pendency Times for Habeas Petitions Filed in All Districts from 1997 to 2006, by Percentile



Note: Figure 11 shows by percentile the number of days that all state-prisoner federal habeas petitions filed between fiscal years 1997 and 2006 remained pending before termination. The fastest 10% of petitions were decided within 15 days, half of the petitions were terminated within 197 days, and 90% of the petitions were terminated within 868 days (which means that 10% of the petitions filed during this period required at least 2.3 years to be decided).

Summary. This review of all of the state-prisoner habeas petitions that appeared on the district courts' dockets from 1996 to 2008 establishes that a large and increasing number of

petitions remain undecided for a very long time. The number of undecided petitions as of the end of each reporting year, for example, has increased from 9,086 in 1996 to 15,824 in 2008. The proportion of petitions that remain pending for lengthy periods before decision has likewise increased substantially during this time period. As of 2008, fully 39.4% of petitions required at least one year for decision, compared with only 25.7% in 2006. The proportion of petitions requiring at least two years for decision more than doubled during this time period, increasing from 8.5% of petitions in 1995 to 18.7% in 2008. And the proportion of petitions requiring at least three years to decide increased more than threefold, from 2.7% in 1996 to 7.8% in 2008.

C. Habeas Delay District by District

The national statistics reveal that, even though the number of new habeas filings (and the number of new habeas filings per judge) has been trending downward since 2000, an increasing number and percentage of cases remain undecided on the district courts' dockets for years. While the observations from the previous Section therefore show that there is in fact a serious habeas delay problem, closer scrutiny of the dockets district by district reveals that the problem is much more pronounced in individual districts. As is shown below, all other things being equal, the amount of time that a petitioner's habeas application will remain pending without decision depends upon the district in which he files his petition (which, in turn, is generally determined by the district in which he is incarcerated).[148]

Sharp Differences by District in Mean and Median Number of Days Habeas Petitions Remain Undecided. For habeas petitions that were filed between 1997 and 2006, the mean amount of time that they remained pending (either until decision, or until September 30, 2008, if they had not been decided by that date) was 325 days nationwide, with a median of 197 days. As Figure 12 reveals, however, the mean and

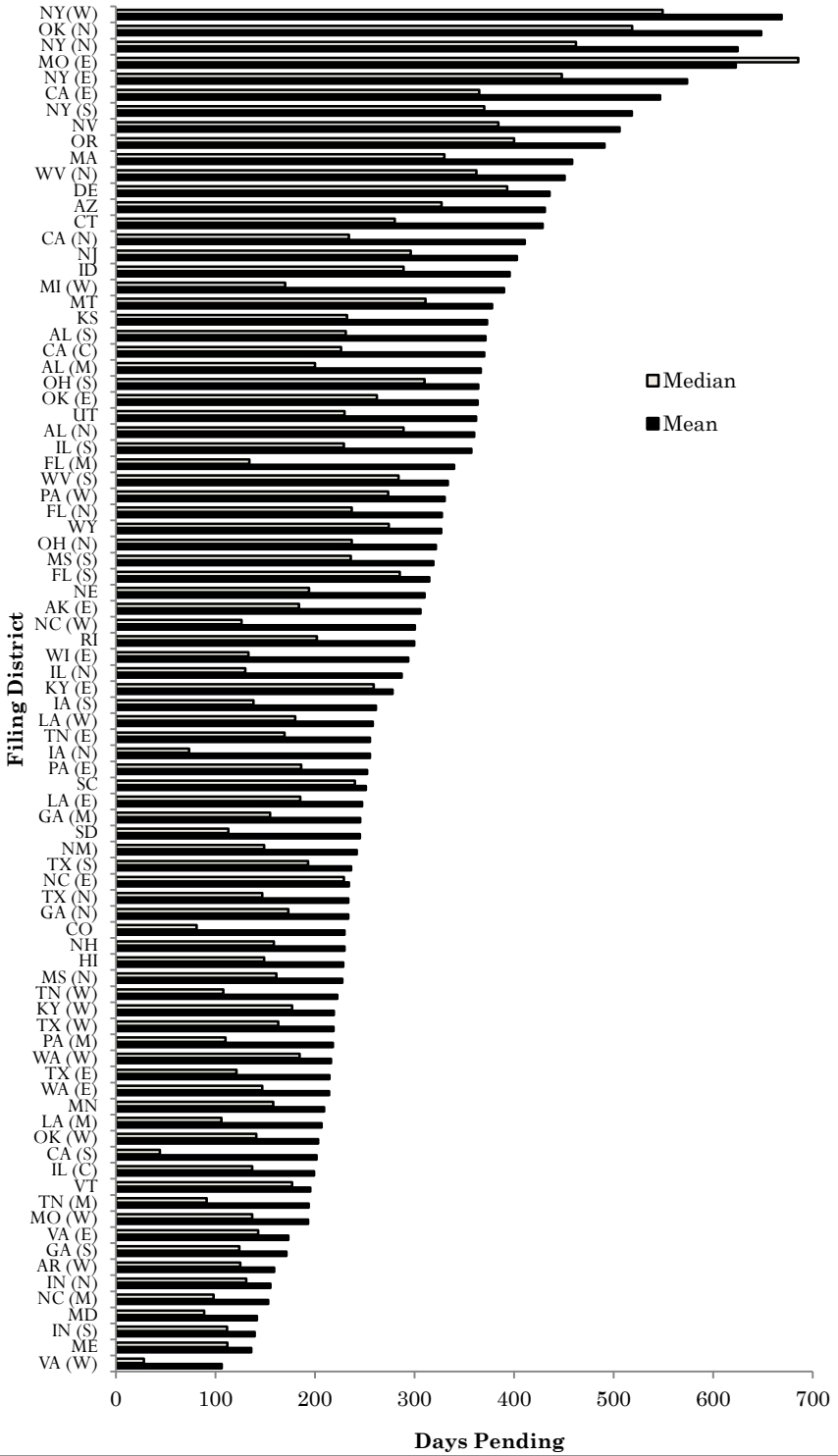
148. *See* 28 U.S.C. § 2241(d) (2006) (petitioner serving a state criminal sentence in a state containing more than one federal district may file a habeas petition not only "in the district court for the district wherein [he] is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him"); Rumsfeld v. Padilla, 542 U.S. 426, 442–44 (2004) (discussing proper jurisdiction for filing habeas challenges).

median days pending for petitions was not uniform by district. The mean number of days that petitions remained open in the "slowest" ten districts—as measured by the mean number of days pending until decision—ranged from 451 days (in the Northern District of West Virginia) to 669 days (in the Western District of New York). The median processing times in these "slowest" ten districts was likewise much longer, ranging from 330 days (in the District of Massachusetts) to 686 days (in the Eastern District of Missouri).

In contrast, the ten "fastest" districts had mean processing times considerably below the national average—ranging from 193 days (in the Western District of Missouri) to a low of 106 days (in the Western District of Virginia). Medians for these "fastest" districts ranged from 143 days (in the Eastern District of Virginia) to just 28 days (again, in the Western District of Virginia).[149]

149. The Virginia districts' low disposition time for resolving state-prisoner habeas matters is consistent with its overall efficiency in civil matters. *See* Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 233 (1997).

Figure 12. Median and Mean Number of Days Pending for Habeas Petitions Filed from 1997 to 2006 by District



Note: Figure 12 shows the median and mean number of days pending, by district, for the 163,443 state-prisoner federal habeas petitions filed from 1997 to 2006. Districts with fewer than 100 petitions filed during this period have been excluded.

District in Which Petition is Filed Appears to Determine How Long the Petition Will Remain Pending. There is wide variation among the districts in the number of petitions that are decided promptly, whether measured by the number decided within six months or within one year of filing.

Unsurprisingly, the "slowest" districts have a smaller proportion of petitions pending for under six months than do the "fastest" districts. Figure 13 includes data for the ten districts with the highest mean number of days pending for habeas petitions; it shows the total number of petitions filed between 1997 and 2006 that were pending: (1) for less than six months, and (2) for six months or more. Figure 14 shows the same information for the ten districts with the lowest mean number of days pending.[150]

150. There is a statistically significant positive correlation between the mean number of habeas filings per judge per year in a district and the mean disposition times for the petitions. *See infra* Figure 18 and accompanying text.

Figure 13. Number of Habeas Petitions Decided in Less than Six Months and in Six Months or More, for Districts with Highest Mean Days Pending

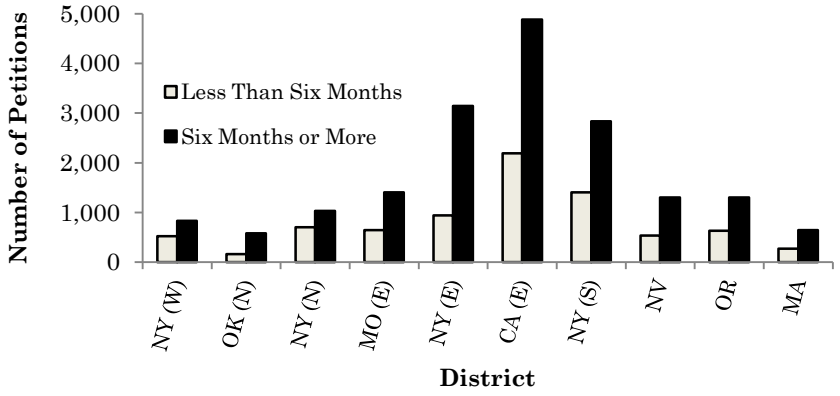
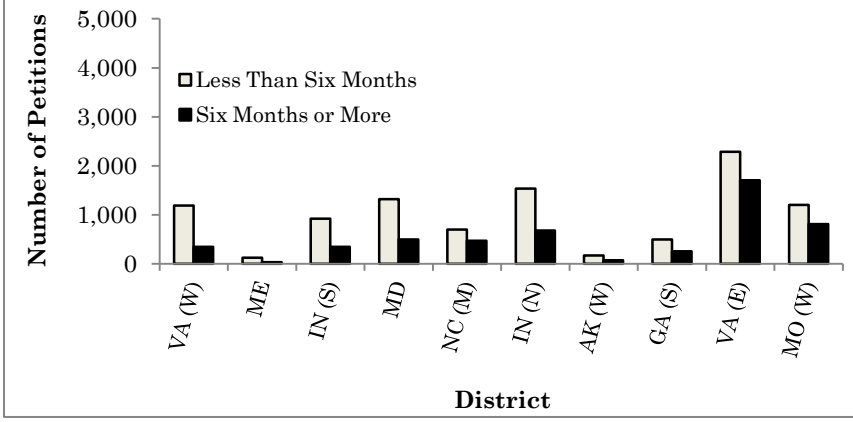


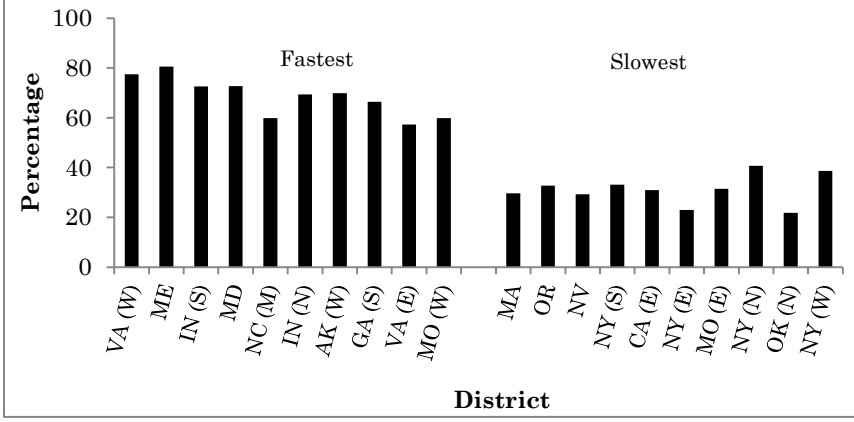
Figure 14. Number of Habeas Petitions Decided in Less than Six Months and in Six Months or More, for Districts with Lowest Mean Days Pending



Note: Figures 13 and 14 show the number of state-prisoner federal habeas petitions (filed between fiscal years 1997 and 2006) terminated in less than six months and the number of such petitions that remained open for six months or more, for the ten slowest districts (those with the highest mean days pending per petition) and for the ten fastest districts (those with the lowest mean days pending per petition), respectively. Without exception, the fast districts resolve more habeas petitions in less than six months than in six months or more, while the opposite holds true for the slowest districts.

Taken together, what is most striking about these figures is that none of the "slowest" districts had more petitions decided in less than six months than in six months or more, while the opposite holds true in the "fastest" districts. Figure 15 highlights this difference by expressing this same information proportionally. For the "fastest" districts, the proportion of petitions requiring less than six months to terminate ranged from 57% (in the Eastern District of Virginia) to 81% (in the District of Maine). In contrast, for the "slowest" districts, the range was from 41% (in the Northern District of New York) to only 22% (in the Northern District of Oklahoma).

Figure 15. Proportion of Habeas Petitions Filed from 1997 to 2006 and Decided in Less than Six Months in the Fastest and Slowest Districts

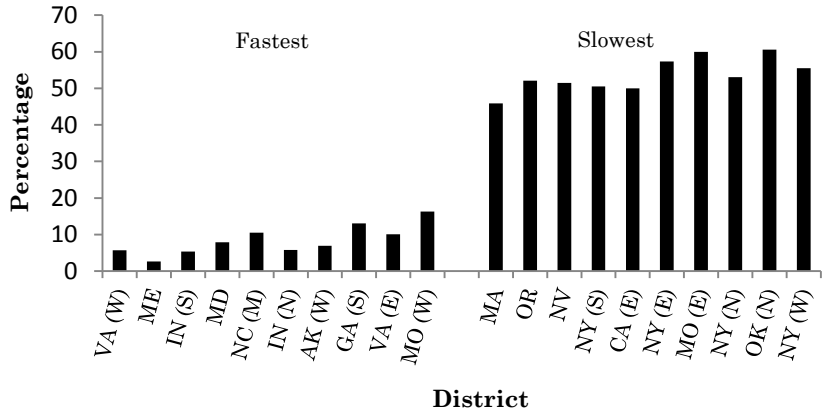


Note: Figure 15 shows the percentage of state-prisoner federal habeas petitions (filed between 1997 and 2006) terminated in less than six months for the ten fastest districts (those with the lowest mean days pending per petition) and for the ten slowest districts (those with the highest mean days pending per petition).

The same pattern can be seen for the number and proportion of petitions that require at least one year until termination, though in this regard, the differences between the "fastest" and "slowest" districts are even more pronounced. Figure 16 shows that in each of the ten "fastest" districts, fewer than 20% of the petitions filed between 1997 and 2006 required more than one year to be decided. In fact, for the ten "fastest" districts, the proportion of petitions requiring more than one

year ranged from just 16% (in the Western District of Missouri) to as low as 3% (in the District of Maine). In contrast, for the ten "slowest" districts, the proportion of petitions requiring more than one year for decision was drastically higher, ranging from 46% (in the District of Massachusetts) to 61% (in the Northern District of Oklahoma).

Figure 16. Proportion of Habeas Petitions Filed from 1997 to 2006 and Open for at Least One Year in the Fastest and Slowest Districts



Note: Figure 16 shows the percentage of state-prisoner federal habeas petitions (filed between fiscal years 1997 and 2006) requiring at least one year before termination for the ten fastest districts (those with the lowest mean days pending per petition) and for the ten slowest districts (those with the highest mean days pending per petition).

In addition (though it is not shown in any of these figures), the proportion of petitions requiring at least *three* years to be decided in the "slowest" districts ranged from 9% (in the District of Massachusetts) to 29% (in the Northern District of Oklahoma). For four of the ten "slowest" districts, at least 25% of all petitions appearing on their dockets required at least three years to be decided.

Statistical Significance of Differences in Disposition Times Among Grouped Districts. Although the discussion up to this point has been primarily descriptive in nature, as a predictive matter, there is in fact a statistically significant positive correlation between the district in which a petition is filed and the number of days that it is likely to remain pending on the

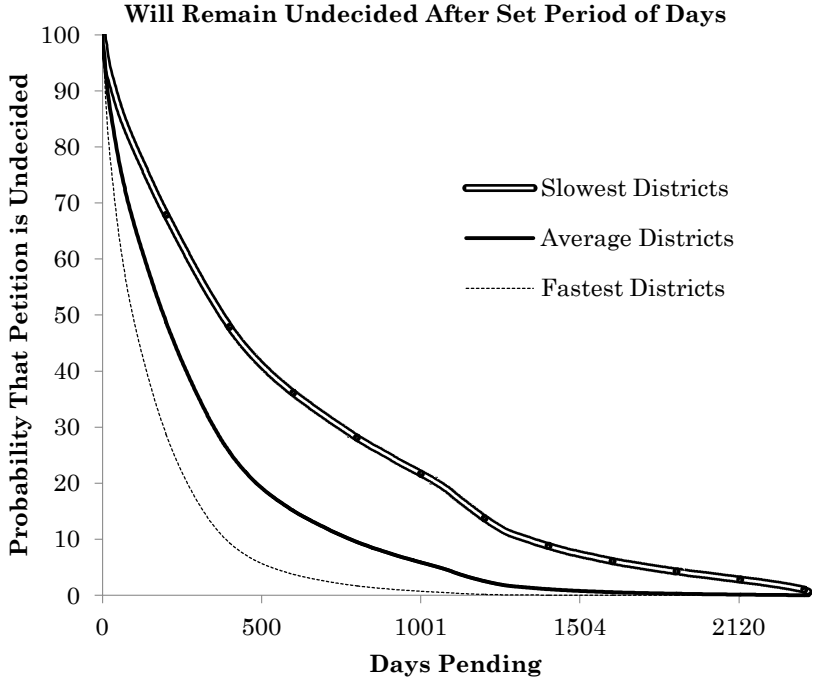
district court's docket. Figure 17, below, divides the universe of all petitions that were filed between 1997 and 2006 into three groups: The first group includes petitions filed in the ten "fastest" districts (by mean number of days pending); the second includes petitions filed in the ten "slowest" districts; and the third includes petitions filed in the "average" districts (which includes all districts that are in neither the "fastest" nor the "slowest" categories).[151] Figure 17 shows the likelihood that a petition filed in one of these groups will remain open at any point in time.[152] For example, the median amount of time that a petition filed in one of the ten "fastest" districts is about three months (94 days), the median in one of the "average" districts is more than double that (190 days), and the median in one of the "slowest" districts doubles that again, to more than a year (374 days).[153]

151. Districts in which fewer than one hundred petitions were filed between 1997 and 2006 were excluded from the analysis.

152. The analysis was performed using the Cox Proportional Hazard method.

153. The difference among each of these categories ("fastest," "slowest," and "average") is statistically significant, with a p-value of <.0001.

Figure 17. Probability That Habeas Petitions Filed from 1997 to 2006 in Fast, Average, and Slow Districts Will Remain Undecided After Set Period of Days



Note: Figure 17 shows the "survival probability" for habeas petitions filed in the ten fastest districts by mean disposition time (see Figure 14), in the ten slowest districts (see Figure 13), and in the "average" districts (that is, districts that are among neither the fastest nor the slowest). The probability indicated by the y-axis is that a petition will remain undecided. The calculations were made using the Cox Proportional Hazard Model, with the number of days pending used as the response variable, and the average number of filings per judge per year and the district category (fastest, average, and slowest) used as independent variables. The differences among all groups (fastest-slowest, fastest-average, and average-slowest) were statistically significant, with p-value of <.0001 for each.

A comparison of the "fastest," "slowest," and "average" groups shows that the likelihood that a petition that is filed in one of those districts will be decided within any given period of time varies markedly and significantly by group. Table 1 shows, for example, that for the "fastest" districts, fully 68.2% of petitions are decided within six months, while 48.3% of

petitions in the "average" districts are decided that quickly, and only 29.9% of petitions in the "slowest" districts are terminated within that time frame. Similarly, the likelihood that a petition will be decided within two years of filing is 97.8% in the "fastest" districts, 89.3% in "average" districts, and only 69.2% in the "slowest"districts.

Table 1. Likelihood That a Habeas Petition Will Be Decided Within Set Number of Days, by Category of District

District	6 Months	1 Year	2 Years	3 Years
Fastest	68.2	88.7	97.8	99.6
Average	48.3	71.5	89.3	95.7
Slowest	29.9	49.2	69.2	81.6

Note: The information set out in Table 1 and in Table 2, below, is the same as that shown in graphic form in Figure 17.

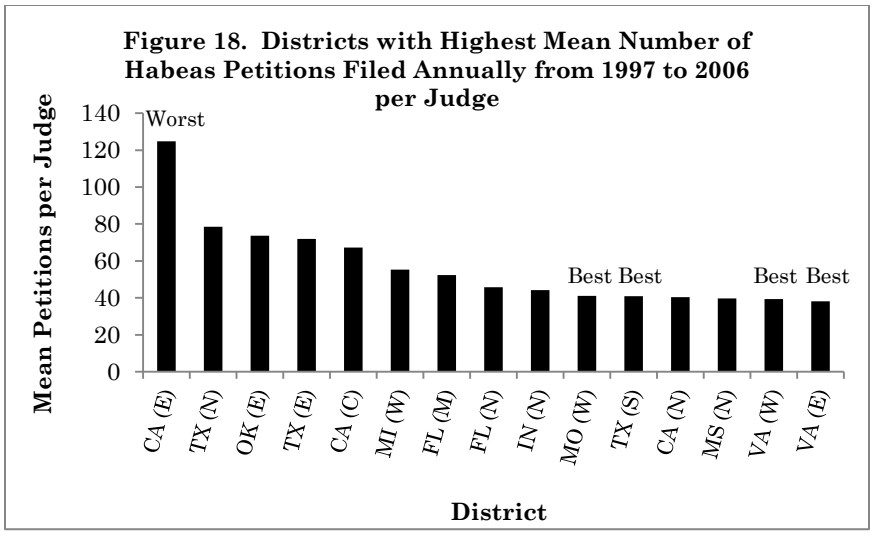
Table 2 tells the same story in slightly different form. For example, 90% of habeas petitions that are filed in one of the "fastest" districts will be decided within 387 days, but it will take more than double that (779 days) for 90% of the petitions in an "average" district to be decided, and fully 1,337 days to reach that percentage in the "slowest" districts. Similarly, in the "fastest" districts, one quarter of all petitions are decided within a month (28 days) while in the "average" districts it takes nearly two months (59 days) to reach this percentage, and in the slowest districts it takes more than four months (139 days).

Table 2. Expected Number of Days Until Decision for a Habeas Petition Filed in Each Category of District, by Percentile

District	10th	25th	50th	75th	90th
Fastest	7	28	94	225	387
Average	14	59	190	405	779
Slowest	35	139	374	896	1337

In fact, the likelihood that a habeas petition will be decided within a set number of days is 3.2 times higher for a petition filed in one of the "fastest" districts than for a petition filed in one of the "slowest" districts; it is 1.7 times higher for a petition filed in one of the fastest districts than for a petition filed in one of the "average" districts. A petition filed in an "average" district is 1.8 times more likely to be decided by any given date than a petition filed in one of the "slowest" districts.

Age of Petitions is Correlated with Density of Filings in District. Districts with the highest mean number of habeas filings per judge per year might be expected to have the highest mean disposition times for those petitions. In the case of the Eastern District of California, this common sense expectation turns out to be true. From 1997 to 2006, the district had by far the highest mean number of filings per judge annually—an astonishing 125 per judge, which is fully 100 petitions per year per judge more than the 25-petition median for districts nationwide. Unsurprisingly, the Eastern District of California was also among the ten "slowest" districts, as measured by mean processing time. See Figure 18, below, showing the fifteen districts with the highest mean number of habeas petitions filed annually per judge for this period.



Note: Figure 18 shows the mean number of habeas petitions filed per judgeship annually between 1997 and 2006 for the fifteen districts with the highest such mean. The label "Worst" denotes a district that is among the ten districts with the slowest mean processing times for habeas petitions; the label "Best" denotes a district that is among the ten fastest. Of the fifteen districts with the highest number of petitions filed per judgeship, only one (the Eastern District of California) is also among the districts with the worst processing times for habeas petitions, while four (the Western District of Missouri, the Southern District of Texas, the Western District of Virginia, and the Eastern District of Virginia) are among the ten districts with the *best* mean processing times.

That said, Figure 18 also reveals that, of the remaining districts with the highest mean number of new habeas filings per judge, none of them are also among the ten "slowest" districts by mean processing time. Moreover, four of the districts with the highest mean number of habeas filings annually per judge (Western District of Missouri, Southern District of Texas, Western District of Virginia, and Eastern District of Virginia) were among the ten "fastest" districts by mean processing time. Still, notwithstanding the success of these high-density districts in resolving habeas petitions quickly, regression analysis shows that the average number of filings per judge per year *is* a statistically significant indicator

of the number of days that a petition is likely to remain pending.[154]

Summary. This Section has shown that the scope of the habeas delay problem nationwide is not distributed uniformly across judicial districts; in some districts the delay is quite profound, and in others it is not. While filing rates and the number of judges in each district provides some explanation for the delay, many of the districts with the highest ratio of filings per judgeship have processed their habeas caseloads with the best efficiency in the country. It is beyond the scope of this Article to identify the reasons for the differences in processing times across districts, but the mere fact of the disparities establishes that for state prisoners who unluckily must file in one of the least efficient districts, the likelihood of having their petitions decided in a reasonable period of time is astonishingly slim.

III. PUBLIC REPORTING AND THE CIVIL JUSTICE REFORM ACT

While there is no panacea for relieving the habeas delay problem detailed in Part II,[155] the following Sections offer a simple proposal for improving the disposition rate of habeas petitions: require federal court judges to produce semi-annual, easily-accessible, public reports that identify by name and case number all state-prisoner habeas petitions that have been pending in their chambers for six months or more. The purpose of such a requirement would be to hold judges accountable to the public (and to their fellow judges) for the state of their habeas dockets, and to incentivize them to reach decisions on their habeas petitions more expeditiously.

The proposal is simple and straightforward. In fact, federal district court judges *already* must supply exactly this information for all other civil motions that have been pending

154. The p-value was <.0001, meaning that the annual number of habeas filings per judge is a statistically significant indicator of the length of time that a petition will remain pending.

155. Such an effort would surely be quixotic. Although "[l]iterally hundreds of articles have been written since the early part of this century that directly or indirectly address court delay," JOHN GOERDT ET AL., EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987, at 3 (1989), civil matter processing times remain less than ideal. *See, e.g.*, IAALS STUDY, *supra* note 3, at 38 tbl.4 (providing distribution of cases by overall time from filing to disposition for sample of about 7,700 federal civil matters—excluding prisoner petitions—that were terminated in 2006).

for six months or more on their dockets as of the semi-annual reporting dates. A fair reading of the federal statute that sets out this requirement—section 476 of the CJRA[156]—would seem to mandate that the status of undecided habeas petitions be treated in like manner. However, the Judicial Conference and the Administrative Office, as the bodies responsible for implementing section 476, have thus far interpreted the provision to exempt habeas petitions.

The result of the combination of the CJRA reporting requirement and the Judicial Conference's exemption of habeas from its ambit is that judges are encouraged to promptly decide motions in every type of civil case *except* habeas. Indeed, the perverse effect of exempting habeas petitions is that judges are more likely to leave such petitions *unexamined*, at least while other civil motions that will be imminently reportable remain on the docket. Reinterpreting section 476 of the CJRA to require public reporting on habeas motions that remain undecided for at least six months would remove the disincentive that judges now have to decide habeas cases promptly.[157] Of course, there will be a corresponding cost: Disposition times for non-habeas civil matters may be affected if district court judges are no longer incentivized to turn to them first before habeas matters.[158]

The first Section below reviews the history of the CJRA reporting requirement, and notes the general consensus that it has been successful in reducing some of the delay in civil cases in the federal courts. The second Section discusses the Judicial Conference's decision not to include habeas petitions among the motions reportable under the CJRA, and suggests that a more faithful construction of the statute would not exempt habeas

156. 28 U.S.C. § 476 (2006).

157. This observation should not be understood to suggest that current interpretations of the CJRA reporting requirement are the sole explanation for the increasing habeas delay problem. Other factors might include any number of the following: an increasing federal criminal caseload, which must be given priority by judges pursuant to the Speedy Trial Act; the increased complexity of, and time commitment needed to resolve, other civil matters; a high judicial vacancy rate; understaffing in states' Attorney General offices, and a concomitant difficulty in filing timely responses to prisoner petitions; the arguably difficult nature of habeas decision making itself, which since the passage of AEDPA has required judges to apply increasingly complex rules; and the near-total lack of lawyers to assist habeas petitioners and prod judges to reach decisions promptly.

158. Of course, that is precisely the result envisioned by 28 U.S.C. § 1657, which requires the district courts to expedite habeas applications. *See supra* Part I.C.

petitions. The final Section applies the results of this Article's analysis of Administrative Office data and provides a normative argument encouraging the Judicial Conference to revisit its interpretation of the CJRA's reporting requirement, so that habeas petitioners are not made to suffer disproportionately for the district courts' heavy civil caseloads.

A. The CJRA and Its Reporting Requirement

The CJRA grew out of a broad consensus in the legal community that "civil litigation costs too much and takes too long."[159] In 1989, at the behest of then-Senator Joseph Biden, a task force from the Brookings Institution, a nonprofit public policy think tank, offered Congress a series of recommendations for reducing inefficiencies and inequities in federal civil litigation, including having judges take a more active role in managing their caseloads and by requiring each district court to develop its own "Civil Justice Reform Plan."[160] These plans would mandate, among other things, "tracking" cases by degree of difficulty, scheduling conferences, setting early and firm trial dates for all cases, providing firm time guidelines for discovery, and devising "procedures for resolving motions quickly."[161] The CJRA as a whole was envisioned to be a "civil analogue to the federal Speedy Trial Act."[162]

Brookings also found relatively broad support in the legal community for "increasing judicial accountability" by publicizing court dockets.[163] Brookings therefore also recommended that judges be required to submit quarterly reports of all pending submitted motions that had remained unresolved after thirty, sixty, and ninety days, "and all succeeding 30-day increments" thereafter.[164] Interest groups

159. BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989).

160. *Id.* at 3.

161. *Id. See generally* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1290–94 (1994) (discussing the origins of the CJRA).

162. Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 724 (1993).

163. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the S. Comm. on the Judiciary*, 101st Cong. 159 (1990) [hereinafter *Hearings on S. 2027 and S. 2648*].

164. BROOKINGS INST., *supra* note 159, at 27.

like Public Citizen backed the reporting proposal, and suggested the reports would be even more valuable if they were to include case identification information and the identity of the judges whose motions remained pending.[165]

The federal judiciary launched a strong lobbying effort against the entire CJRA project. Among other concerns, the judges expressed initial skepticism about the proposed reporting requirement of section 476. In testimony before a House subcommittee, for example, Judge Robert F. Peckham (a respected jurist and former Chief Judge for the United States District Court for the Northern District of California) noted "the unfortunate implications of the title" of the section.[166] The title, "Enhancement of judicial accountability through information dissemination," suggested to Judge Peckham that the legislature believed there was a "shortfall in judicial accountability and that it is sufficiently significant to warrant being highlighted and addressed in a federal statute."[167] (The title of the section would later be changed.) On the substance of the proposal, Judge Peckham suggested that his colleagues on the bench were concerned about the effect that "artificial deadlines" would have on "the quality of judicial work and on the morale of the conscientious."[168]

The CJRA as a whole was passed in 1990, in much the same form as recommended by Brookings.[169] The final version of the Act included the reporting requirement, though it mandated only semi-annual rather than quarterly reports.[170]

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165. *See Hearings on S. 2027 and S. 2648*, *supra* note 163, at 474–77 (letter from Alan B. Morrison, Public Citizen Litigation Group). This modification would eventually be included in the statute, providing the first formal way to hold judges publicly accountable for the management of their caseloads. Katherine J. Henry, *Judicial Discipline Through the Civil Justice Reform Act's Data Collection and Dissemination Requirements*, 1 RES. PAPERS OF THE NAT'L COMMISSION ON JUD. DISCIPLINE & REMOVAL 859, 859 (1993).

166. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 133 (1990) (statement of the Hon. Robert F. Peckham).

167. *Id.*

168. *Id.* at 134.

169. *See* Judicial Improvements Act of 1990, tit. I, 103(a), Pub. L. No. 101-650, 104 Stat. 5089, 5090–98 (codified as amended at 28 U.S.C. §§ 471–482 (1994)). Absent congressional reauthorization, the CJRA was designed to sunset in 1997. *See id.* at 5096 ("[The] requirements set forth in [the CJRA] . . . shall remain in effect for seven years after the date of the enactment of this title [December 1, 1990].").

170. *See* H.R. REP. NO. 101-732, at 8 (1990) (concluding that "periodic assessment of docket conditions" would ensure "continuous renewal of the

As enacted, section 476 of the CJRA (now re-titled "Enhancement of Judicial Information Dissemination") required that the Director of the Administrative Office:

> prepare a semiannual report, available to the public, that discloses for each judicial officer—(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending; (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and (3) the number and names of cases that have not been terminated within three years after filing.[171]

After seven years of living with the CJRA experiment, judges and practitioners were skeptical about its benefits. In 1996, the RAND Corporation—a nonprofit think tank—was asked by the Administrative Office and the Judicial Conference to evaluate the implementation and effectiveness of the case management reforms the Act had required.[172] The RAND study gave mixed marks to the programs, concluding that for the most part the reforms "had little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management."[173] According to a commentator, experience with the CJRA had confirmed the "unvarnished truth" that "we have no idea how to make a substantial dent in either cost or delay."[174]

The RAND analysis also found, however, that the reporting requirement may have worked.[175] Others similarly observed that while most provisions of the CJRA had been "somewhat disappointing," the "publication requirement seems

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commitment to reduce . . . delays"); *see also* Gordon Hunter, *Judges Clog Federal Docket*, TEX. LAW., Nov. 18, 1991, at 1 (quoting senior aide to Senate Judiciary Committee as calling public disclosure " 'an incentive [for judges] to work a little faster' and enhance their accountability").

171. 28 U.S.C. § 476(a) (2006).

172. JAMES S. KAKALIK ET AL., RAND CORP., JUST, SPEEDY, AND INEFFECTIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 1 (1996) [hereinafter RAND STUDY].

173. *Id.*

174. Paul Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 61 (1997).

175. *See* RAND STUDY, *supra* note 172, at 24 (noting that the "number of cases pending more than three years has dropped by about twenty-five percent from its pre-CJRA level," and concluding, in the absence of other explanations for the drop, that the CJRA reporting requirement may have been responsible); IAALS STUDY, *supra* note 3, at 77–78; Jeffrey J. Connaughton, *Judicial Accountability and the CJRA*, 49 ALA. L. REV. 251, 253 (1997).

to have resulted in the clearest reduction in case delays."[176] Even the Judicial Conference agreed that the statistical reporting of cases had been useful, acknowledging there was evidence that case processing times had dropped as a result of public reporting on the state of the judges' dockets.[177] The Judicial Conference therefore planned to continue with its statistical reporting even after the provisions of section 476 had expired[178] along with the rest of the CJRA provisions.[179] This independent action turned out to be unnecessary, however, because Congress reauthorized the reporting requirement of section 476 in December 1997, even as it allowed the balance of the CJRA provisions to expire.[180]

Recent scholarship suggests that the CJRA reporting requirement continues to influence the behavior of judges. The Institute for the Advancement of the American Legal System (IAALS), for example, sampled 7,700 federal civil cases and noted a significant increase in the rate of decision on motions within two weeks before the semi-annual CJRA reporting deadlines.[181] The decision rate during those two weeks ranged from 11% to 15%, when the predicted decision rate was only 8.5%.[182] In addition, the IAALS study found that 35% to 40% of the motions that were decided in the two weeks before a CJRA reporting deadline *would* have gone on the judges' section 476 reporting list if they had not been decided when they were.[183] The authors concluded from these observations that there was "strong circumstantial evidence that judges rush to complete

176. Robert E. Litan, *Foreword* to HON. DANIEL B. WINSLOW, JUSTICE DELAYED: IMPROVING THE ADMINISTRATION OF CIVIL JUSTICE IN THE MASSACHUSETTS DISTRICT AND SUPERIOR COURTS (1998).

177. JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990, FINAL REPORT 10, 18 (1997) [hereinafter JUDICIAL CONFERENCE, FINAL REPORT]. *See also* Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 533 (1993) (noting a seven percent decline in the number of motions pending more than six months during the first and second CJRA reporting periods).

178. JUDICIAL CONFERENCE, FINAL REPORT, *supra* note 177, at 19.

179. *See* Judicial Improvements Act of 1990, tit. I, 103(a), Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (1994)) (describing the sunset provisions of the CJRA).

180. *See* Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173, 1173 ("The requirements set forth in section 476 of title 28, United States Code, as added by subsection (a), shall remain in effect permanently.").

181. IAALS STUDY, *supra* note 3, at 8.

182. *Id.*

183. *Id.*

rulings on motions immediately prior to those reporting deadlines."[184]

B. Habeas Motions Excluded from Reporting Requirement

However, section 476 has not helped speed the disposition of habeas applications. The Judicial Conference and the Administrative Office have advised district court judges that a habeas petition, even though it is a request for a judge to issue an order, need not be considered a "motion" for purposes of the CJRA reporting requirement.[185] Judges do not, in other words, have to include on their published lists of undecided motions habeas petitions that have been pending for at least six months as of the semi-annual CJRA reporting date. And, of course, judges accordingly do *not* report this information.[186]

This interpretation of section 476 does not seem consistent with the language and purpose of the provision, nor is it consistent with the habeas-priority requirements of 28 U.S.C. § 1659. To be sure, responsibility for implementing the section 476 reporting requirement lies with the Judicial Conference and the Administrative Office. The CJRA authorizes the Director of the Administrative Office to prescribe standards for categorizing or characterizing judicial actions for recording purposes,[187] including "a definition of what constitutes a

184. *Id.* at 8, 78, 79 tbl.31. The authors excluded prisoner suits (including habeas petitions) from their study. *See id.* at 23.

185. *See* ADMINISTRATIVE OFFICE, POLICY GUIDE, *supra* note 38; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46 (1991) (noting that the Committee on Court Administration and Case Management defined "motions pending," "bench trials submitted," and "three-year-old cases" for CJRA reporting purposes). The Judicial Conference has offered no public explanation of its rationale for exempting habeas applications from the CJRA's six-month reporting requirements.

186. However, pursuant to 28 U.S.C. § 476(a)(3) (2006), judges must report habeas petitions that are at least three years old. In addition, the Judicial Conference requires judges to report on "secondary" habeas motions (that is, motions besides the habeas application itself) that have been pending for more than six months.

187. *See* 28 U.S.C. § 476(b) (stating that "[t]o ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a)"); 28 U.S.C. § 481(b)(1) ("In carrying out subsection (a), the Director shall prescribe—(A) the information to be recorded in district court automated systems; and (B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.").

dismissal of a case and standards for measuring the period for which a motion has been pending."[188] In addition, the Judicial Conference is statutorily authorized to supervise the administration of the federal courts.[189] As a practical matter, therefore, the Administrative Office will have the last word on which aged "motions" must be reported by district courts. That said, it is not immediately clear how much deference should be owed to these bodies. As an entity within the judicial branch, the Administrative Office is not an "administrative agency" for *Chevron* deference purposes.[190] Nonetheless, Congress has charged it with administering the CJRA, and accordingly, it seems appropriate to recognize a kind of quasi-*Chevron* deference for the Administrative Office's construction of the statute.[191]

The reasonableness of the Judicial Conference and the Administrative Office's exemption of habeas petitions from the "motions" reporting requirement seems, at any rate, questionable. A state-prisoner habeas petition (which is referred to as an "application" in section 2254) is a request to the district court for an order (usually release from custody).[192] As such, the Federal Rules of Civil Procedure would characterize a habeas application as a "motion" rather than a

188. 28 U.S.C. § 481(b)(2) (2006).

189. *Id.* § 331.

190. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (holding courts must defer to agency's interpretation of statute); Brooks v. United States, 757 F.2d 734, 742 (5th Cir. 1985) (noting that the "views of the Administrative Office are not entitled to the deference of an administrative agency charged with administering a statute," even though its opinion could be helpful as an indication of the practice of the federal courts); Litton Sys., Inc. v. AT&T Co., 568 F. Supp. 507, 514 (S.D.N.Y. 1983) ("Although the views of the Administrative Office are not entitled to the deference normally given to those of an administrative agency interpreting either its own regulations or a statute which it is charged with administering, its opinion is, nevertheless, that of a government body that has considered the issue and reached a conclusion consistent with this Court's result.").

191. *Cf.* Mills v. United States, 547 F. Supp. 116, 119–20 (N.D. Ill. 1982) ("The approach taken by the Administrative Office is especially significant because the United States Supreme Court repeatedly has stated that when a question of statutory construction arises great deference should be given to how the statute is interpreted by the officers or agents charged with its administration. . . . Since this court has found no compelling indications that [the Director of the Administrative Office's] interpretation [of the Criminal Justice Act] is wrong, due deference must be given to such an administrative determination.").

192. *See* 28 U.S.C. § 2254(a), (b), (d), (e) (referring to an "application for a writ of habeas corpus").

"pleading."[193] The Supreme Court, too, has observed that the "term '*motion*' generally means '[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.' "[194] In fact, petitions brought pursuant to 28 U.S.C. § 2255 (the analogue to section 2254 petitions for federal prisoners) are referred to as "motions" within the statute,[195] but are likewise exempted by the Judicial Conference from treatment as "motions" for CJRA reporting purposes.

Whether or not deference is appropriate, it is clearly within the power of the Judicial Conference and the Administrative Office to revisit the question of what counts as a "motion" and to assure that habeas applications are treated in the same way as other motions. Indeed, there is precedent for the Judicial Conference to do just that. The Judicial Conference initially exempted both social security and bankruptcy appeals from the section 476 reporting requirement, but subsequently reconsidered its position. For bankruptcy appeals, it explained that "[r]equir[ing] that all bankruptcy appeals pending over six months in the district courts be included in the [CJRA] reports" would "assist in directing judges' attention to bankruptcy appeals and avoid undue delays."[196] For social security cases, the Judicial Conference similarly concluded that a change from past practice was appropriate because "including social security appeals in public reports may encourage courts to remain attentive to their prompt disposition."[197] Precisely the same reasoning should be adopted by the Judicial Conference for habeas petitions.

193. *See* FED. R. CIV. P. 7(a)–(b) (distinguishing between a pleading—which includes only forms of a complaint, answer, or reply—and a motion, which is a "request for a court order").

194. Melendez v. United States, 518 U.S. 120, 126 (1996) (emphasis added) (quoting BLACK'S LAW DICTIONARY 1013 (6th ed. 1990)); *see also In re* Vogel Van & Storage, Inc., 59 F.3d 9, 12 (2d Cir. 1995) ("A motion is an application for an order.").

195. *See, e.g.*, 28 U.S.C. § 2255(a) (stating that a federal prisoner "may *move* the court which imposed the sentence to vacate, set aside or correct the sentence") (emphasis added); *id.* § 2255(c) ("A court may entertain and determine *such motion* without requiring the production of the prisoner at the hearing.") (emphasis added).

196. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1998).

197. *Id.* at 63.

Because habeas petitions are not treated as "motions" for section 476 reporting purposes, there is no incentive for the district courts to decide them before other civil motions. To the contrary, by exempting habeas applications from the reporting requirement, the practical effect is to encourage judges to turn to aging motions in every *other* type of civil matter first. This is a perverse result for a category of cases that by statute is supposed to receive *expedited* treatment.[198]

C. Proposal to Include Habeas in Reporting Requirement

As a matter of policy, the Judicial Conference should reconsider its interpretation of section 476 and include habeas petitions among the courts' reportable motions. As presently construed by the Judicial Conference, the provision actually provides a disincentive for judges to address habeas petitions while other civil motions that might be reportable remain pending on their dockets.

Concededly, the public may not notice the inclusion of habeas motions on judges' six-month reporting lists,[199] even though the reports have recently been made more accessible than in the past.[200] And there is a reasonable argument that enhanced public scrutiny of the state of the federal courts' dockets may, in fact, be undesirable.[201] Nonetheless, including

198. *See* 28 U.S.C. § 1657; *see also supra* Part I.C; s*ee also* Dungworth & Pace, *supra* note 3, at iii (noting that delay in civil cases is not distributed uniformly, either among classes of litigants or among the various districts in this country).

199. *See, e.g.*, R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 698–700 (1993) (noting that, despite judges' concerns, relatively little media attention has been paid to the section 476 reports).

200. *See* Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 13 n.29 (2009) ("Given the notion of transparency and accountability inherent in the CJRA, it is ironic that the Director's semiannual reports are not available to the public on the official U.S. Courts website."); IAALS STUDY, *supra* note 3, at 39 n.71 (showing that while CJRA reports are "available in theory," they are "difficult for the public to find" and often delayed by up to nine months); Henry, *supra* note 165, at 864 (encouraging the Administrative Office to make these reports easily available to the public). The reports have now, however, been made available on the courts' website. *See Judiciary Approves Free Access to Judges' Workload Reports; Courtroom Sharing for Magistrate Judges*, THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts), Sept. 15, 2009, at 1–2 (stating that all future CJRA reports will be made available to the public without charge on the judiciary's public website beginning with the period ending March 31, 2010).

201. Some commentators have noted the tension between accountability and judicial independence. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431,

habeas applications in the publication requirement would likely have a beneficial effect, since the audience for the CJRA semiannual reports is not only the public at large, but also other judges.[202]

Judges, like any other peer group, are influenced by the behaviors and norms of their colleagues. Since passage of the CJRA, judges do appear to be sufficiently concerned about their image that they will go about remedying congested dockets in order to avoid appearing on the six-month lists.[203] As Judge James Robertson of the U.S. District Court for the D.C. Circuit observed recently in the *Buffalo Law Review*, habeas matters are routinely allowed to "linger for months, or even years," which is in part due to the perverse incentives created by the CJRA:

> Each district judge is required to report semiannually his or her 'old motions' in civil cases—those that have been pending undecided for longer than six months. It's a negative incentive—a shaming device—and it has been quite effective in getting judges to move their cases along. Habeas corpus cases and § 2255 applications, however, are not regarded as 'motions.' They are not reportable, so, if they are sitting on remote corners of our desks gathering

458 (2004) ("If judges were completely 'accountable' in a political sense, they would become passive tools of the popular will."). And there may be unpalatable results to enhancing judicial accountability to the public. *See* David A. Hoffman et al., *Docketology, District Courts and Doctrine*, 85 WASH. U. L. REV. 681, 706 n.122 (2007) (noting several news articles about "dilatory judges"). For example, the public may not understand the docket reports because judges with heavier caseloads (or those who are willing to take on time-consuming multidistrict litigation) may appear to be delinquent when in fact they are providing extraordinary help to their colleagues. Judicial backlogs, in addition, may be an unreliable indicator of judicial quality. *See* Miller, *supra* at 475 ("Judges whose principal concern is to clear cases off their desk may have excellent records for timeliness but still be bad judges because they do not give sufficient attention to decisions.").

202. *See* Henry, *supra* note 165, at 862–63 ("Judges themselves believe that the reporting requirements will improve performances by stimulating peer pressure."); Hoffman et al., *supra* note 201, at 705–06 ("[S]cholars have been insufficiently attendant to the shaming sanctions that judges face if they fall too far behind on their docket. In essence, Congress (through the Administrative Office) publishes a list naming judges whose dockets are too full. Such dilatory judges face the gentle ribbing of their fellows at the judicial lunch table and the harsh glare of the media spotlight."); *see also* PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 39 (1973) (discussing the origins of the Judicial Conference and noting Chief Justice Taft's "confidence" that publicizing the state of the courts' dockets would promote efficiency through "peer-group influence").

203. *See, e.g.*, *supra* notes 183–86 and accompanying text.

> dust, there is no public accountability. Transparency does wonders.[204]

As Judge Robertson suggests, inclusion of habeas petitions on the CJRA six-month motions list would cultivate an attitude of efficiency and a legal culture where the judges would care about habeas delay.[205] In addition, to the extent the public is paying attention, inclusion of habeas petitions in the section 476 reports would enhance public confidence in the fair administration of justice in the courts.[206] Because the Judicial Conference does not require that habeas petitions be included on the six-month list, however, the self-policing effects of the reporting requirement in the habeas context have been lost.

Other considerations also suggest the wisdom of adding habeas applications to the definition of "motions" for the reporting requirements of the CJRA. Expanding the reporting requirement presents no separation of powers issues, unlike proposed legislation that would set firm time limits on judges to decide habeas matters.[207] Adding habeas to the reporting requirement will not force judges to *do* anything. Judges may continue to allow habeas applications to sit undecided for six months, a year, two years, or more, without being required to turn to those matters before others deemed more pressing.[208] While allowing old habeas motions to sit on the docket may prove embarrassing when the semiannual reports are issued, it is difficult to see how judicial independence would be chilled by

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204. James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1083 (2008).

205. *See* IAALS STUDY, *supra* note 3, at 8–9.

206. Federal judges who have commented on section 476 uniformly embrace it. *See, e.g.*, Avern Cohn, *Advice to the Commission—A Sentencer's View*, 8 FED. SENT'G REP. 14, 14 (1995) (recommending expansion of public reporting of "judge identifier data" about sentencing decisions, and noting that "[e]xperience under the Civil Justice Reform Act using judge identifiers in connection with cases pending more than three years, bench trials undecided, and motions pending more than six months, has resulted in substantial improvement in shortening the time that judges take to dispose of motions and cases").

207. *See* H.R. 3035, 109th Cong. § 8(a) (2005) (requiring Courts of Appeal to decide the appeal from an order granting or denying a habeas writ "not later than 300 days" after briefing is completed).

208. Modifications for reporting on habeas matters might nonetheless be appropriate. The Judicial Conference has instructed courts that the "pending" clock for civil motions will not begin running until "30 days after the motion is filed," *see* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57 (1999), but for social security cases, the clock does not begin to run until 120 days after the filing of the transcript, *see id.* at 58.

expanding the reporting requirement. To the extent judges are concerned that the public or their peers will draw unfair conclusions from their inclusion on the list, they may submit explanations for the number of undecided habeas petitions they have been forced to report.[209]

Indeed, this proposal is decidedly less intrusive than other measures that, at least in theory, might be available to habeas petitioners whose applications have been sitting unresolved for lengthy periods of time—including mandamus, impeachment, and civil liability.[210] In contrast, the reporting requirement is precisely the kind of self-executing, "informal" method for resolving delay that seems most likely to be effective in actually reducing systemic delay.[211] In the last analysis, judges may still handle their dockets in any way they like, but their failure to speedily resolve habeas petitions—along with any explanations for the delay—will at least be transparent to the public and their colleagues.[212]

Including habeas petitions in the section 476 reports would not require new administrative costs, since identical reports are already required for all other civil matters. Still, it cannot be said that this proposal would promote efficiency entirely without costs. Judges have only a limited amount of time to spend on resolving motions and cases on their dockets, so time devoted to one set of cases will, absent increased efficiency, require other matters to remain unresolved for longer. Just as the Speedy Trial Act requires district court judges to put criminal matters at the front of their dockets, thereby necessarily adding some degree of delay to their civil dockets,[213] any procedural device that encourages the speedier

209. *See* Dessem, *supra* note 199, at 697–98 (giving examples of circuits that include explanatory notes with their section 476 reports).

210. Miller, *supra* note 201, at 458–64; *see also* RUSSELL R. WHEELER & A. LEO LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES 7–9 (1979) (discussing the formal mechanisms used to regulate judicial conduct); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PENN. L. REV. 243, 248–59 (1993) (discussing the Judicial Conduct and Disabilities Act).

211. Charles Gardner Geyh has suggested that formal disciplinary procedures, like those authorized by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, are ill-suited to address the problem of docket delay. *See* Geyh, *supra* note 210, at 261. Instead, "informal actions by the chief circuit and district judges appear to be used with the most frequency and to the greatest effect." *Id.* at 276.

212. *Cf.* Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 682–83 (1979) (arguing against formal regulation of the judiciary).

213. *See, e.g.*, J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U. L. REV. 39, 51 (noting that

resolution of habeas matters will, presumably, mean that other civil matters get resolved less expeditiously.

Of course, as was demonstrated above in Part I, moving habeas petitions through the courts promptly is precisely the result that our federal habeas statute, habeas rules, and case law all seem to envision. That said, the proposal to include habeas petitions in the CJRA six-month reports does not, in itself, privilege habeas petitions over other civil motions. Rather, it does no more than level the playing field so that judges are not discouraged from addressing habeas petitions while other civil motions remain pending. In the last analysis, all that this proposal calls for is fair treatment of habeas petitions.[214]

None of the foregoing observations or recommendations should be construed as denigrating the work ethic of federal district court judges. Their workloads are tremendous, and their dedication to the "just, speedy, and inexpensive"[215] resolution of motions is beyond dispute. But incentives matter, and habeas petitioners should not be made to bear a disproportionate share of the burden, in the form of delay in the resolution of their habeas petitions, caused by the district courts' heavy caseloads.

CONCLUSION

Speedy judicial attention to a prisoner's claim of illegal detention must be, and has always been, central to the function of the writ of habeas corpus. As this empirical study has shown, however, since the passage of AEDPA, the federal courts have not kept current with their habeas dockets, instead

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the Speedy Trial Act, "while not directly increasing the judiciary's workload per se, will cause immense problems of caseload management because it severely compresses the disposition time permitted in criminal cases").

214. Adoption of this proposal would not preclude the courts' adoption of other measures that would speed the resolution of habeas cases. Judge Weinstein, for example, has suggested a number of reforms, with the goal of closing each state-prisoner habeas case within 100 days of filing. *See* WEINSTEIN REPORT, *supra* note 16, at 17. Among his proposals are (1) that each court's Clerk's Office designate a staff member to assure that habeas files (including state court hearing transcripts, briefing, and decisions) are gathered promptly; (2) that adjournment requests be denied except in extraordinary circumstances; (3) that the practice of assigning petitions to magistrates be abandoned, unless magistrates' reports are treated as binding; and (4) that Chief District Court Judges take a more active role in reassigning habeas cases that have been pending overlong. *Id.* at 16–25.

215. FED. R. CIV. P. 1.

allowing an increasing number of petitions to remain undecided for extraordinary lengths of time. Although, by statute and court rules, judges should be moving habeas petitions to the front of their dockets, they have been discouraged from doing so by the Judicial Conference's exclusion of habeas petitions from the reporting requirements of the CJRA. The Judicial Conference should reconsider its interpretation of the CJRA's reporting provision so that habeas petitioners do not bear a disproportionate share of the burden of delay caused by the courts' heavy civil caseload.

GOOGLE, GADGETS, AND GUILT: JUROR MISCONDUCT IN THE DIGITAL AGE

THADDEUS HOFFMEISTER*

This Article begins by examining the traditional reasons for juror research. The Article then discusses how the Digital Age has created new rationales for juror research while simultaneously affording jurors greater opportunities to conduct such research. Next, the Article examines how technology has also altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing the reasons jurors violate court rules about discussing the case.

In Part II, the Article explores possible steps to limit the negative impact of the Digital Age on juror research and communications. While no single solution or panacea exists for these problems, this Article focuses on several reform measures that could address and possibly reduce the detrimental effects of the Digital Age on jurors. The four remedies discussed in this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Article analyzes two sets of jury instructions to see how well they adhere to the suggested changes proposed by this Article. This is followed by a draft model jury instruction.

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As part of the research for this Article, this author conducted one of the first surveys on juror conduct in the Digital Age. The survey was completed by federal judges, prosecutors, and public defenders throughout the country. The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age's impact on juror communications and research. Second, it operated as a barometer for the reform proposals suggested by this Article.

INTRODUCTION

> *The theory of our [legal] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.*[1]

> *In the face of ignorance—or curiosity—we "Google."*[2]

Like most members of society, jurors have been influenced by the Information or Digital Age.[3] In some respects, this impact has been positive. Today's jurors, unlike their predecessors, spend far less idle time at the courthouse. This time is reduced because mundane tasks such as watching orientation videos and filling out juror questionnaires can now be completed online.[4] Furthermore, by using email, the court can send out the jury summons[5] and complete certain aspects of jury selection electronically.[6] Another benefit of the Digital Age includes the creation of court websites that provide jurors with useful information about jury service.[7]

However, the ease with which information is disseminated to and accessed by jurors has drawbacks. Just as jurors use the Internet to learn directions to the courthouse, they also learn definitions of important legal terms,[8] examine court case files,[9]

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1. Patterson v. Colorado *ex rel.* Attorney Gen. of Colo., 205 U.S. 454, 462 (1907).

2. Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 288 (2008).

3. *Id.* ("[The Internet] has permeated every aspect of our society, including the American courtroom.").

4. Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1271 (2001); MaryAnn Spoto, *Online Juror Surveys Makes Process Easier for Courts, Citizens*, STAR-LEDGER, Feb. 8, 2011, at 16.

5. Marder, *supra* note 4, at 1272.

6. *See* State v. Irby, 246 P.3d 796, 800–01 (Wash. 2011) (disallowing jury selection by email because not all parties were involved).

7. For example, the website for the Court of Common Pleas in Franklin County, Ohio, allows potential jurors to learn about juror eligibility, dress code, courthouse security, requests for excuse and postponement, terms of service, and compensation. *Jury*, FRANKLIN COUNTY CT. COMMON PLEAS, http://www.fccourts.org/gen/WebFront.nsf/wp/658B17FFA9A383B0852574FB006DB07A?opendocument (last visited July 7, 2011).

8. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208. In one Florida case, a criminal conviction was

view photographs of crime scenes,[10] and even download medical descriptions of powerful drugs.[11] During one trial, nine of the twelve sitting jurors conducted some form of independent research on the Internet.[12] In another trial, a juror enlisted a family member in his quest to unearth online information.[13]

Advancements in technology also provide jurors new methods by which to communicate with others.[14] In some instances, jurors have communicated with other jurors,[15] witnesses,[16] attorneys,[17] and defendants[18] through social media websites and email. While sitting in the jury box, jurors have disseminated their thoughts about the trial and received the views of others.[19] On certain occasions, this information has

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overturned because the foreman of the jury looked up the definition of "prudence." Tapanes v. State, 43 So. 3d 159, 160 (Fla. Dist. Ct. App. 2010).

9. *See* Bill Braun, *Judge Closes Trial's Internet Window*, TULSA WORLD, May 3, 2010, at A1, *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100503_14_A1_Inasig174831.

10. Robert Verkaik, *Collapse of Two Trials Blamed on Jurors' Own Online Research*, INDEPENDENT (Aug. 20, 2008), http://www.independent.co.uk/news/uk/home-news/collapse-of-two-trials-blamed-on-jurorsrsquo-own-online-research-902892.html ("A judge at Newcastle Crown Court was forced to discharge a jury in a manslaughter trial yesterday when one of the jurors sent him a Google Earth map of the alleged crime scene and a detailed list of 37 questions about the case.").

11. People v. Wadle, 77 P.3d 764, 770–71 (Colo. App. 2003), *aff'd*, 97 P.3d 932 (Colo. 2004).

12. John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, at A1, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html.

13. *Commonwealth v. Szakal*, LEGAL INTELLIGENCER (Nov. 16, 2009), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202435434751 (paid subscription).

14. *See* United States v. Fumo, 655 F.3d 288, 298 (3d Cir. 2011).

15. United States v. Siegelman, 640 F.3d 1159, 1181–85 (11th Cir. 2011).

16. *See, e.g.*, Kathleen Kerr, *Attorneys: Juror Tried to 'Friend' Witness on Facebook*, NEWSDAY (Apr. 7, 2009), http://www.newsday.com/long-island/crime/attorneys-juror-tried-to-friend-witness-on-facebook-1.1217767; *see* People v. Rios, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Sup. Ct. Feb. 23, 2010) (noting that a juror used Facebook to contact a witness).

17. *See, e.g.*, Thomas Zambito, *Judge Declares Mistrial in Rape After Juror's Email Ridicules 'Doubting Thomases' on the Jury*, N.Y. DAILY NEWS (June 9, 2011), http://articles.nydailynews.com/2011-06-09/news/29654981_1_reasonable-doubt-queens-prosecutors-mistrial.

18. State v. Dellinger, 696 S.E.2d 38, 40–42 (W. Va. 2010) (discussing a juror who failed to tell the court that she was MySpace friends with the defendant).

19. Christopher Danzig, *Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel*, INSIDECOUNSEL (June 2009), http://www.insidecounsel.com/2009/06/01/mobile-misdeeds ("You've got jurors who could literally be sitting in the box running an Internet search while testimony is going on.") (quoting an attorney).

been made available online for the general public to see and comment.[20]

Although this Article focuses on the American judicial system, it should be briefly noted that other countries have experienced similar problems from the widespread use of technology by jurors.[21] In England, a juror conducted an online poll to determine the guilt or innocence of a defendant.[22] In New Zealand, a judge was so troubled by the possibility of jurors going online to conduct research that he initially prevented the media from printing images or names of two defendants on trial.[23] Australia recently amended its Juries Act to raise the amount of potential fines assessed to jurors who improperly access the Internet during trial.[24]

These new methods of juror research and improper communications, which have led commentators to coin phrases such as the "Twitter Effect,"[25] "Google Mistrials,"[26] and "Internet-Tainted Jurors,"[27] are problematic. Such activities lead to mistrials, which prove quite costly both financially[28] and emotionally for those involved in the trial.[29] In addition,

20. Deborah G. Spanic, *To Tweet or Not to Tweet: Social Media in Wisconsin's Courts*, ST. B. WIS. (Mar. 5, 2010), http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=90872 (stating that in one trial, a juror tweeted, "I just gave away TWELVE MILLION DOLLARS of somebody else's money!").

21. *See* Afua Hirsch, *Is the Internet Destroying Juries?*, GUARDIAN (Jan. 26, 2010), http://www.guardian.co.uk/uk/2010/jan/26/juries-internet-justice.

22. Urmee Khan, *Juror Dismissed from a Trial After Using Facebook to Help Make a Decision*, TELEGRAPH (Nov. 24, 2008, 10:01 AM), http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html.

23. *See* Edward Gay, *Judge Restricts Online Reporting of Case*, N.Z. HERALD (Aug. 25, 2008, 5:06 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10528866.

24. *See* Ellen Whinnett, *DIY Jury Probe*, HERALD SUN (May 9, 2010, 12:00 AM), http://www.heraldsun.com.au/news/diy-jury-probe/story-e6frf7jo-1225864033798.

25. Ira Winkler, *An Appeal to a Jury of Your Twittering Peers*, INTERNET EVOLUTION (Mar. 24, 2009), http://www.internetevolution.com/author.asp?section_id=515&doc_id=173990.

26. Schwartz, *supra* note 12.

27. Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J. (Sept. 8, 2009), http://www.stroock.com/SiteFiles/Pub828.pdf.

28. *See* Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 302 (2009–10).

29. *See* Annmarie Timmins, *Juror Becomes a Defendant*, CONCORD MONITOR (Mar. 26, 2009), http://www.concordmonitor.com/article/juror-becomes-defendant?SESSf8ff6c533a0d9d4898d6084f82d9a035=ysearch.

improper juror research and communications call into question whether today's jurors can still function in their traditional role as neutral and impartial fact-finders.

In light of the media attention given to this topic, one might quickly conclude that improper juror research and communications are pervasive and growing problems.[30] However, beyond anecdotal discussions, there is little academic research or studies to prove this conclusion.[31] The dearth of legal scholarship may be due in large part to the fact that (1) the Digital Age is a recent and still evolving era and (2) juror misconduct is historically an under-examined area of the law.[32] The academic articles that address this subject primarily focus on the benefits of technology and how to harness it to aid in juror comprehension of the evidence submitted at trial.[33] Thus, there is a possibility that despite the high visibility of a few cases, no systemic problem exists.

In an attempt to resolve this question, the author conducted one of the first surveys on jury service in the Digital

30. Brickman et al., *supra* note 2, at 292 ("Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggest that it is not uncommon."); Grow, *supra* note 8. Grow notes:

> The data show that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years.
>
> Judges granted new trials or overturned verdicts in 28 criminal and civil cases—21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.

Id.

31. In the future, this author expects this area of law to receive increased scholarly attention. *See generally* Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935 (2010); McGee, *supra* note 28.

32. *See* Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 323 (2005) ("Although a considerable body of scholarship on the jury system, jury selection techniques, and jury decision-making exists, the issue of juror misconduct has not been as closely or systematically studied.") (footnotes omitted); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2673 (1996) ("This article examines two aspects of the jury system that have attracted far less attention from scholars than from the popular press: avoidance of jury duty by some citizens, and misconduct while serving by others.").

33. *See* Marder, *supra* note 4, at 1269–74; Gregory J. Morse, *Techno-Jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y.L. SCH. L. REV. 241, 247 (2009–10); Paul Zwier & Thomas C. Galligan, *Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century?*, 67 TENN. L. REV. 523, 529 (2000).

Age.[34] This "Jury Survey" was sent to federal judges, prosecutors,[35] and public defenders to learn how they viewed the impact of the Digital Age on jurors. The questions in the Jury Survey focused primarily on juror research but briefly touched upon juror communications.[36] Although conducted anonymously, the Jury Surveys were written to distinguish responses from judges and practitioners. Of the responses received, approximately half were from federal judges, and the other half were from either federal public defenders or prosecutors.

The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age's negative impact on jury service. According to the Jury Survey results, this effect is statistically significant. Approximately ten percent of the respondents reported personal knowledge of a juror conducting Internet research.[37] In light of the difficulty of detecting this type of juror misconduct, this percentage probably under-represents the actual number of jurors who use the Internet to research cases.[38] The second purpose of the Jury Survey was to receive feedback from those who regularly interact with jurors in criminal trials. For the most part, the Jury Survey respondents agreed with the proposed reforms discussed in this Article. The one noticeable exception was the topic of allowing jurors to ask questions of witnesses, which was met with disapproval by most Jury Survey respondents.

Obviously, a survey of this scope has some limitations. First, it only examined federal courts, not state courts. Second, all of the Jury Survey respondents were in some way affiliated with the federal government, as no actual jurors or private criminal defense attorneys were surveyed. Third, although

34. For another example of a survey covering similar issues as the Jury Survey, see NEW MEDIA COMM., CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE, *available at* http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf.

35. A few prosecutors refused to complete the Jury Survey because it was not approved by the Department of Justice.

36. *See* Jury Survey of anonymous respondents [hereinafter Jury Survey]. The Jury Survey is reprinted *infra* Appendix.

37. Jury Survey, *supra* note 36.

38. *See* Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLA. B.J., Jan. 2010, at 9–10 ("These examples represent recent transgressions that were *discovered*, and probably represent just the tip of the iceberg of juror behavior.").

every federal district was surveyed, the overall number of responses received was small.[39] However, even with these drawbacks, the Jury Survey provides a good snapshot of current trends in the American legal system. In addition, it offers the views of those who are directly confronted with the problems of improper juror communications and research. Many of the responses provided by the Jury Survey respondents are highlighted throughout the Article.

Part I of the Article begins with a discussion of the Digital Age's influence on juror research and communications.[40] Here, the Article examines the traditional rationales for juror research.[41] The Article then discusses how the Digital Age has created new reasons for juror research while simultaneously affording jurors greater opportunities to conduct such research. This Section also examines how new technology has altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing why jurors violate court rules about discussing the case before deliberations or outside of the deliberation room.

Part II analyzes possible steps to limit the negative impact of new technology on juror research and communications. While no single solution exists for these problems,[42] this Part focuses on several reform measures that could address, and possibly reduce, the detrimental effects of the Digital Age on the legal process. The four remedies proposed by this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Part analyzes two sets of jury instructions to see how well they adhere to the

39. Forty-one individuals responded to the Jury Survey.

40. The Digital Age has also impacted attorneys who investigate jurors online. For information on that topic, see *infra* Part II.B; *see also* Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. 28 (2011), *available at* http://www.uclalawreview.org/wordpress/?p=2735.

41. For the purposes of this Article, "jury research" refers to any effort by a juror to discover information about the case beyond that which was presented at trial.

42. Question 7 of the Jury Survey provided a list of potential solutions and asked respondents to select the most effective. One respondent answered, "[t]here is no one best method . . . [a] combination is most effective," while another indicated that a combination of three distinct solutions was required. Jury Survey, *supra* note 36.

suggested changes proposed by this Article. This is followed by a draft model jury instruction.

I. PROBLEM AREAS

A. Research

Although improper juror communications have raised numerous concerns in the Digital Age,[43] the issue presently generating the greatest anxiety is juror research.[44] While the underlying concept is not new, the methods by which jurors conduct research are.[45] Since the late 1990s, jurors, rather than relying solely on the evidence presented at trial, have increasingly turned to the Internet to obtain information about the case on which they sit.[46]

Research by jurors is problematic because their verdict must be based on only the evidence offered in court.[47] Allowing jurors to decide a case based on outside information "violates a defendant's Sixth Amendment rights to an impartial jury, to confront witnesses against him, and to be present at all critical stages of his trial."[48] Unlike evidence presented in court, attorneys cannot cross-examine, question, or object to information discovered by jurors online. As the Third Circuit noted in *United States v. Resko*, "extra-record influences pose a substantial threat to the fairness of the criminal proceeding

43. *See* discussion *infra* Part I.B.

44. *See* Schwartz, *supra* note 12 (citing a trial consultant who suggests that "juror research is a more troublesome issue than sending Twitter messages or blogging").

45. One of the first reported cases of juror research is *Medler v. State* ex rel. *Dunn*, 26 Ind. 171, 172 (1866); *see also* Caleb Stevens, *Lure of the Internet Has Courts Worried About Its Influence on Jurors*, MINNEAPOLIS/ST. PAUL BUS. J. (May 10, 2009, 11:00 PM), http://www.bizjournals.com/twincities/stories/2009/05/11/focus3.html ("Since the inception of a trial by jury, jurors have had the temptation of researching cases outside the courtroom against judges' orders."). As a Jury Survey respondent indicated in answering a question regarding Internet research by jurors, "This is just another aspect of an old problem." Jury Survey, *supra* note 36.

46. *See* Grow, *supra* note 8.

47. *See* Turner v. Louisiana, 379 U.S. 466, 472–73 (1965) (" '[E]vidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

48. United States v. Dyal, No. 3:09-1169-CMC, 2010 WL 2854292, at *12 (D.S.C. July 19, 2010).

because the extraneous information completely evades the safeguards of the judicial process."[49]

This is not to say that jurors must refrain from relying on life experiences to interpret the evidence presented by the parties.[50] Rather, jurors are not to make a decision based on outside or extrinsic evidence[51] that lacks proper authentication.[52] For example, a juror in a recent murder trial in Rhode Island went online to look up the definitions of "manslaughter," "murder," and "self-defense."[53] The definitions discovered by the juror, however, were derived from California statutes and case law.[54] This juror's actions ultimately led the trial judge to declare a mistrial.[55]

The Digital Age, with its advancements in technology, has exacerbated the problem because, unlike traditional research, online research occurs before voir dire,[56] during trial,[57] and in the midst of deliberations.[58] Furthermore, online research, which generally does not attract the attention of others, can be accomplished almost anywhere. Jurors only need Internet access.[59] Some might think that online research is easier to detect than traditional research because the court can search a juror's computer or handheld device. But this presupposes that

49. United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993). Research also suggests that extrinsic information can greatly influence the decision-making of jurors. Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 LAW & HUM. BEHAV. 73, 86 (2002).

50. *See* Bibbins v. Dalsheim, 21 F.3d 13, 17 (2d Cir. 1994) ("[A juror's] observation concerning the life of this community is part of the fund of ordinary experience that jurors may bring to the jury room and may rely upon.").

51. *See* Brickman et al., *supra* note 2, at 289–90 ("Research has demonstrated that jurors' exposure to media coverage and other extrinsic information about a case can be highly influential to their decision-making.").

52. *See Dyal*, 2010 WL 2854292, at *12; Ken Strutin, *Electronic Communications During Jury Deliberations*, N.Y. L.J., May 19, 2009, at 5 ("The potential prejudice to the integrity of the process implicates basic fairness embodied in due process, right to a jury trial, confrontation and cross-examination.").

53. Talia Buford, *New Juror Policy Accounts for New Technology*, PROVIDENCE J. (May 17, 2009), http://www.projo.com/news/content/TWITTER_AND_THE_JURY_05-17-09_C7EA4AE_v24.3549604.html.

54. *Id.*

55. *Id.*

56. *See* Russo v. Takata Corp., 774 N.W.2d 441, 444–45 (S.D. 2009).

57. *See* People v. Carmichael, 891 N.Y.S.2d 574, 574 (App. Div. 2009).

58. *See* State v. Aguillar, 230 P.3d 358, 359 (Ariz. Ct. App. 2010).

59. *See* Commonwealth v. McCaster, 710 N.E.2d 605, 606–07 (Mass. App. Ct. 1999).

(1) the court knows to check those items,[60] (2) jurors would be amenable to such a practice, and (3) jurors did not access the Internet through public or non-personal means. To better understand and address the modern-day problem of online research by jurors, it is first necessary to take a step back and examine why jurors feel the need to conduct any research at all.

1. Traditional Reasons for Juror Research

Due to the nature of the adversarial system, limitations are placed on the information received by jurors. First, judges act as gatekeepers, controlling the flow of information to the jurors by limiting what evidence they may hear.[61] Second, prospective jurors with pre-existing knowledge of the facts in dispute, the parties, or witnesses are generally challenged and dismissed by the attorneys or the judge.[62] In choosing today's juries, "ignorance is a virtue and knowledge a vice."[63] This lack of information has led to increased juror curiosity and confusion. In addition, it has left some jurors feeling ill-equipped to determine a defendant's guilt or innocence.[64]

According to one legal commentator, "There are people who feel they can't serve justice if they don't find answers to certain questions."[65] These so-called "conscientious jurors" take their role as fact-finders very seriously and aspire to do a good job.[66]

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60. Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, CT. MANAGER, Summer 2009, at 42, 44 ("It is very difficult to frame intelligible questions for jurors if the questioner does not fully understand what he or she is asking about or, for that matter, the responses of individual jurors to those questions.").

61. *See* United States v. McKinney, 429 F.2d 1019, 1022–23 (5th Cir. 1970) ("To the greatest extent possible, all factual [material] must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime."); Brickman et al., *supra* note 2, at 288 ("In a sense, though, the very existence of the Internet is antithetical to the idea of a controlled flow of information.").

62. Gershman, *supra* note 32, at 349.

63. *Id.* Historically, however, this was not the case. For a discussion of how the Digital Age may resurrect the original notion of a jury in which impartiality only referred to the absence of conflict, not a complete lack of information about the parties, witnesses, or facts in dispute, see generally Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579 (2011).

64. *See infra* text accompanying note 74.

65. Schwartz, *supra* note 12.

66. *See* Bridget DiCosmo, *Judge Re-enforces Electronic Gadget Ban*, HERALD MAIL, Jan. 22, 2010, at A1 ("Often, the jurors who end up causing problems by

But they feel unprepared to render a verdict that in certain instances requires them to decide between life and death.[67] Jurors falling into this category often "want to 'solve' the case," and they think more information might help them.[68]

The Ohio case of Ryan Widmer demonstrates how far some jurors will go to ensure that they make the right decision.[69] In that case, the defendant was charged with drowning his newlywed wife, Sarah, in the couple's bathroom.[70] The defense claimed that Ryan found Sarah in the bathtub and immediately called 911 and started to perform CPR.[71] However, emergency medical technicians (EMTs), who arrived on the scene shortly after being called, claimed that Sarah's body was dry when they arrived, which supported the government's theory that Ryan drowned his wife and then staged the 911 call.[72] A key question in the case was whether a human body could dry between the time Ryan supposedly pulled his wife out of the bathtub and the time the EMTs arrived.[73] Several jurors were so concerned about this issue and possibly convicting an innocent man that, after deliberations ended on the first day, they went home, bathed, and then calculated the amount of time it took for their bodies to air-dry.[74]

Another cause of juror research is confusion, which stems from a variety of factors.[75] First, some of the more modern

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conducting their own research are the most conscientious ones, because they want all of the facts so they can make an informed decision about the case.").

67. *See* Janice Morse, *Long Road Ahead in Widmer Case*, CINCINNATI ENQUIRER (May 22, 2009), http://news.cincinnati.com/article/20090522/NEWS0107/905230364/Long-road-ahead-Widmer-case; *see also* Gershman, *supra* note 32, at 347.

68. *See* Jury Survey, *supra* note 36.

69. *See* Morse, *supra* note 67.

70. *Id.*

71. *See* Dennis Murphy, *The Mystery in the Master Bedroom*, MSNBC (Sept. 18, 2009) http://www.msnbc.msn.com/id/32860588/ns/dateline_nbc-crime_reports/t/mystery-master-bedroom.

72. *See id.*

73. Morse, *supra* note 67.

74. *Id.* The actions of the jurors resulted in a new trial for the defendant. His second trial ended in a hung jury, and his third trial ended in a conviction. Janice Morse, *Jury Finds Ryan Widmer Guilty of Murder*, CINCINNATI ENQUIRER (Feb. 15, 2011), http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20110215/NEWS010702/302150035/&template=artiphone.

75. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 553–54 (1997).

crimes that jurors must consider, such as violations of the Racketeer Influenced and Corrupt Organizations Act (RICO)[76] or securities fraud, go "well beyond the general knowledge of the layperson."[77] Thus, jurors become reliant on the attorneys or the judge to explain the elements and charges. Unfortunately, both attorneys and judges sometimes fail to provide adequate explanations.

Second, some jurors are unclear about words and phrases used at trial that often go undefined by the attorneys or the judge.[78] Jurors have been discovered researching medical or legal terms like "oppositional defiant disorder"[79] and "distribution."[80] In other instances, jurors have turned to the Internet to learn the definitions of uncommon words like "lividity."[81] The problem of juror confusion is compounded by the fact that many jurisdictions prevent jurors from discussing the case until deliberations and, even then, only with other jurors who may be equally as confused.[82]

Besides being overly conscientious and confused about the facts at trial, some jurors are just plain curious.[83] Like most people, they want to know why certain issues went unexamined and why specific witnesses went uncalled.[84] Furthermore, jurors are interested in learning about evidence objected to or deemed inadmissible.[85] As one Jury Survey respondent noted, "They want to know all the things they think we are keeping from them."[86]

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76. 18 U.S.C. §§ 1961–68 (2006).

77. *See* Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1189 (2008).

78. *See* Jerry Casey, *Juries Raise a Digital Ruckus*, OREGONIAN (Jan. 13, 2008), http://blog.oregonlive.com/washingtoncounty/2008/01/juries_raise_a_digital_ruckus.html.

79. Wardlaw v. State, 971 A.2d 331, 334 (Md. Ct. Spec. App. 2009).

80. United States v. Bristol-Mártir, 570 F.3d 29, 37 (1st Cir. 2009).

81. Del Quentin Wilber, *With Social Networking, Justice Not So Blind*, WASH. POST, Jan. 9, 2010, at C1.

82. *See infra* text accompanying notes 121–24.

83. *See, e.g.*, Jeffrey T. Frederick, *You, the Jury, and the Internet*, BRIEF, Winter 2010, at 12, 12 (quoting a juror who explained his misconduct by stating, "Well, I was curious.").

84. *See* Strutin, *supra* note 52 ("More powerful than any rule of courtroom conduct are human curiosity and the overwhelming need to share our experiences.").

85. *See* Susan J. Silvernail, *Internet Surfing Jurors*, ALA. ASS'N FOR JUST. J., Fall 2008, at 49, 49 ("Judge Vowell says he has observed a change in juror's [sic] attitudes about wanting more information about the cases.").

86. Jury Survey, *supra* note 36.

2. Modern-Day Reasons for Juror Research

In addition to the traditional grounds for juror research, the Digital Age has created new opportunities and reasons for jurors to seek information outside of the courtroom. First, in the Digital Age, Internet usage has become increasingly common and popular.[87] As a result, more people have grown accustomed to and reliant on it.[88] In fact, "going online" to find information has become almost instinctive, something people do without giving it much thought.[89] For many, the customary preparation for, or follow-up after, meeting a new person, either professionally or socially, is to research that person by "Googling" or "Facebooking" him or her.[90] This practice does not necessarily cease because someone is serving as a juror. When jurors initially see the judge,[91] parties,[92] attorneys,[93] and witnesses,[94] they want to know more about these individuals, and, to do this, they go online to find information.

Second, the Internet makes research by jurors much easier to accomplish. According to one state bar journal, "Jurors have

87. For current information on the number of individuals using the Internet, see *Internet Usage Statistics: The Internet Big Picture*, INTERNET WORLD STATS, http://internetworldstats.com/stats.htm (last updated Oct. 6, 2011) (estimating that 78.3% of the North American population uses the Internet); *see also* Michael K. Kiernan & Samuel E. Cooley, Juror Misconduct in the Age of Social Networking 2 (July 28, 2011) (unpublished presentation), *available at* http://www.thefederation.org/documents/18.Juror%20Misconduct%20and%20Social%20Media-Kiernan.pdf.

88. *See* Nora Lockwood Tooher, *Tackling Juror Internet Use*, LAWS. USA, Mar. 24, 2009 ("There's a whole generation of people for whom twittering is as natural as breathing.") (quoting litigation consultant Ken Broda-Bahm).

89. Michelle Lore, *Facing Down Facebook: Social Media Use and Juries*, MINN. LAW. (June 14, 2010), http://minnlawyer.com/2010/06/14/facing-down-facebook-social-media-use-and-juries ("I emphasize [that jurors should not investigate cases] because I think it's almost becoming natural to [go to websites to] satisfy your curiosity and get answers.") (second alteration in original) (quoting a judge); *see also* Ellen Lee, *Pew Survey: Half of Us Have Looked Up People We Know on Internet*, S.F. CHRON., Dec. 17, 2007, at E1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/17/BUKETSUFG.DTL ("About half of the online adult population has looked up themselves or someone else online.").

90. *See* Brickman et al., *supra* note 2, at 288 ("[M]any people automatically search the Internet when confronted with a new name, subject, idea or other stimulus.").

91. Email Interview with Jake Durling (Nov. 10, 2011).

92. *See* Russo v. Takata Corp., 774 N.W.2d 441 (S.D. 2009).

93. *See* Henry Gottlieb, *Should You Design Your Firm's Web Site with Jurors in Mind?*, N.J. L.J., Jan. 2, 2007, at 29.

94. *Id.*

the capability instantaneously to . . . look up facts and information during breaks, at home, or even in the jury room."[95] If a juror has a question about an issue that arose in court or wants to know more about where the alleged crime took place, she does not have to physically go to the library or crime scene.[96] Instead, she merely needs to access the Internet which, compared to other options, is quicker, less onerous, and less likely to be noticed.[97]

The ease of obtaining information from the Internet has also led jurors to more readily seek out facts on their own.[98] This in turn has made jurors less deferential to the person offering information in court, whether she is the judge, attorney, or witness.[99] With the Internet, even a layperson can be an expert—at least for the moment.[100]

Another reason for online juror research is the sheer number of news stories about trials, and the longer shelf-life of those stories. Today, even routine cases are now reported or

95. Artigliere et al., *supra* note 38, at 9; *see also* Eric Sinrod, *Jurors: Keep Your E-fingers to Yourselves*, TECHNOLOGIST (Sept. 15, 2009, 9:29 AM), http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html ("It is reasonable to expect that the natural curiosity of some jurors and the ease and habit of Internet research might cause them to let their fingers do their walking into finding out about their cases outside of the courtroom.").

96. Erika Patrick, Comment, *Protecting the Defendant's Right to a Fair Trial in the Information Age*, 15 CAP. DEF. J. 71, 87 (2002) ("Because the Internet is such a vast resource, the potential exists for jurors to do independent research on matters of law with more ease and stealth than going to the local law library would require.").

97. *See* Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360 (Oct. 23, 2009, 4:18 PM), http://www.law360.com/topnews/articles/128603 (paid subscription) ("[T]he sheer wealth of data available online makes it easier for [jurors] to look up arcane terms or dig up dirt on the parties.").

98. *See* John G. Browning, *When All That Twitters Is Not Told: Dangers of the Online Juror (Part 3)*, LITIG. COUNS. AM. (Aug. 2009), http://www.trialcounsel.org/082909/BROWNING.htm ("As [an Oregon district attorney] puts it, the ease of the Internet and handheld technology 'almost invite people to do extrinsic research . . . .' ").

99. Renee Loth, Op-Ed., *Mistrial by Google*, BOS. GLOBE, Nov. 6, 2009, at A15, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/06/mistrial_by_google.

100. *See* Rebecca Porter, *Texts and 'Tweets' by Jurors, Lawyers Pose Courtroom Conundrums,* TRIAL, Aug. 2009, at 12, 14 ("Some have a compulsion to know and be viewed as an expert. In the privacy of their own homes at 2 a.m., they do whatever they want.") (quoting jury consultant Amy Singer); *see also* Strutin, *supra* note 52 ("Our Internet culture has enlarged the knowledge base of anyone with a smartphone.").

discussed on the Internet.[101] Also, unlike in the past, information on the Internet about the trial or parties does not necessarily go away just because the case is out of the news cycle of the traditional media. This was noted by several legal commentators who wrote that a "year-old article in an out-of-state publication will show up in an Internet search just as easily as a current headline from the daily local paper."[102]

Finally, some jurors unwittingly conduct research because the jury instructions are either unclear or outdated. For example, in *Russo v. Takata Corp.*, a juror named Flynn received a jury summons that stated, "Do not *seek out evidence* regarding this case and do not discuss the case or this Questionnaire with anyone."[103] Flynn "did not recognize Takata by name or product line and wondered 'what they did.' "[104] Flynn also wanted to know if Takata had been involved in any previous lawsuits.[105] Thus, he went online to investigate the company.[106]

Flynn's online research never came out during voir dire because the attorneys handling the case did not directly raise the topic with Flynn.[107] Later, however, during deliberations, Flynn told another juror that during his Internet research of Takata he did not find any lawsuits against the company.[108] Shortly after reaching a verdict in favor of the defendants, Flynn's actions were uncovered, and the trial judge granted the plaintiff's motion for a mistrial based on juror misconduct.[109] The defendants appealed to the South Dakota Supreme Court, which affirmed the actions of the trial judge and also stated that "[i]t may well be that Flynn did not realize that performing a Google Search on the names of the Defendants Takata and TK Holdings constituted 'seek[ing] out evidence.' "[110]

101. Brickman et al., *supra* note 2, at 292 ("Virtually every trial is newsworthy to someone and can therefore end up on the Internet where jurors can easily find it.").
102. *Id.*
103. Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009) (emphasis added).
104. *Id.*
105. *See id.* at 446.
106. *Id.*
107. *See id.* at 445.
108. *Id.* at 446.
109. *Id.* at 447.
110. *Id.* at 450 n.* (second alteration in original).

Unfortunately, the negative impact of the Digital Age on jurors is not limited to online juror research. Juror communications, which will be discussed in greater detail below, has also become a major area of concern in the Digital Age.[111]

B. Communications

For the purposes of this Article, juror communications occur either among jurors themselves or with outside third parties. Generally speaking, communications by a juror are not an issue if they are unrelated to the trial on which the juror sits.[112] But if the communications relate to the trial, problems can arise. This is because most jurisdictions forbid jurors from discussing trial evidence with other jurors prior to deliberations and with non-jurors before reaching a verdict.[113] Yet, as with the prohibition on juror research, the restrictions on juror communications are not always followed.

1. Juror-to-Juror Communications

Traditionally, juror communications with third parties have raised more concerns than juror communications with other jurors.[114] In fact, some reformers want to allow jurors to discuss the case among themselves prior to the commencement of deliberations.[115] Currently, at least four states allow jurors in civil proceedings to discuss the case before the submission of

111. *See* DiCosmo, *supra* note 66 ("Society's increasing dependence on cell phones, smart phones and social networking sites such as Facebook and Twitter to stay in contact can pose a problem for court officials when it comes to keeping jurors from communicating during a case.").

112. For a twist on this general rule, see Pablo Lopez, *Juror E-mails Muddy Trial*, MCCLATCHY (Apr. 16, 2010), http://www.mcclatchydc.com/2010/04/16/92318/juror-e-mails-muddy-trial.html. This article discusses a California judge who, upon being selected to serve as a juror, sent emails about his experience to his fellow jurists. "[L]egal observers say it's not clear that [Judge] Oppliger did anything wrong. Jurors are allowed to tell others they are assigned to a trial. But the judge should have known better than to do something that could raise a possible objection, they say." *Id.*

113. David A. Anderson, *Let Jurors Talk: Authorizing Pre-deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92, 94–95 (2002).

114. Gershman, *supra* note 32, at 341 ("External influences completely evade the safeguards of the judicial process, whereas internal violations do not raise the fear that the jury based its decision on reasons other than the trial evidence.").

115. *See* Anderson, *supra* note 113, at 123–24.

all evidence.[116] Other jurisdictions are considering or experimenting with the idea for criminal trials.[117]

Advocates of pre-deliberation discussions argue that they improve juror comprehension and focus the jury once deliberations commence.[118] In addition, these proponents believe that it is naïve and unrealistic to think that jurors will refrain from discussing the trial with anyone until deliberations.[119] "[T]he urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of juror."[120] Thus, to those supporting juror pre-deliberation discussions, it is better that jurors talk with fellow jurors as opposed to family members or other improper third parties.

Nevertheless, most jurisdictions prohibit jurors from talking about the case with other jurors prior to deliberations.[121] This rule is in place in order to (1) prevent premature judgments, (2) increase flexibility during deliberations, (3) ensure quality and broad deliberations, (4) decrease juror stress, and (5) maintain open-mindedness.[122] A strong belief exists, especially among the defense bar in both civil and criminal matters, that allowing jurors to discuss the case prior to deliberations puts defendants at a decided disadvantage, as they have yet to present their evidence.[123] Some also fear that discussions prior to deliberations might

116. These states include Arizona, Indiana, Michigan, and North Dakota. *See* Jessica L. Bregant, Note, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. ILL. L. REV. 1213, 1215 & n.19; Joe Swickard, *Michigan Jurors to Get More Leeway Under New Rules*, DETROIT FREE PRESS, June 29, 2011.

117. William J. Caprathe, *A Jury Reform Pilot Project: The Michigan Experience*, JUDGES' J., Winter 2009, at 27, 30–31.

118. THE ARIZ. SUPREME COURT COMM. ON THE MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12—PART TWO 8–9 (1998) [hereinafter JURORS: THE POWER OF 12], *available at* http://www.azcourts.gov/Portals/15/Jury/Jury12.pdf.

119. *Id.*

120. Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 408 (1994) (citing jury expert Hans Zeisel).

121. For a discussion of the constitutional implications of banning juror speech, see *id.* at 409–14.

122. Anderson, *supra* note 113, at 95.

123. *See* Danielle Salisbury, *Lawyers, Judges Doubt Jury Reform Will Fundamentally Change the Way Courts Operate*, MLIVE.COM (Aug 13. 2011), http://www.mlive.com/news/jackson/index.ssf/2011/08/lawyers_judges_doubt_jury_refo.html.

occur outside the jury room and without the presence of all twelve jurors.[124]

Historically, the issue of jurors communicating with one another before deliberations received little attention because most courts viewed it as low-level or minor misconduct.[125] Although jurors in the past might talk about the case with each other while leaving the courthouse or discuss it during breaks in the trial, these discussions were uncommon occurrences and not considered grave breaches of a juror's duty.[126] Thus, for the most part, courts were hesitant to declare a mistrial based solely on jurors discussing the case before deliberations.[127] This was especially true if the juror-to-juror communications did not occur in the presence of third parties.[128]

The difference today is the impact of technology. Jurors can now communicate with each other via email and social networking sites. For example, in the corruption trial of former Baltimore Mayor Sheila Dixon, several jurors kept in contact during and after the trial via Facebook despite admonitions by the judge not to do so.[129]

These new forms of juror-to-juror communications greatly increase the possibility that the interactions and discussions of jurors will occur outside of the jury room and be made available to third parties. For example, if conducted in an online forum, these communications can provide the general public—including the parties trying the case—access to the inner workings of the jury room and privileged information, such as informal vote counts or details of closed-door deliberations. In the Dixon case, the defense attorneys were able to read the Facebook posts of the jurors.[130] This jeopardized not only jury

124. *See* Anderson, *supra* note 113, at 105–06.

125. NANCY S. MARDER, THE JURY PROCESS 114 (2005) ("Most courts turn a blind eye to the fact that jurors do engage in predeliberation discussions.").

126. *Id.*

127. *Id.*

128. *See* B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996) (discussing the Supreme Court's concern about "division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury").

129. *See Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBAL-TV (Jan. 4, 2010, 8:34 AM), http://www.wbaltv.com/r/22117438/detail.html; *Dixon Jurors Must Testify About Facebook*, UNITED PRESS INT'L (Dec. 30, 2009, 2:37 PM), http://www.upi.com/Top_News/US/2009/12/30/Dixon-jurors-must-testify-about-Facebook/UPI-75451262201840.

130. Brendan Kearney, *'Friends on Jury,'* DAILY REC., Dec. 3, 2009, at A1.

deliberations but also the integrity of the legal system itself.[131] These new methods of communication also demonstrate how juror-to-juror communications can easily and unintentionally become communications to third parties—a much more problematic issue.

2. Juror-to-Non-juror Communications

While strong arguments exist both for and against allowing jurors to discuss the trial prior to deliberations with each other,[132] few, if any, would suggest that jurors be allowed to communicate with third parties about the trial prior to verdict. Yet, despite this uniform disapproval, this communication still happens. Of late, the method of juror-to-third-party contact receiving the greatest amount of attention is online communication.[133]

For a variety of reasons, courts want to limit juror communications to third parties until a verdict is reached. First, there is concern about maintaining the confidentiality of jury deliberations.[134] Having jurors post information online about ongoing deliberations or other jurors would hinder the traditional method of juror decision-making.[135] For example, some jurors may not fully participate or might hold back their

131. *See* Winkler, *supra* note 25 ("One of the cases . . . involving Twitter demonstrates the potential for stock price manipulation if jurors tweet that a company is losing a big lawsuit. It also facilitates jury manipulation, if lawyers or other interested parties tweet back or learn how individual jurors are leaning.").

132. *See* Anderson, *supra* note 113, at 121–23.

133. *See, e.g.*, Douglass L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, JURY EXPERT, Nov. 2009, at 14; Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct: What Happens Behind Closed Doors*, 62 ALA. L. REV. 623, 638 (2011) ("The fastest developing area in the realm of juror misconduct involves juror use of e-mail, social networking sites such as Facebook, and micro-blogging sites such as Twitter during trial.").

134. *See* United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997); Strauss, *supra* note 120, at 403 ("This frank and open exchange by jurors, moreover, is critical to the effectiveness of the decisionmaking process."); *see also* John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929) ("The jury, and the secrecy of the jury room, are the indispensible elements in popular justice.").

135. *See* Clark v. United States, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

true feelings during deliberations if they know that their views will end up on the Internet.[136]

Second, juror communications to third parties undermine the notions of due process and a fair trial by providing attorneys with "inside information" into juror decision-making. Consider this real-life scenario involving a juror in Michigan. At the conclusion of the first day of a two-day criminal trial, a sitting juror posted the following on her Facebook account: "[A]ctually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY. :P."[137] The Facebook post was discovered by defense counsel's son, who was running Internet searches on the jurors.[138] The defense attorney reported the juror, who was removed prior to the start of the second day of trial.[139]

However, it is not difficult to envision a different outcome had the prosecutor discovered the information. Also, a different defense attorney may have taken an alternative approach to this problem. Some attorneys might wait for an unfavorable verdict to reveal the Facebook post.[140] Other attorneys might not report the Facebook post at all and instead approach the prosecutor about a mid-trial plea deal or use the information to revamp their trial strategy.[141] As will be discussed in Part II,

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136. *See* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889–90 (1983) ("Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.") (footnotes omitted).

137. Jameson Cook, *Facebook Post Is Trouble for Juror*, MACOMB DAILY (Aug. 28, 2010), http://macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt?viewmode=fullstory; *see also* Associated Press, *Juror Who Blurted out Verdict on Facebook Fined $250, Ordered to Write Essay*, CLEVELAND.COM (Sept. 2, 2010), http://www.cleveland.com/nation/index.ssf/2010/09/juror_who_blurted_out_verdict.html.

138. *Id.*

139. *Id.*

140. Correy Stephenson, *Should Lawyers Monitor Jurors Online?*, LEGALNEWS.COM (Dec. 27, 2010), http://www.legalnews.com/macomb/1004089 (noting that a lawyer "expressed concern that some attorneys might fail to disclose information they learn about a juror—keeping it in 'their back pocket' in case of an unfavorable verdict—and then use the information to seek a new trial").

141. Richard L. Moskitis, Note, *The Constitutional Need for Discovery of Prevoir Dire Juror Studies*, 49 S. CAL. L. REV. 597, 626 (1976) ("When both the prosecution and the defense can resist discovery of juror information, it is possible

information about jurors is rarely subject to the rules of discovery, and attorneys have a very limited ethical duty to report it to the court.

The final concern with juror-to-non-juror communication is that the juror, by communicating with an outside party about the trial, increases the likelihood that the third party will influence the juror's views.[142] This is because most communications involve an exchange of words or ideas. This concept is reflected in *People v. Jamison*, where the court explained why communications between a juror and a third party are restricted: "[T]he real evil the Court's instruction not to discuss the case was designed to avoid . . . [was] the introduction of an outside influence into the deliberative process, either through information about the case or another person's agreement or disagreement with the juror's own statements . . . ."[143] Juror online communication to a third party, however, is somewhat different in that, depending on how it occurs, the juror may or may not receive feedback. For example, a Facebook post or a tweet on Twitter does not always garner a response.

To date, the United States Supreme Court has not addressed the issue of individuals making online comments while serving as jurors. However, several state supreme courts and lower federal courts have taken up the topic. One of the first to do so was the Supreme Judicial Court of Massachusetts in *Commonwealth v. Guisti*. In *Guisti*, the defendant was convicted of several serious sex-related crimes.[144] During the defendant's trial, one of the jurors sent an email to a 900-person LISTSERV and received at least two responses from individuals on the LISTSERV.[145] The juror's email read: "[S]tuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and

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for members of the community to view the result of the trial as dependent upon which side enjoyed the advantage of juror information rather than upon impartial jury deliberations . . . .)".

142. *See* United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) ("Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence.").

143. People v. Jamison, No. 8042/06, 2009 WL 2568740, at *5 (N.Y. Sup. Ct. Aug. 18, 2009).

144. Commonwealth v. Guisti, 747 N.E.2d 673, 675 (Mass. 2001).

145. *Id.* at 678.

getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!"[146] Shortly after the verdict, defense counsel learned of the email and filed a motion for post-verdict voir dire of the juror in question.[147] The trial court denied this motion, and defense counsel appealed, claiming that the defendant's Sixth Amendment right to a fair trial had been violated.[148]

In reviewing the defendant's appeal, the Massachusetts Supreme Court initially remanded the case to the lower court.[149] However, it did not do so because of the email, which the court found to be "improper" and in violation of "the judge's order not to communicate about the case."[150] Rather, the court remanded the case because of the responses the juror had received from those on the LISTSERV.[151] The Supreme Judicial Court wanted the trial court to determine whether these responses constituted external influences.[152] Upon remand and voir dire of the juror, the trial court ultimately determined that the responses from the LISTSERV were not improper external influences.[153]

Goupil v. Cattell was another case that addressed the issue of improper online communications by a juror.[154] Like *Guisti*, *Goupil* involved a defendant convicted of a serious sex-related crime.[155] However, unlike *Guisti,* the improper method of juror communication in *Goupil* was a blog post, not an email.[156] Another distinguishing feature of *Goupil* is that the trial judge conducted a post-trial voir dire shortly after becoming aware of the juror's blog posts rather than waiting until he was directed to do so by the appellate court.[157]

In *Goupil*, the juror's first questionable post, made prior to voir dire, was as follows: "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I

146. *Id.* (second and third alterations in original).
147. *Id.*
148. *Id.* at 678–79.
149. *Id.* at 681.
150. *Id.* at 680.
151. *Id.*
152. *See* Commonwealth v. Guisti, 867 N.E.2d 740, 742 (Mass. 2007).
153. *Id.*
154. Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).
155. *Id.* at *1.
156. *Id.*
157. *Id.* at *3.

get to listen to the local riff-raff try and convince me of their innocence."[158] In another post, made after voir dire but prior to the start of trial, the juror, who happened to be the foreman, wrote, "After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc."[159]

The defendant in *Goupil* argued on appeal that the juror's blog constituted prejudicial extrinsic communication with a third party and that the juror was personally biased against the defendant.[160] In upholding the defendant's conviction, the federal court noted the state trial court's extensive post-trial voir dire.[161] During this voir dire, the trial court determined that no other juror read the blog or was even aware of its existence.[162] The trial court also found that the blog posts did not discuss the defendant's case specifically and that the juror did not demonstrate any pre-trial bias.[163] The court also analogized the blog to "a personal journal or diary, albeit one that the author publishes to the Web and permits others to read."[164] The court stated that the defendant "surely would not claim that the diary constitutes an 'extraneous communication' with third parties of the sort that gives rise to a presumption of prejudice."[165]

As these cases illustrate, courts are less likely to disturb the ultimate verdict because of a juror's online comments absent the presence of one of the following factors: (1) the juror discussed details of the trial, (2) the juror demonstrated a pre-trial bias, (3) other jurors saw the information, (4) the posts revealed that the juror was considering facts not admitted into

158. *Id.* at *2.
159. *Id.*
160. *Id.* at *5–6.
161. *Id.* at *8.
162. *Id.* at *7.
163. *Id.* at *8. The court noted:

> The fact that Juror 2 might have come to the criminal justice process with preconceived notions about the "local riff-raff" and even a mistaken understanding of which party bears the burden of proof in a criminal trial is, in this case, of little moment. . . . [T]he [trial] court reasonably and sustainably concluded that: (1) Juror 2's comments did not relate to [the defendant's] trial; [and] (2) Juror 2 understood the presumption of innocence . . . .

Id. at *10.
164. *Id.* at *7.
165. *Id.*

evidence, or (5) a third party contacted the juror about her comments.[166]

3. Reasons for Improper Juror Communications

In some respects, the reasons for improper juror communications and research are similar. Like juror research, some juror communications occur because of a misunderstanding of the judge's instructions.[167] In *State v. Dellinger*, a West Virginia juror never told the trial judge that she interacted with the defendant via MySpace despite being asked during voir dire whether she knew the defendant.[168] When the defendant's conviction was later overturned because of the juror's lack of candor, the court asked the juror why she did not reveal that she knew the defendant and had interacted with him on MySpace.[169] According to the juror:

> I just didn't feel like I really knew him. I didn't know him personally. I've never, never talked to him. And I just felt like, you know, when [the trial judge] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. . . . I knew in my heart that I didn't know him. . . . [M]aybe I should have at least said that, you know, that he was on MySpace, which really isn't that important, I didn't think.[170]

Many jurors also do not consider or realize that texting, emailing, tweeting, and blogging are prohibited forms of

166. Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings*, LAW TECH. NEWS (May 13, 2009), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430647333&slreturn=1&hbxlogin=1 (paid subscription) ("When jurors blog about ongoing trials, there are several key considerations: Did the jurors discuss details of the trial? Did the jurors display a pretrial bias for or against one party? Did fellow sitting jurors read the blog or electronic communication during the trial and thus become unduly influenced?").

167. Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, ARIZ. ATT'Y, Feb. 2010, at 38, 39 ("It seems, however, that many jurors do not see blogging, tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions.").

168. State v. Dellinger, 696 S.E.2d 38, 40 (W. Va. 2010).

169. *Id.* at 41.

170. *Id.*

communication.[171] Noted juror expert Paula Hannaford-Agor points out that, "For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication."[172] Not surprisingly, then, jurors continue to communicate with other jurors (prior to deliberations) and with outside parties (prior to the verdict) despite admonitions from judges.[173]

Also, as with online research, some jurors violate the rules on prohibited communications because they have grown attached to the technological advancements brought by the Digital Age.[174] For these jurors, going any extended period of time without communicating via a social media website, text, tweet, or blog is a challenge.[175] This desire for constant contact is so strong that it can almost be categorized as an "addiction"—one that they cannot give up even when called to serve on a jury.[176] Jurors falling into this category are more likely to discuss the case with others.[177]

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171. Allison, *supra* note 97 ("It may seem obvious that you shouldn't broadcast your juror experience live on Twitter, but even sophisticated people need reminders.").

172. Hannaford-Agor, *supra* note 60, at 43.

173. Even some lawyers and judges have difficulty understanding the concept. For example, one lawyer-juror thought that he could blog about a case he was sitting on: "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial." *Attorney Discipline*, CAL. B.J. (Aug. 2009), http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=2009.

174. *See* Jerold S. Solovy & Robert L. Byman, *Confronting the Fact of Juror Research*, LAW TECH. NEWS (Nov. 30, 2009), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435852040 (paid subscription) ("[W]e cell phone abusers, we internet junkies, we believe it is our God-given right to be connected.").

175. *See* Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communications Devices*, FINDLAW (Aug. 11, 2009), http://writ.news.findlaw.com/ramasastry/20090811.html ("Citizens have become increasingly reliant on such devices and applications. Indeed, many use them incessantly, as a lifeline to their friends, relatives, and colleagues—especially when they are at meetings, conferences, or otherwise away from their normal office or home routines.").

176. *See* McGee, *supra* note 28, at 310; Susan Macpherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, Nov. 2010, at 40, 42 ("[A]ddiction to Internet access is not limited to young jurors.").

177. Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621, 639–40 (2011) ("To some jurors, the cell phone, iPad, notebook, or other digital device is a lifeline to which they feel addicted. These jurors require constant communication with others on events and matters from the mundane to the critical."); *see also* Cassandra Jowett, *'Google Mistrials' Derail Courts; Critics Say System Ignores Impact of New Technology*, NAT'L POST, Mar. 23, 2009, at A1 ("The

Finally, in other respects, the reasons behind improper juror communications are completely different from online research. For example, some, like the jury foreman in *Goupil*, feel the need to constantly chronicle their daily activities to the general public.[178] This desire by the so-called "Tell-All Generation" to put their lives on display to the world is not shed just because they are called to serve on juries.[179] Rather, this change in daily routine may actually increase the appeal to reveal[180] because jury duty "can in its own strange way be an escape from the usual rhythms of city life."[181]

Regardless of whether the rationale behind improper juror communications is similar or dissimilar to juror research, one thing is certain: The Digital Age has had a significant influence on juror behavior. With respect to juror research, the impact has been almost entirely negative. Save for the opportunity to become more like grand jurors,[182] few positive attributes arise from providing jurors with better methods by which to conduct research. Arguably, even the staunchest advocates of the so-called "Active Jury"[183] would deem research by jurors detrimental to the legal process.

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modern addiction to instant communication appears to have given rise to the 'Google mistrial'—the use of new technology to inadvertently skew the scales of justice.").

178. Artigliere et al., *supra* note 38, at 9 ("Some jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers.").

179. *See* Laura M. Holson, *Tell-All Generation Learns to Keep Things Offline*, N.Y. TIMES, May 8, 2010, at A1, *available at* http://www.nytimes.com/2010/05/09/fashion/09privacy.html (arguing that, according to conventional wisdom, "everyone under 30 is comfortable revealing every facet of their lives online, from their favorite pizza to most frequent sexual partners").

180. Michael Bromby, The Temptation to Tweet—Jurors' Activities Outside the Trial (Mar. 26, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (describing one of the few studies to track Twitter comments by jurors and prospective jurors). For examples of celebrities tweeting about their jury experiences, see *Live from the Jury Box, It's Steve Martin!*, ZIMBIO (Dec. 22, 2010, 12:53 PM), http://www.zimbio.com/Steve+Martin/articles/1StTKdTeaji/Live+jury+box+Steve+Martin, and Debra Cassens Weiss, *Media Atwitter over Al Roker's Twitter Photos from Jury Duty Wait*, A.B.A. J. (May 29, 2009, 9:08 AM), http://www.abajournal.com/news/article/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait.

181. Ariel Kaminer, *The Torturous Trials of the Idle Juror*, N. Y. TIMES, Oct. 1, 2010, at MB1, *available at* http://www.nytimes.com/2010/10/03/nyregion/03critic.html.

182. *See generally* Hoffmeister, *supra* note 77.

183. Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 219–20 (1990). Active juries are generally

In contrast, there is a growing trend in the United States to allow jurors, prior to the close of trial, to discuss among themselves evidence introduced in court.[184] For those who support juror-to-juror communications prior to deliberations, the Digital Age—with its smart phones, blogs, and social media websites—is a boon because it facilitates this practice. As for jurors discussing the case with third parties prior to the verdict, little can be said in support of this activity. Similar to juror research, it should not occur, and the technological advancements that support this practice are a detriment to the legal system.

The next portion of this Article, Part II, will discuss four possible remedies to address the problems raised in Part I. The proposed solutions are as follows: (1) imposing penalties on jurors, (2) investigating jurors, (3) allowing juror questions, and (4) improving jury instructions. These remedies take various approaches in regulating juror behavior. The first two rely on punishment and oversight, while the last two use empowerment and education.[185]

II. POSSIBLE SOLUTIONS

A. Imposing Penalties

The first remedy analyzed in this Article is juror penalties, which can take various forms that range from fines[186] to public

described as those that are more engaged in the trial process and allowed to ask questions, take notes, and bring the instructions or transcripts back to the jury room. Jannessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1011–12 (1996).

184. *See* Anderson, *supra* note 113, at 92.

185. *See* Hannaford-Agor, *supra* note 60, at 43 ("Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.").

186. *See, e.g.*, Andria Simmons, *Georgia Courts to Bar Jurors from Internet*, ATLANTA J.-CONST. (Mar. 30, 2010, 6:54 PM), http://www.ajc.com/news/georgia-courts-to-bar-420308.html. Also, if fines are indeed used, the court should consider imposing *day fines*, which "are based on an elementary concept: 'punishment by a fine that should be proportionate to the seriousness of the offense and should have roughly similar impact (in terms of economic sting) on persons with differing financial resources who are convicted of the same offense.' " John W. Clark et al., *Social Networking and the Contemporary Juror*, 47 CRIM. L. BULL. 83, 91–92 (2011) (quoting BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 1 (1996), *available at* https://www.ncjrs.gov/pdffiles/156242.pdf).

embarrassment[187] to sequestration.[188] The common theme with all penalties is that once imposed, they make citizens less inclined to want to serve as jurors.[189] The average individual views jury duty as a burden that pulls so-called "citizen volunteers" away from their jobs, families, and friends to perform a sometimes stressful, and other times mundane, civic duty for which they receive minimal pay, if any at all.[190] In fact, it is quite common for individuals to think of excuses, real or imagined, to get out of serving jury duty.[191] Once jurors realize that, in addition to the possibility of sequestration, they run the risk of being penalized, the incentive to avoid jury duty will only increase.[192] Therefore, penalties should be a last resort in preventing juror misconduct.

1. Contempt

Contempt is one of the more common penalties for jurors who violate court rules.[193] Once imposed, it allows the court to fine the juror.[194] To date, at least one state (California) has increased its civil and criminal contempt penalties to address juror misconduct in the Digital Age. The recently enacted California law allows "punishment of jurors who electronically discuss confidential legal proceedings."[195] According to the

187. *See, e.g.*, Ed White, *Judge Punishes Michigan Juror for Facebook Post*, YAHOO! NEWS (Sept. 2, 2010), http://news.yahoo.com/judge-punishes-michigan-juror-facebook-post.html.

188. *See infra* Part II.A.3.

189. *See* Brian Grow, *Juror Could Face Charges for Online Research*, REUTERS (Jan. 19, 2011, 1:11 PM), http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KI20110119 ("But penalties could also increase resistance to serving on juries. 'It's a Catch-22 for judges,' said Thaddeus Hoffmeister . . . .").

190. According to one Jury Survey respondent, "Because jurors are citizen volunteers, the least invasive approach should be used until proven ineffective." Jury Survey, *supra* note 36.

191. King, *supra* note 32, at 2704.

192. David P. Goldstein, Note, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 601 (2011) ("With the knowledge that they could face fines or even prosecution for something as innocuous as updating a Facebook status or sending Twitter messages, people may go even further out of their way to avoid jury duty.").

193. "Contempt" refers to "[c]onduct that defies the authority or dignity of a court or legislature." BLACK'S LAW DICTIONARY 360 (9th ed. 2009).

194. *See id.*

195. Cheryl Miller, *New Bill Targets Web-Surfing Jurors*, RECORDER, Feb. 22, 2010, at 1.

legislative director of the assemblyman who introduced the initial bill, "It's really just the law catching up with technology when it comes to the sanctity of the jury room."[196]

Prior to exercising its contempt authority, a court should first determine why a juror violated the court's rules.[197] Jurors violate court rules for a variety of reasons.[198] Some do it intentionally; others do it unintentionally. Some do it for personal gain; others do it in a misguided effort to better fulfill their duties as jurors. To discover the juror's motivation for violating the court's instructions, the trial judge should directly ask the juror. In most instances, the juror will be quite candid with the court.[199] Many jurors openly state that they disregarded the court's rules because of curiosity[200] or a misinterpretation of the judge's instructions.[201] In those cases where the juror is not forthcoming or the court questions the juror's credibility, the court should examine the context of the juror's actions.

After determining the reasons behind the juror's conduct, the court should then decide whether a contempt sanction will prevent similar behavior in the future. For example, holding a juror in contempt for misinterpreting jury instructions may not curb similar behavior in the future. However, if the juror did fully comprehend the jury instructions but disregarded them anyway because she wanted to be the first to reveal information about the case on her blog, the court may want to consider sanctions. Finally, the court should weigh the long-term impact of penalties on the legal system—one that needs citizen participation to effectively operate.

196. *Id.*; *see also* Eric P. Robinson, *New California Law Prohibits Jurors' Social Media Use*, CITIZEN MEDIA L. PROJECT (Sept. 15, 2011), http://www.citmedialaw.org/blog/2011/new-california-law-prohibits-jurors-social-media-use.

197. For a good discussion of when to hold a juror in contempt for violating the court's prohibitions against conducting research, see Superior Court of N.J., *In the Matter of Lawrence Toppin*, LAW OFF. DONALD D. VANARELLI (Oct. 11, 2011), http://www.dvanarelli.com/blog/wp-content/uploads/2011/10/Matter-of-Lawrence-Toppin.pdf.

198. *See supra* Parts I.A.1–2, I.B.2.

199. *See supra* Part I.A.

200. *See* Frederick, *supra* note 83 and accompanying text.

201. *See, e.g.*, Russo v. Takata Corp., 774 N.W.2d 441, 450 n.* (S.D. 2009).

2. The "Luddite Solution"[202]

Besides contempt proceedings, the court may also penalize jurors by depriving them of the tools they need to conduct research or communicate with third parties. At present, a number of jurisdictions across the country restrict juror access to cell phones and the Internet.[203] This so-called Luddite Solution, which was noted by several Jury Survey respondents,[204] can take a variety of forms. Some courts do not allow jurors to enter the courthouse with any electronic communication devices.[205] Other courts impose restrictions only during deliberations.[206]

The latter policy appears to make more sense than the former for two reasons. First, depriving jurors of their electronic communication devices for an entire day can constitute a significant hardship and make jurors feel as though they are being controlled.[207] Second, it creates a logistical problem for the court, which becomes responsible for ensuring that jurors have alternative forms of communication and can be reached by family members, friends, and employers. Both policies, however, lose effectiveness with trials lasting beyond one day. This is because jurors can simply wait until they get home to violate the judge's instructions.[208]

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202. "Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool." The Honorable Dennis M. Sweeney, Circuit Court Judge (Retired), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials—Lessons Learned from the Dixon Trial 3 (Apr. 29, 2010) (transcript available at http://juries.typepad.com/files/judge-sweeney.doc).

203. *See, e.g.*, Jury Survey, *supra* note 36 ("In the CD of Illinois jurors are not allowed to bring cell phones into the courtroom."; "We take up their cell phones at the door."). *See generally* Eric P. Robinson, *Jury Instructions for the Modern Era: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J., 307 (2011).

204. *See* Jury Survey, *supra* note 36.

205. *Id.*

206. *See id.* ("I require them to surrender cell phones and other such devices when they retire to deliberate.").

207. Goldstein, *supra* note 192, at 602 n.108.

208. Allison, *supra* note 97 ("Courts can also ban mobile devices from the courtroom—some already do—though there could be some backlash from jurors accustomed to being in constant communication with family and friends. And that still doesn't keep them from doing research on Google or tweeting when they get home.").

Compared to the traditional methods used to prevent juror misconduct, the Luddite Solution appears to be extreme and an overreaction to the problems presented by online research and communications. For example, courts do not routinely deprive jurors of their radios and televisions even though these devices might be used to learn information about the case.[209] Instead, jurors simply are told to avoid watching or listening to programs about the trial on which they sit.[210] Even in rare instances of sequestration, jurors are not necessarily deprived of access to the radio or television.[211] Thus, jurors should not be deprived of their laptops and smartphones but rather should be instructed that neither is to be used to research the case or to discuss it.[212]

209. *See* ADMIN. OFFICE OF THE ILL. COURTS, A HANDBOOK FOR ILLINOIS JURORS: PETIT JURY (2011), *available at* http://www.state.il.us/court/circuitcourt/Jury/Jury.pdf ("YOU SHOULD AVOID NEWSPAPERS OR RADIO AND TELEVISION BROADCASTS which may feature accounts of the trial or information about someone's participation in it.").

210. Robert Little, *Their Holiday Task: Don't Talk or Listen*, BALT. SUN (Nov. 26, 2009), http://articles.baltimoresun.com/2009-11-26/news/bal-md.jurors26nov26_1_pressure-benefit-jurors-informal-vote-counts ("The judge implored the panel to stay away from newspapers, television broadcasts and idle Dixon-related chatter, but few courtroom observers could imagine 12 people spending the next four days in Baltimore without encountering at least a whiff of the criminal case against the city's mayor.").

211. *See* Thaddeus Hoffmeister, *Lifetime Off Limits for Casey Anthony Juries?*, JURIES (Apr. 6, 2011), http://juries.typepad.com/juries/2011/04/lifetime-off-limits-for-casey-anthony-jurors.html.

212. *See Public Hearing Before the Mich. Supreme Court* 34 (2009) (statement of Robert P. Young, J.), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/PublicHearings/051209-PublicHearingTranscript.pdf. Justice Young stated:

> I have a theory about technology. We oughtn't impose on technology more than we impose on similar activities we conduct without technology. . . . [W]e used to have newspapers, we used to tell people not to read them. We have television[s]—we used to tell people not to listen to them. So . . . why would we do more than instruct jurors that [they] may not use this newer technology to do research in the same way that they could do if . . . prior to the time we had Blackberrys and PDAs[,] they could have gone to the library and done this research. . . . I'm struggling to understand why just because we now have the availability of a library in our hands we should be doing more than saying you may not use that library whether it's at a physical location somewhere other than the court or you can bring it in on a PDA.

Id.

3. Sequestration

Of the possible remedies available, sequestration best ensures juror compliance. This is because the court has direct control of the jurors' environment. While popular in the past and still relied upon in some jurisdictions for high-profile and capital trials, sequestration is not widely used today.[213] Despite this fact, some believe that sequestration, because of its deterrent effect, should be mentioned to all jurors upon initial empanelment.[214]

Sequestration is generally disfavored because of the burden it places on courts and jurors.[215] It is expensive for a court to lodge jurors throughout a trial.[216] At present, courts are struggling to pay the nominal fee given to jurors for their service.[217] Additional costs might break the budget of many jurisdictions.[218] Sequestration also generally results in a longer jury selection process, as many potential jurors will attempt to get excused from jury service because they either cannot or prefer not to be away from their families and friends for an extended amount of time.[219] For the most part, jurors view

213. *See* King, *supra* note 32, at 2713 ("Eventually, the sluggish pace of trials prompted courts to abandon their first line of defense against jury misconduct: sequestration."); *see also* Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 71–72 (1996).

214. Fallon, *supra* note 31, at 966; *see also* Artigliere, *supra* note 177, at 643 (quoting a Florida judge as saying, "I have two ways I can do this. I can lock you up—that's called sequestering, it's a fancy word for locking you up—during the course of the trial, or I can have you promise me that you will strictly abide by my instructions during the trial . . . .").

215. *See* Jury Survey, *supra* note 36 ("Sequestration [is] very burdensome on jurors . . . [and] very expensive for taxpayers.").

216. *See, e.g.*, Rob Shaw, *Costs of Casey Anthony Case Not Just Measured in Dollars*, TAMPA BAY ONLINE (July 17, 2011), http://www2.tbo.com/news/breaking-news/2011/jul/17/13/costs-of-casey-anthony-case-not-just-measured-in-d-ar-244247 ("It cost more than $30,000 just to feed the Pinellas County jury for six weeks. . . . The tab was more than $112,000 to put the jurors up at a nice hotel.").

217. *See, e.g.*, Joe Guillen, *Cuyahoga Cuts Jurors' Daily Pay*, PLAIN DEALER, May 14, 2009, at B2 (discussing decisions in several Ohio counties to reduce juror pay in order to help balance county budgets).

218. *See, e.g.*, Bob Egelko, *Budget Woes Slow the Wheels of Justice; Crisis Could Lead to 200 Layoffs, Close 25 S.F. Courts*, S.F. CHRON., July 19, 2011, at A1 (illustrating that a San Francisco budget crisis will result in the city laying off forty percent of its Superior Court employees).

219. King, *supra* note 32, at 2713 ("Judges concerned about jury competence recognized that sequestration deterred many potential 'reliable' jurors from serving as jurors."); Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 2D 191, 195–96 (1999).

sequestration negatively because they must live in a controlled environment away from their residences and those with whom they normally associate.[220]

One twist to the old idea of sequestration is "virtual sequestration."[221] Here, jurors remain in their own homes but consent to having their access to the Internet and certain electronic devices either monitored or blocked.[222] While arguably less burdensome and probably less expensive than regular sequestration, virtual sequestration may be viewed by some as online snooping and overly intrusive.[223] However, as discussed next, some attorneys currently conduct an informal version of virtual sequestration by investigating and monitoring the online activities of jurors.

B. Investigating Jurors

Besides imposing penalties, investigating jurors also works to limit improper juror research and communications. These investigations are carried out primarily by attorneys or their staff and occur via the Internet.[224] Most people have at least one online reference or "footprint," whether put there personally or by someone else.[225] Attorneys investigate

220. *See* Strauss, *supra* note 213, at 106–07.

221. This idea was recently raised at a conference. *See* Professor Eric Chaffee, Address at the Legal Scholarship Conference at the University of Toledo College of Law (June 2010). This author is unaware of any jurisdiction that has implemented virtual sequestration. However, at least one enterprising district attorney in Texas is considering offering jurors free access to the court's wireless network in exchange for temporarily "friending" his office, which, depending on privacy settings, would allow the DA to monitor the juror's Facebook account. *See* Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J., Feb. 22, 2011, at A2; *see also* Jack Zemlicka, *Judges in Wisconsin Set Electronic Media Limits for Juries*, WIS. L.J., May 10, 2010 (citing a circuit judge as suggesting that judges "could ask jurors engaged in social networking that, if empanelled, would they consent to being friended by the court").

222. Address by Eric Chaffee, *supra* note 221.

223. Julie Kay, *Social Networking Sites Help Vet Jurors*, LAW TECH. NEWS (Aug. 13, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315 (paid subscription).

224. *See* Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 211 (2001).

225. Allison, *supra* note 97 ("Everybody has something on them on the Web, and everybody can look it up.") (quoting attorney Daniel Ross).

jurors[226] by searching the jurors' digital trails[227] or Internet footprints.[228] This practice, which occurs before, during, and after trials, can take various forms.[229] The most basic level is a name search on an Internet search engine.[230] However, many attorneys employ far more sophisticated procedures such as extracting information from social networking sites and databases[231] and monitoring the online activities of jurors.[232]

Recently, online investigation of jurors has gained increased acceptance among practitioners.[233] Moreover, courts and state bar associations have both approved[234] and encouraged the practice.[235] Proponents argue that the online investigation of jurors by attorneys has uncovered numerous instances of juror misconduct.[236] Furthermore, proponents claim that once jurors realize that many of their voir dire answers can be verified, they either will be more truthful or will request dismissal from the case.[237] Finally, jurors who

226. For a discussion of judges investigating jurors, see John DiMotto, *Judges and the Internet—Juror Information*, BENCH & B. EXPERIENCES (Apr. 28, 2010), http://johndimotto.blogspot.com/2010/04/judges-and-internet-juror-information.html (the blog of a Milwaukee County Circuit Court Judge).

227. Hoffmeister, *supra* note 40, at 32; *cf.* Tresa Baldas, *Open Web, Insert Foot*, NAT'L L.J. (May 10, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457874016&slreturn=1 (discussing lawyers "talking trash about clients—online, leaving a digital trail for bar counsel to follow").

228. Jeffrey T. Frederick, *Seasoned Jury Expert Shares Secrets of* Voir Dire *and Jury Selection*, YOURABA (Mar. 2011), http://www.americanbar.org/publications/youraba/201103article01.html; *see also* Kay, *supra* note 223.

229. *See* Zemlicka, *supra* note 221 ("Since the explosion of social networking, [a Wisconsin attorney] regularly researches jurors and monitors their online activity during lengthy trials. 'It's not unusual for someone in my office to run the name of a juror, if we get them ahead of time, through Google, Twitter or Facebook,' he said.") (internal quotation marks added).

230. Hoffmeister, *supra* note 40.

231. *Id.*

232. *Id.*; *see also* Kay, *supra* note 223.

233. Hoffmeister, *supra* note 40.

234. *See, e.g.*, Carino v. Muenzen, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *26–27 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (admonishing a trial judge for forbidding counsel from investigating jurors online during jury selection); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2011) [hereinafter N.Y. Ethics Opinion] ("It is proper and ethical . . . for a lawyer to undertake a pretrial search of a prospective juror's social networking site.").

235. *See, e.g.*, Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (encouraging attorneys to prevent retrials by investigating jurors' litigation history prior to empanelling the jury).

236. Hoffmeister, *supra* note 40.

237. Molly McDonough, *Rogue Jurors*, A.B.A. J., Oct. 2006, at 39, 43 ("Because judges are emphasizing [criminal background] checks [for jurors] . . . more jurors drop out before the jury is formally seated and thus 'fewer and fewer people are

know that their online activities will be investigated are more likely to follow court instructions throughout the trial.[238]

While online investigation of jurors will help reduce incidents of juror misconduct associated with the Digital Age, the practice has its limitations. First, as with imposing penalties, investigating jurors does not address the reasons that jurors violate court rules.[239] Therefore, it does little to combat the root causes of juror misconduct. Second, unless courts impose virtual sequestration[240] by requiring jurors to make all of their online activities and communications subject to review, certain misconduct will go undetected.

Third, and most problematic, looking for information about jurors online raises privacy issues. According to Judge Richard Posner, "Most people dread jury duty—partly because of privacy concerns."[241] The following quotation reflects the view held by many on this issue: "The Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for privacy."[242] Thus, as more citizens realize that jury duty now includes online background checks and monitoring, it is likely that the low juror summons response rates in certain parts of the country will only get worse.[243]

Finally, there is a concern that attorneys will not reveal juror misconduct that they discover to the court or opposing counsel, especially if they think that a particular juror is advantageous to their side or if they agree with the overall outcome of the trial.[244] At present, few courts require attorneys

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coming up with a criminal record in contradiction of their jury questionnaire.' ") (quoting a district attorney).

238. Goldstein, *supra* note 192, at 603 ("With the knowledge that they are under the watchful eye of the court, jurors are less likely to discuss trials on their social networking sites.").

239. *See supra* Parts I.A.1–2, I.B.2.

240. *See supra* notes 221–23 and accompanying text.

241. United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc) (citations omitted).

242. Kay, *supra* note 223 (quoting litigator Dan Small).

243. *See* Elaine Silvestrini, *Tampa Judge Threatens Jail for People Ignoring Jury Summons*, TAMPA BAY ONLINE (Oct. 3, 2011), http://duke1.tbo.com/content/2011/oct/03/041120/judge-threatens-jail-for-residents-who-ignored-jur/news-breaking/.

244. *See* John E. Nowak, *Jury Trials and First Amendment Values in "Cyber World,"* 34 U. RICH. L. REV. 1213, 1225 (2001) ("The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner.").

to reveal information uncovered about jurors; most jurisdictions reflect the views of the Jury Survey respondents and consider such information to be attorney work product.[245] Only a small number of states make information about jurors discoverable in criminal cases.[246] The states that impose such a requirement, generally speaking, place the burden solely on the prosecution and only after a request from defense counsel.[247] Furthermore, the duty to disclose, in many instances, is limited to private information as opposed to publicly available information.[248] Thus, it is highly unlikely that any information pertaining to juror misconduct will be disclosed through the discovery process.

As for an attorney's ethical obligation to reveal such information, the Rules of Professional Responsibility have not kept pace with technological advancements brought by the Digital Age. The most relevant rule of professional responsibility with respect to juror misconduct is Rule 3.3, Comment 12, which states:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the

245. Jury Survey, *supra* note 36; *see also* Moskitis, *supra* note 141, at 630–33; Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors,* 86 A.L.R. 3D 571 (1978). For cases not requiring the release of juror information obtained by the prosecutor to defense counsel, see, for example, Monathan v. State, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); State v. Jackson, 450 So. 2d 621, 628 (La. 1984); Martin v. State, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979).

246. *See, e.g.*, People v. Murtishaw, 631 P.2d 446, 465 (Cal. 1981), *rev'd on other grounds sub nom.* Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 1999) (finding that judges may permit discovery of juror information obtained by opposing counsel); State v. Bessenecker, 404 N.W.2d 134, 138–39 (Iowa 1987) (holding that a juror "rap sheet" can be discoverable in certain circumstances); Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966) (finding that information about prospective jurors obtained by the police should be available to both parties).

247. *See, e.g.*, *Bessenecker*, 404 N.W.2d at 138–39 (limiting access to juror information obtained by county attorneys and requiring county attorneys to disclose to the defense any information obtained).

248. *See, e.g.*, State v. Beckwith, 344 So. 2d 360, 370 (La. 1977) (holding that the prosecution was not required to disclose a compilation of prospective jurors' voting records where there was no evidence that such information was unavailable to the defendant through independent means); State v. Matthews, 373 S.E.2d 587, 590–91 (S.C. 1988) (holding that the prosecution was not required to disclose results of investigation into potential jurors' backgrounds where defense counsel had an opportunity on voir dire to explore jurors' "backgrounds, attitudes, and characteristics").

> integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.[249]

In applying Rule 3.3, Comment 12, to the Facebook post of the Michigan juror discussed in Part I,[250] neither the defense attorney nor the prosecution would have an ethical duty to present this information to the court. In that case, the defense attorney wanted to reveal the information discovered in the Facebook post because it was beneficial to her client to remove the juror.[251] But the juror's act was neither fraudulent nor criminal, although it was improper and sufficient to cause her removal.[252] As that example illustrates, the current legal system lacks adequate safeguards to ensure that all disqualifying juror information is brought forward.

C. Allowing Questions

Allowing jurors to ask questions of witnesses would significantly reduce the detrimental impact of the Digital Age on jury service.[253] This is because juror questions, like jury instructions, address the reasons that jurors commit misconduct.[254] When jurors have their questions answered,

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249. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2007). At least two states—New York and Tennessee—have more expansive rules. *See* TENN. RULES OF PROF'L CONDUCT R. 3.3(i) (2011) ("A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal," confidentiality requirements notwithstanding.); N.Y. Ethics Opinion, *supra* note 234. In addition, one court has held that "[i]t is unquestioned that each party has an obligation to report the incompetency of any juror upon discovery." Cowden v. Wash. Metro. Area Transit Auth., 423 A.2d 936, 938 (D.C. 1980). However, the *Cowden* decision has yet to be followed by any other court.

250. *See supra* notes 137–39 and accompanying text.

251. *See supra* notes 137–39 and accompanying text.

252. *See supra* notes 137–39 and accompanying text.

253. *See* Brickman et al., *supra* note 2, at 296 ("If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.").

254. *See supra* Part I.A.1. Consider also the case of *Commonwealth v. Cherry*, where the defendant faced capital murder charges for killing his girlfriend's infant child. After finding the defendant not guilty on the charge of first-degree murder, the jury retired for the day in order to consider involuntary manslaughter

they become less confused and curious and have greater confidence in their verdicts.[255] Prohibiting questions leads jurors to seek alternative avenues for information.[256]

Admittedly, resolving issues like juror curiosity is no easy task.[257] Many of the questions that arise from a juror's inquiring mind cannot be answered directly due to restrictions imposed by rules of evidence and the constitutional protections guaranteed to parties and witnesses. This does not mean, however, that these questions should be ignored.

For example, a juror might ask the court whether the defendant is presently incarcerated. It is unlikely that the judge would ever answer or pose such a highly prejudicial question. But the judge can use this situation to her advantage by turning it into a teaching point. The judge, even without going into the details of the question, can once again instruct the jury, including the juror who raised the question, that certain evidence must not be examined or considered by the jurors in order to protect the rights of the parties involved in the case.[258] This timely re-education of the jury is important because answers to questions like the defendant's incarceration status[259] are easily accessible online.[260]

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and third-degree murder charges the next day. During the night, one juror researched the term "retinal detachment," which was a key issue with respect to the injuries sustained by the infant. The juror's online research resulted in the judge declaring a mistrial. Interestingly, this same juror wanted to ask questions during the trial, but the judge refused to allow questions. Sheena Delazio, *Mistrial Declared in Baby's Death*, TIMES LEADER (Jan. 15, 2011), http://www.timesleader.com/news/Mistrial_declared_in_baby_rsquo_s_death_01-14-2011.html.

255. *See supra* notes 66–103, 170–80 and accompanying text.

256. *See supra* notes 95–97 and accompanying text.

257. *See* Judge Dennis Sweeney (Retired), *Social Media and Jurors*, MD. B.J., Nov. 2010, at 44, 48 (arguing that, in addition to allowing jurors to ask questions, judges "should prompt counsel to consider answering the obvious questions presented instead of leaving them open").

258. Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 630 (stating that juror questioning would "pinpoint . . . areas of improper speculation and enable the trial judge to neutralize [its] effects by appropriate admonition") (quoting Bertram Edises, *One-Way Communications: Achilles' Heel of the Jury System*, 48 CAL. ST. B.J. 134, 137 (1973)).

259. *See, e.g.*, *Persons in Custody*, MONTGOMERY COUNTY SHERIFF PHIL PLUMMER, http://www.mont.miamivalleyjails.org (last updated Sept. 17, 2011) (listing all inmates housed in the Montgomery County Jail in Ohio by name).

260. Brickman et al., *supra* note 2, at 291 ("With the advent of the Internet and the ease with which it can be accessed anytime, anywhere, concerns about exposure to pre-trial or mid-trial information obtained outside of the courtroom and about juror use of such information take on a whole new dimension.").

Besides reducing curiosity, allowing questions aids jurors in understanding the trial. Questions by jurors signal to the court and the attorneys what areas or topics are unclear and need further clarification. [261] This in turn reduces the need for jurors to speculate, conduct research, or contact outside third parties for information.[262]

Finally, by asking questions, jurors become more confident in their verdicts.[263] This is attributable to a variety of factors. First, jurors who ask questions are generally less passive and more attentive during trial.[264] Second, questions and their answers decrease both speculation in the deliberation room and uncertainty about the verdict.[265]

While some jurisdictions still do not allow jurors to pose questions, many are increasingly allowing them in both civil and criminal trials.[266] This is not to say, however, that questions by jurors are routine. Most jurisdictions that allow jurors to submit written questions do so at the discretion of the judge, who also decides whether those questions will be posed to the witnesses.[267] Thus, in some courts, jurors are not only kept in the dark about questions but also discouraged or

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261. *See* Kim Smith, *AZ Jurors Are Given Bigger Say in Trials*, ARIZ. DAILY STAR (Feb. 28, 2011, 12:00 AM), http://azstarnet.com/news/local/article_c3c684dc-f816-512e-b4cb-a5814300f65e.html.

262. *See* Brickman et al., *supra* note 2, at 298 ("The more they understand what they hear in court, the less motivated they may be to do Internet research for clarification.").

263. *See* Judge John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541, 543 (2004). *See generally* Steven Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259 (1997).

264. B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, CT. REV., Spring 2004, at 12, 15.

265. *Id.* (citing various studies discussing the positive attributes of allowing juror questions). "The overwhelming majority of jurors felt that being allowed to put their questions to witnesses improved their role as decision makers . . . . When asked how the question procedure helped, almost 75% of jurors answered that the procedure helped them better understand the evidence." *Id.*

266. *See* Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747 (2010); *see also* Martin A. Schwartz, *Selected Evidence Issues Illustrated—Recent Decisions, Famous Trials, Movies and Novels*, 855 PRACTISING L. INST. 19, 147–52 (2011); Colleen Jenkins, *Change Lets Jurors Submit Questions for Trial Witnesses*, ST. PETERSBURG TIMES (Jan. 4, 2008), http://www.sptimes.com/2008/01/04/State/Change_lets_jurors_su.shtml ("The tweaks in the state's jury system follow a nationwide trend toward fuller participation by the citizen deciders of fact.").

267. *See* State v. Fisher, 789 N.E.2d 222, 226–28 (Ohio 2003) (reviewing court holdings on juror questioning in various jurisdictions).

prevented from asking them.[268] This is unfortunate because jurors who are permitted to ask questions "feel more involved in the trial" and report an enhanced satisfaction with their jury service.[269]

Contrary to the growing national trend of allowing questions by jurors, few Jury Survey respondents recommended this practice for combating improper juror research and communications.[270] In fact, few Jury Survey respondents thought this specific reform proposal would decrease or prevent juror misconduct. Some Jury Survey respondents went so far as to question the connection between juror questions and misconduct.[271] Others thought that questions by jurors would cause the judge to lose control of the courtroom. For example, one Jury Survey respondent wrote that she was "[n]ot certain [that allowing juror questions] would help—a judge couldn't be certain where this would lead."[272] This response indicates a lack of familiarity with how jurors ask questions in court.

In the courts that allow juror questions, the normal procedure is as follows: At the conclusion of a witness's testimony, the judge asks the jurors whether they have any questions.[273] If the jurors do have questions, they write them down and then hand them to the bailiff, who gives the questions to the judge.[274] The judge and the attorneys review the questions.[275] The judge, after hearing any possible objections from the attorneys, then decides whether she will answer or pose the question to the witness.[276] Thus, the concern about "where this would lead" appears to be unwarranted. Judges remain in control because they still serve as gatekeepers, monitoring how questions are handled and what information the jurors will receive. Judges lose control

268. Marder, *supra* note 266, at 747.

269. Dann & Hans, *supra* note 264, at 15.

270. Only six of forty-one Jury Survey respondents recommended allowing jurors to ask questions. Jury Survey, *supra* note 36.

271. *Id.*

272. *Id.*

273. Barry A. Cappello & James G. Strenio, *Juror Questioning: The Verdict Is In*, TRIAL, June 2000, at 44, 48.

274. *Id.*

275. *Id.*

276. *Id.*

when jurors, after growing frustrated with the inability to ask questions, seek answers outside of the courtroom.[277]

The views expressed by the Jury Survey respondents regarding juror questions may be attributed to the fact that they dislike the idea of allowing anyone else in the courtroom to ask questions.[278] At present, only the judge and attorneys have the power to ask questions. By sharing this right with someone else, the judges and attorneys who participated in the Jury Survey might feel that they have lost some power or that jurors are now equal partners in the trial process.[279] Also, the Jury Survey respondents may share some of the concerns raised by the Sixth Circuit Court of Appeals when it addressed the issue of jurors asking questions in *United States v. Collins*:

> There are a number of dangers inherent in allowing juror questions: jurors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies.[280]

The potential problems raised by the Sixth Circuit and Jury Survey respondents regarding juror questions must be examined in the context of what now occurs when jurors are not allowed to pose questions. Jurors go elsewhere and seek answers through alternative means. According to Professor Nancy Marder, jurors who are not afforded the opportunity to ask questions during trial are more likely to engage in self-

277. Macpherson & Bonora, *supra* note 176, at 43 ("However, allowing and even encouraging jurors to ask their questions in the courtroom is the best way to maintain control over the evidence they consider, as it will reduce—if not eliminate—the jurors' motivation to get their questions answered online.").

278. *See* Cappello & Strenio, *supra* note 273, at 48–49 ("Simply put, if a trial judge sitting as a trier of fact without a jury can ask questions, jurors should have the same right in the careful search for the truth.").

279. *See* Smith, *supra* note 75, at 559 ("The fact that [juror questioning] is not more widely employed may be due to a basic distrust of juries on the part of judges and their fear that they will lose control of the trial process.").

280. United States v. Collins, 226 F.3d 457, 461 (6th Cir. 2000).

help.[281] And, unlike in the past, self-help in the Digital Age is easier for jurors to accomplish and more difficult for courts to discover.[282] By denying jurors even the opportunity to seek answers to their questions in the presence of the judge, the court encourages them to look elsewhere and rely on alternative sources.[283]

D. Improving Instructions

The most obvious and popular solution for combating the negative influence of the Digital Age is to modernize jury instructions.[284] This proposal received the greatest amount of support from the Jury Survey respondents.[285] In addition, several courts have recently recommended improving instructions to jurors.[286] Thus, the majority of Part II will be spent on this topic.

The problem with relying on jury instructions is that they are only instructions—nothing more.[287] In order for instructions to be effective, jurors must follow them. In the corruption trial of Mayor Sheila Dixon, the jurors, despite repeated admonitions by the judge to desist, continued to communicate via Facebook.[288] Absent sequestering jurors and

281. MARDER, *supra* note 125, at 113 ("There are instances in which jurors have, on their own, made site visits or consulted reference books, the Internet, and lawyers who are not involved in the case.") (footnote omitted).

282. *See supra* Part I.A.2.

283. *See generally* Macpherson & Bonora, *supra* note 176.

284. *See* King, *supra* note 32, at 2728. As Professor King notes, this interest in more specific jury instructions is not new: "Calls for more explicit instructions to jurors to keep out of mischief appeared as early as 1893 . . . ." *Id.*

285. Twenty-six of forty-one Jury Survey Respondents cited jury instructions as an effective method of decreasing online research and improper communications by jurors. Jury Survey, *supra* note 36.

286. *See, e.g.*, United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011); State v. Mitchell, 252 P.3d 586, 591 (Kan. Ct. App. 2011) ("We encourage our PIK committee to consider a revision to the general instruction on juror communication along the lines of that utilized in New York."); Superior Court of N.J., *supra* note 197 ("To avoid any similar instances from happening again, the court recommends the model instructions to the attention of The Supreme Court Committee on Model Criminal Jury Charges for a possible revision, which should make unquestionably clear the prohibition on juror research and outside materials is absolute.").

287. People v. Jamison, No. 8042/06, 2009 WL 2568740, at *6 (N.Y. Sup. Ct. Aug. 18, 2009) ("No matter what the instructions may be, they are only as effective as the integrity of the juror who hears them.").

288. *Dixon Jurors Ignore Judge, Continue Facebook Posts*, *supra* note 129. In another example, a federal judge warned jurors in a death-penalty trial forty-one

confiscating all of their communication devices, which is both burdensome and expensive, no surefire methods exist to ensure compliance.[289] Thus, jury instructions must be written in such a manner as to create the optimum atmosphere for acceptance.

1. Component Parts

One way to increase the likelihood of adherence is to use language easily understood by jurors.[290] This includes avoiding overly technical terms and offering descriptions of improper conduct.[291] Some jurors violate the rules against conducting improper research because the instructions in place either are unclear or do not specifically address the technological advancements ushered in by the Digital Age.[292] For instance, although jurors are told in their initial summons not to "gather any evidence" about the case, some nevertheless look up the name of a party on the Internet.[293] To those jurors, "gathering evidence" may mean going to the library or the actual crime scene, not necessarily performing a name or image search on Google.[294] This has caused some judges to "go beyond the current boilerplate instructions to jurors and specifically include references to the Internet and social media."[295]

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times not to discuss the trial with outside third parties, yet the jury foreperson still contacted the press about the case prior to the end of the trial. *See* United States v. Basham, 561 F.3d 302, 316–21 (4th Cir. 2009); Mark Sherman, *Kagan: No Need for Court Review of Rogue Juror*, WASH. TIMES (May 31, 2010), http://www.washingtontimes.com/news/2010/may/31/kagan-no-need-court-review-rogue-juror.

289. *See supra* Part II.A.3.

290. Russo v. Takata Corp., 774 N.W.2d 441, 450 n.* (S.D. 2009) ("We suggest circuit courts consider using simpler and more direct language in the [jury] summons to indicate that no *information* about the case or the parties should be sought out by any means, including via computer searches. This type of admonishment is warranted given the ease with which anyone can obtain information via the internet . . . .").

291. *See* Zemlicka, *supra* note 221 ("Judges admit there is little they can do to completely keep jurors from avoiding electronic communication, which is why many stress the potential problems that even inane interaction can create.").

292. *See id.* ("I think people know they can't go home and talk to their wife about a case, but they don't think anything about firing off a bunch of texts . . . . That is why you have to state it explicitly.") (quoting a judge).

293. *See, e.g.*, *Russo*, 774 N.W.2d at 452.

294. *See id.*; *see also* Sweeney, *supra* note 202, at 3 ("[A] deliberating juror conducted an on-line search for the terms 'livor mortis' and 'algor mortis' on Wikipedia . . . . When asked about it, the juror said, 'To me that wasn't research. It was a definition.' ").

295. Browning, *supra* note 98.

Similar issues arise with instructions about improper juror communications.[296] According to one legal commentator, "People tend to forget that e-mail, twittering, updating your status on Facebook is also speech . . . . There's an impersonality about it because it's a one-way communication—but it is a communication."[297] Therefore, for jury instructions to be effective, they have to reflect the new methods by which members of society communicate and interact.

In addition to being told what they cannot do, jurors need to know why it is impermissible.[298] Several Jury Survey respondents echoed this belief, with one respondent stating that jury instructions are "effective, if . . . the reason for the rule is explained."[299] Providing the "why" is important because jurors in the Digital Age are more receptive to learning information online.[300] Moreover, many jurors today feel comfortable using technology to discover facts for themselves or communicate with others.[301] As a result, it is a challenge to get these jurors to give up their methods of learning and acquiring

296. *See* Jason Cato, *Burgeoning Social Networking System Has Legal Community in a Twitter*, PITTSBURGH TRIB.-REV. (Feb. 8, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/print_666211.html.

297. Greg Moran, *Revised Jury Instructions: Do Not Use the Internet*, SIGN ON SAN DIEGO (Sept. 13, 2009, 2:00 AM), http://www.signonsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet (quoting professor Julie Cromer Young); *see also* Trish Renaud, *Watch out for Blogging Jurors*, LAW TECH. NEWS (Feb. 17, 2009), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202428284825 (paid subscription) (quoting a juror posting on his blog, "Hey guys! I know jurors aren't supposed to talk about their trial, but nobody said they couldn't LIVE-BLOG it, right?").

298. Diane Jennings, *Dallas Judges Take Pains to Keep Web from Undermining Fair Trials*, DALL. MORNING NEWS (Jan. 30, 2010), http://www.dallasnews.com/news/community-news/dallas/headlines/20100130-Dallas-judges-take-pains-to-keep-8754.ece ("Courts have to explain to people why, not just tell people, 'Don't read the newspaper, don't do your own research and don't Twitter' . . . . Explain the rationale behind it.") (quoting an attorney); *see also* Macpherson & Bonora, *supra* note 176, at 42 ("To get through to jurors who can't quite believe that the judge really means *no* communication and *no* research, the judicial admonition needs to do more than 'just say no.' Social science research on persuasion has demonstrated that compliance can be measurably increased by simply adding the word 'because' and some type of explanation.").

299. Jury Survey, *supra* note 36.

300. *See* Christopher Hope, *Web-Savvy Young Make Bad Jurors Because They Cannot Listen, Says Lord Chief Justice*, TELEGRAPH (Nov. 6, 2008, 7:33 PM), http://www.telegraph.co.uk/news/uknews/law-and-order/3393061/Web-savvy-young-make-bad-jurors-because-they-cannot-listen-says-Lord-Chief-Justice.html.

301. *Id.*

information and adhere to the court's instructions.[302] According to two well-known trial consultants, "The deeply ingrained habit of . . . resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted with a truly important decision."[303] To make the court's task easier, jurors need to be told why practices that they regularly rely on are incompatible with jury service.[304]

While a long discourse on due process is unnecessary, jurors need to know that information obtained outside of the courtroom cannot be considered when deciding a verdict despite how inconsequential or helpful the information may seem.[305] Jurors should be told that, to ensure fairness in the trial process, the parties must have the opportunity to refute, explain, or correct the information jurors receive.[306] According to Ohio Supreme Court Justice Judith Ann Lanzinger:

> One of the things we as judges need to do is explain why [the rules of evidence are] so important . . . . We're not trying to keep the truth from anyone—pull the wool over anyone's eyes. The rules of evidence are there for a reason to make sure both sides get a fair trial.[307]

Failure to provide an explanation of the court's instructions not only decreases the likelihood of juror compliance but also creates mistrust of the judicial system.[308]

In addition to providing the rationale behind the instructions, judges must advise jurors of the negative

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302. *See* Macpherson & Bonora, *supra* note 176, at 42 ("Many jurors under 40 are used to keeping their electronic devices close at hand and ignoring any authority figure who attempts to impose prohibitions on their access to the Internet.").

303. *Id.*

304. According to one Jury Survey Respondent, jury instructions can be effective if "given forcefully but fairly and [if] the reason for the rule is explained." Jury Survey, *supra* note 36.

305. *See* Brickman et al., *supra* note 2, at 297 ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors *why* their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system.").

306. *See supra* Part I.A.

307. Jacob Lammers, *Courts Adapting to Technology*, NEWS-HERALD (June 13, 2010), http://www.news-herald.com/articles/2010/06/13/news/nh2621582.txt.

308. *See* Gareth S. Lacy, *Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research*, 1 REYNOLDS CTS. & MEDIA L.J. 167, 178 (2011).

consequences of ignoring them.[309] This starts by reminding jurors that disregarding the court's instructions is a violation of their oath.[310] Next, jurors should be told that failure to abide by these rules may cause the court to declare a mistrial, which is costly both in financial terms and in the emotional toll it takes on those involved in the process.[311] Also, jurors need to be informed of the potential for contempt of court and the subsequent penalties assessed to jurors who violate the court's instructions.[312]

Adding a self-policing section will also encourage compliance with jury instructions.[313] While some jurisdictions have shied away from this approach for fear of creating distrust and apprehension among jurors,[314] jury instructions should include language requiring jurors to report fellow jurors for failing to follow the rules of the court.[315] This watch-dog

309. Artigliere et al., *supra* note 38, at 14 ("Some judges tell jurors *why* it is important to follow the instructions. Many jurors respond better to direction if they understand the reason the requirement has been placed on them.").

310. The value of the oath was recently illustrated in the first trial of former Illinois Governor Rod Blagojevich. *Holdout Juror in Blagojevich Case Explains Her Reasoning*, STLTODAY.COM (Aug. 28, 2010, 12:00 AM), http://www.stltoday.com/news/national/article_f803c33c-18ef-5244-be18-7235b1fc26a5.html ("[S]tanding her ground in the jury room was not easy. Other jurors have acknowledged pressuring [the holdout] to change her vote on the Senate seat. . . . One person asked the judge for a copy of the juror's oath, implying that [the holdout] wasn't fulfilling her obligation.").

311. Judge Margaret R. Hinkle, *Criminal Practice in Suffolk Superior Court*, BOS. B.J., Nov.–Dec. 2007, at 6, 6 ("With a jury impasse, not only do jurors feel a sense of incompleteness, but any mistrial imposes an enormous emotional and financial cost on the prosecution, the defense, the victim and the Commonwealth.").

312. *See* Fallon, *supra* note 31, at 967.

313. *See* Artigliere et al., *supra* note 38, at 14 ("Another tactic is to 'empower' all jurors to report transgression by informing them of their duty to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial."); *see also* Edward T. Swaine, Note, *Pre-deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 201 (1988).

314. Michigan proposed a rule on electronic device usage by jurors that contained a requirement for jurors to report other jurors who violate the court's instructions. Correy Stephenson, *Michigan Considers Rule on Juror Device Use*, ALLBUSINESS (May 12, 2009), http://www.allbusiness.com/legal/evidence-witnesses/12333409-1.html (paid subscription). This requirement was later removed. *See Order: Amendment of Rule 2.511 of the Michigan Court Rules*, MICH. SUPREME CT. (June 30, 2009), http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf.

315. Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 97 (2010) ("Courts should conclude their preliminary instructions by

requirement is necessary because juror misconduct is difficult to detect and prevent.[316] An added benefit of this rule is that if a juror violates the court's instructions, for example by researching the case or communicating with a third party, she, for fear of being reported to the court, is less likely to reveal her findings to other jurors and thereby taint the entire jury.[317]

Besides the actual substance of the jury instructions, there are procedural questions such as when they should be given and how often.[318] As indicated in Part I, improper research and communications by jurors occur at all stages of the trial, including immediately upon receiving a jury summons.[319] Thus, the earlier the instructions are given to jurors—for example, in the jury summons or upon initial arrival at the courthouse—the greater the chance for compliance. As for frequency, several Jury Survey respondents stated that instructions should be repeated as often as possible[320] because they are easily forgotten.[321] This repetition usually comes in the form of brief reminders during breaks in trial.[322] Legal commentators have also recommended that jurors be provided with the instructions prior to starting deliberations.[323]

Another procedural recommendation involves having jurors sign an oath or affidavit acknowledging the instructions.[324] The Jury Survey respondents were split on the benefits of this proposal. One felt that, "[i]f jurors commit to signing [a] declaration, they are more likely to not violate that commitment."[325] Another stated that "actually sign[ing] a

telling the jurors that they have a responsibility to inform the court of any misconduct that they witness.").

316. Strutin, *supra* note 52 ("The hallowed ground of jury deliberations makes it difficult to unearth, preserve and authenticate surreptitious electronic communications and Web postings or to seek redress when they are uncovered.").

317. Brickman et. al., *supra* note 2, at 298.

318. Artigliere et al., *supra* note 38, at 14.

319. *See, e.g.*, Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009).

320. Jury Survey, *supra* note 36 ("Because it is repetitive and comes from the judge I believe this is effective.").

321. One Jury Survey respondent stated, "This is o.k. but would be forgotten during the time delay from summons and jury duty. Moreover, it is more effective when the jurors hear it from the judge." *Id.*; *see also* Bell, *supra* note 315, at 91 ("Perhaps in part because Internet activity is such an integral, reflexive part of many Americans' lives, some judges not only give . . . instructions [not to use the Internet] at the inception of trial, but also repeat them before each recess.").

322. Artigliere et al., *supra* note 38, at 14.

323. JURORS: THE POWER OF 12, *supra* note 118, at 8–9.

324. *See* Moran, *supra* note 297.

325. Jury Survey, *supra* note 36.

document may verify to them the importance."[326] Another opposed such a policy, stating that "[w]e can't turn jury duty into a check list of things sworn to."[327] And yet another respondent believed that this step is unnecessary if the judge addresses the issue early in voir dire.[328]

At present, this Article does not favor requiring jurors to sign an affidavit or contract stating that they will abide by the jury instructions. Obtaining the juror's signature would probably heighten juror awareness about the importance of following instructions; however, it seems overly formalistic. Jurors should not have to enter into written agreements with the court to fulfill their civic responsibilities. Furthermore, it may not be necessary if the other suggestions recommended in this Article are implemented. Moreover, taking such action may lead jurors to falsely believe that these instructions are superior or more important than all other instructions given to them by the court.

Finally, certain jurors are going to ignore the court's instructions regardless of how well they are written and delivered.[329] For example, some jurors feel compelled to chronicle every aspect of their life online or learn the entire story about the case prior to rendering a verdict.[330] To help deal with these so-called rogue jurors, attorneys or preferably the judge should ask all jurors during voir dire about their online presence and their ability to limit their use of the Internet during the trial.[331] On occasion, straightforward and direct questions are quite revealing, as some potential jurors make their inability to follow court rules quite clear.[332]

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326. *Id.*

327. *Id.*

328. *See id.*

329. Strutin, *supra* note 52 ("Sharing the minutest details of our lives through mobile telecommunications has become second nature in the Information Age.").

330. *See supra* Part I.A.2.

331. *See* Judge Linda F. Giles, *Does Justice Go Off Track When Jurors Go Online?*, BOS. B.J., Spring 2011, at 7, 8–9 ("At the risk of sounding like a Luddite, it seems to me that succumbing to the temptation of technology and allowing jurors to go rogue is not the solution."); Allison, *supra* note 97 ("I find that judges are asking now during voir dire whether jurors have a blog and what the name of the blog is . . . . If you get that commitment from the juror upfront, you're more likely to avoid problems down the line.") (quoting a trial consultant).

332. Ross, *supra* note 27. Ross cites the following example:

> In Kansas City, attorney Peter Carter asked potential jurors during voir dire if they would follow instructions not to do Internet research. In response, about six to 10 said that they would not. Carter also

In addition to weeding out jurors who refuse to follow the judge's instructions, these questions help educate jurors and give them early notice about court prohibitions. They let the juror know that some habits such as blogging or looking up information on the Internet that are viewed as normal and inconsequential during everyday life can have profound and harmful consequences when conducted during jury duty. Also, early questioning alerts the court and attorneys to those jurors who might regularly blog or visit social media websites. This in turn facilitates online monitoring of juror activity.[333]

Numerous jurisdictions have updated or are in the process of updating their jury instructions to address the new methods by which jurors communicate and research.[334] Many of the updates include the suggestions mentioned above. This Article will now examine two sample jury instructions—one from Multnomah County, Oregon[335] and the other from the Judicial Conference Committee on Court Administration and Case Management (Judicial Conference Committee) of the federal courts—to see how well these instructions adhere to the previously discussed recommendations.

2. Sample Instructions

a. Multnomah County, Oregon

> Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, tweeting, blogging or

discovered, simply by asking, that some six or seven of the 80 potential jurors already had researched the case on the Internet.

Id.

333. *See supra* Part II.B.

334. Even the military is getting into the act. *See* Kent Harris, *Jury Instructions to Include Rules on Use of New Media*, STARS & STRIPES (June 21, 2009), http://www.stripes.com/news/jury-instructions-to-include-rules-on-use-of-new-media-1.92649 (noting that, following cases of juror misconduct, a military judge "said he's been working on specific language addressing networking phenomena such as Twitter and Facebook that judges would use when instructing troops who sit on court-martial panels"). For a comprehensive overview of the various instructions across the country, see Robinson, *supra* note 203.

335. Of the jury instructions surveyed at the time this Article was written, Multnomah County, Oregon, along with New York, appeared to have the most comprehensive instructions addressing juror research and communications in the Digital Age.

any other form of communication. Do not discuss this case with other jurors until you begin your deliberations at the end of the case. Do not attempt to decide the case until you begin your deliberations.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I do not think you are paying attention, but because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common[:] what they just watched together.

There are at least two reasons for this rule. The first is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won't have that until the very end of the trial. The second reason for the rule is that we want all of you working together on this decision when you deliberate. If you have conversations in groups of two or three during the trial, you won't remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial.

Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to my staff.

Do not make any independent personal investigations into any facts or locations connected with this case. *Do not* look up any information from any source, including the Internet. *Do not* communicate any private or special knowledge about any of the facts of this case to your fellow jurors. *Do not* read or listen to any news reports about this case or about anyone involved in this case.

In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our

system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.[336]

b. Judicial Conference Committee

Before Trial

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

336. *Jury Instructions*, MULTNOMAH COUNTY, OR. (2009), *available at* http://bit.ly/cb3y3a [hereinafter *Multnomah County Jury Instructions*].

At the Close of the Case

> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.[337]

c. Analysis

Both instructions avoid overly complex language and appear to be drafted with the layperson in mind. For example, they do not use technical terms or legal homonyms.[338] A juror would not need any legal training to understand these instructions. In addition, each instruction specifically references the prohibition against using both old and new forms of communication to discuss the case.

Also, each instruction offers specific examples of inappropriate conduct. Surprisingly, many jurors are still

337. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009) [hereinafter JUDICIAL CONFERENCE COMM. INSTRUCTIONS], *available at* http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf. These instructions have been endorsed by the Third Circuit Court of Appeals. United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) ("We enthusiastically endorse these instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions.").

338. *See* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1101–02 (2001) ("One of the most obvious problems with jury instructions, or any other legal language that is meant to be understood by the general public, is *technical vocabulary*. Some legal terms are completely unknown in ordinary language, like *quash* or *expunge* or *res gestae*. Others, which I have elsewhere called *legal homonyms*, are ordinary words but have a specific legal meaning. Examples include *brief*, *burglary*, *mayhem*, *complaint*, *notice*, *aggravation*, and many others. Legal homonyms are potentially dangerous because a layperson may think that he knows what they mean, whereas the terms may mean something quite different in the law.") (footnote omitted).

unsure of what activities run afoul of court rules.[339] Examples help connect the instructions to everyday juror behavior. Some judges even go beyond the standard instructions and take it upon themselves to demonstrate how seemingly innocent online communications can jeopardize a trial.[340] This is important because jurors need to understand that routine practices such as "Googling" individuals or discussing their lives on social media websites, which they have grown accustomed to and reliant on, have to be modified during jury duty.

Of the two instructions, the Multnomah County instructions are superior to those of the Judicial Conference Committee. First, while both tell jurors not to research the case or discuss it until deliberations, the Multnomah County instructions explain, at least partially, why this rule is necessary. Jurors in the Digital Age, more so than in the past, need this explanation. Telling jurors why they should not engage in misconduct, even if only in broad terms, is important because it increases the likelihood that jurors will "buy in" and follow the instructions.[341] While the Multnomah County instructions do a good job explaining why improper communications are deleterious, they do not go far enough with respect to research.[342] Some states, such as Wisconsin, inform jurors that relying on outside information or conducting research "is unfair because the parties would not have the opportunity to refute, explain, or correct it."[343]

339. Many jurors who are discovered conducting research claim that they did not know that they were doing anything wrong. In one Florida case, after the judge declared a mistrial because a juror went to Wikipedia to look up the terms "sexual assault" and "rape trauma syndrome," the juror said, "I didn't read about the case in the newspaper or watch anything on TV. . . . To me, I was just looking up a phrase." Susannah Bryan, *Davie Police Officer Convicted of Rape to Get New Trial*, PALM BEACH POST (Dec. 16, 2010), http://www.palmbeachpost.com/news/crime/davie-police-officer-convicted-of-rape-to-get-1126441.html; *see also* Zemlicka, *supra* note 221 ("But the situation served as a cautionary tale as to how even seemingly harmless online banter can potentially influence jurors and their verdict.").

340. *See* Artigliere et al., *supra* note 38, at 14 ("Some judges are already enhancing the standard instructions on their own.").

341. *See supra* notes 298–304 and accompanying text.

342. *See Multnomah County Jury Instructions*, *supra* note 336.

343. *Social Networking, Jurors and Jury Instructions*, WIS. LAW. (Feb. 2011), http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=100316 (quoting Wisconsin Jury Instructions).

Also, the Multnomah County instructions, unlike those of the Judicial Conference Committee, define terms like "discussion" and how such terms are interpreted in the Digital Age. For example, the Multnomah County instructions explain to jurors that "discussion" includes "emailing, text messaging, tweeting, blogging or any other form of communication."[344] This is important because many jurors think that "discussion" only concerns face-to-face conversations.[345]

As for repetition, the Multnomah County instructions inform jurors that the judge "will give you some form of this instruction every time we take a break."[346] The Multnomah County instructions even address the conscientious juror who thinks that by knowing more she will be able to better fulfill her duties.[347] The Multnomah County instructions make it clear to this type of juror that "it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should."[348]

Finally, the Multnomah County instructions inform the juror that she might be held in contempt of court for violating the instructions. Although penalties should be a last resort to correct inappropriate behavior, they sometimes are necessary.[349] Thus, courts should warn jurors that they may be penalized for misconduct. One Jury Survey respondent noted, "When a juror can sit in the privacy of their [sic] own home and find out info about the case they [sic] really need strong discouragement."[350]

The one superior aspect of the Judicial Conference Committee instructions is that they directly address the issue of jurors researching "individuals," not just the facts or

344. *Multnomah County Jury Instructions*, *supra* note 336.

345. *See* Hannaford-Agor, *supra* note 60, at 45. According to Lake County Common Pleas Court Judge Vincent Culotta: "The definition of talk has changed. Talk now includes blogging, [posting] on [your] Facebook account, text messaging, e-mailing." Lammers, *supra* note 307 (second alteration in original) (quoting Judge Culotta).

346. *Multnomah County Jury Instructions*, *supra* note 336.

347. According to one Jury Survey respondent, "Jurors want to do the right thing—that is a double-edged sword. They think the more info they have the better job they will do." Jury Survey, *supra* note 36.

348. *Multnomah County Jury Instructions*, *supra* note 336.

349. *See* Pamela MacLean, *Jurors Gone Wild*, CAL. LAW. (Apr. 2011), http://www.callawyer.com/story.cfm?eid=914907&evid=1.

350. Jury Survey, *supra* note 36.

circumstances surrounding the case. For example, these instructions tell jurors not to "conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case."[351] As illustrated in *Russo v. Takata*, jurors like to know the backgrounds of the parties in a particular case.[352] Thus, jury instructions should address this issue.

With respect to the negative features of both instructions, they lack the self-policing section advocated by some legal commentators.[353] This additional safeguard is important in light of the secrecy and deference normally given to jury deliberations.[354] Without this requirement, it is difficult to ensure that the instructions will be followed and that juror misconduct, if it occurs, will be discovered.[355] Also, neither instruction specifically informs jurors that disobeying court rules violates the juror's oath. This latter point was significant for at least one Jury Survey respondent.[356]

351. JUDICIAL CONFERENCE COMM. INSTRUCTIONS, *supra* note 337.

352. *See supra* notes 103–10 and accompanying text.

353. Judge Dennis M. Sweeney (Retired), *Worlds Collide: The Digital Native Enters the Jury Box*, 1 REYNOLDS CTS. & MEDIA L.J. 121, 141 (2011) ("If you become aware that any other juror has violated this instruction, please also let me know by a note."); *see also* Brickman et al., *supra* note 2 at 298. Several states also impose a duty on jurors to report misconduct by fellow jurors. A Tennessee jury instruction reads as follows: "Any juror who receives any information about this case other than that presented at trial must notify the court immediately." Robinson, *supra* note 203, at 389 (2011) (quoting TENN. JUDICIAL CONFERENCE, COMM. ON PATTERN JURY INSTRUCTIONS (CIVIL), TENN. PATTERN JURY INSTRUCTIONS (2010)). "[T]he only way to ensure that deliberations are not tainted by information that shouldn't be brought into the jury room is to 'get jurors to police themselves.' " Porter, *supra* note 100, at 14 (quoting trial consultant Amy Singer).

354. *See* Zemlicka, *supra* note 221 ("Under [Judge] DiMotto's instructions, a fellow juror would be responsible for reporting misconduct to the court."). *See generally* Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493 (2001).

355. Hirsch, *supra* note 21 ("Unless a juror informs the court that another juror has conducted internet research, or . . . the material is discovered, [juror research] is impossible to police.") (quoting barrister Eleanor Laws); *see, e.g.*, Altman v. Bobcat Co., 349 F. App'x 758, 760–61 (3d Cir. 2009).

356. Jury Survey, *supra* note 36.

3. Model Instructions

a. Introduction to Model Instructions

The model instructions created in this Article are an amalgamation of jury instructions from across the country.[357] They were created because no single jurisdiction had instructions that addressed all of the concerns raised by this Article. Hopefully, these instructions will serve as a model for jurisdictions that have yet to update their instructions or who feel that their updates were insufficient. In addition, these model instructions can be useful to practitioners who are concerned with jurors conducting improper research and communications.[358] The instructions assume that the jurisdiction does not allow pre-deliberation discussions between jurors. If that is not the case, then these instructions would have to be slightly modified by removing or altering the section on pre-deliberation discussions.

b. Text of Model Instructions

Introduction: Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

Communications: During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your

357. These instructions also benefitted from the useful suggestions of Eric P. Robinson, Deputy Director of the Donald W. Reynolds Center for Courts and the Media at the University of Nevada at Reno.

358. The defense team representing Barry Bonds in his 2011 perjury trial used a modified version of these instructions. Howard Mintz, *Jurors Must Lay Off Twitter, Facebook, iPhones and All Else for Barry Bonds Trial*, OAKLAND TRIB., Mar. 5, 2011.

experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. "No discussion" extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, iTouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial. The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party. If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to me or my staff.

Research: Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the

Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and we may "Google" things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the judge to the jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

Ramifications: If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty

to report it to me or my staff so that we can protect the integrity of this trial.

CONCLUSION

The Digital Age, with its advancements in technology, has made it easier for jurors to violate courts' prohibitions against juror research and communications. This Article has suggested four possible solutions to combating this problem. The first two, increased penalties and greater monitoring of juror activity, take a somewhat paternalistic approach to the issue by treating jurors like children who need to be watched and punished when they fail to follow the rules. This course of action, while possibly beneficial in the short-term, may prove ineffective or harmful in the long-term. This is because these solutions only address the symptoms of juror misconduct, not its cause. Thus, courts will always be chasing the next technological advancement that facilitates juror research or communications. Second, and more importantly, these two proposals will discourage citizens from participating in jury service.

In the alternative, the courts could take a more holistic view of the problem. Thus, rather than solely blame the jurors, courts could examine the trial process as a whole and attempt to eliminate the reasons for juror misconduct. This would require the courts to reconsider the type of information made available to jurors. As discussed earlier, many instances of juror misconduct can be traced to a juror's desire for more information. Allowing juror questions will help curb this desire. This solution provides jurors with additional information while not violating the Rules of Evidence or the Constitution. It also allows courts to maintain control of what information jurors see and hear.

Besides permitting questions, courts also need to improve jury instructions. Today's instructions need to inform jurors that routine practices such as "Googling" individuals or discussing their own lives on social media websites, which they have grown accustomed to and reliant on, is incompatible with jury service. In providing these instructions, courts need to ensure that jurors know why such activity is prohibited. While some jurisdictions have updated their jury instructions to reflect the changes brought by the Digital Age, others have not.

In order to facilitate and encourage jurisdictions to re-examine and improve their instructions to jurors, this Article has created model instructions that will hopefully serve as a template for others to use.

The jury, throughout its approximately 400-year history in America, has witnessed many changes and upheavals in the legal system. Through each one, the jury has adapted and survived. Thus, it is highly likely that the jury will weather the storm of the Digital Age. The question becomes: How will it evolve? This author hopes that any changes to the jury go towards empowerment, allowing jurors to function as equal partners in the courtroom.

APPENDIX (JURY SURVEY QUESTIONS)

1. Do you believe that jurors who access the Internet during trial to find out information about the pending case is a problem? If it is not a problem, please state why you feel this way.

2. Do you or the court in which you sit[359] have a policy or rule on jurors accessing the Internet while on jury duty? If you answer "No," go to question #6.

3. Can you briefly describe this policy or rule?

4. How long has the rule or policy been in place?

5. Do you think the policy or rule is effective? If not, what changes should be made?

6. To date, have you had instances of jurors improperly accessing the Internet while on jury duty? If "Yes," what action if any did you take as a result of the juror(s) accessing the Internet?

7. Of the following suggestions which one do you think is most effective at preventing jurors from accessing the Internet? Please state why you believe this one is most effective.

(a) Instruct jurors in the initial summons that they must refrain from accessing any information about the trial from the Internet.

(b) Use voir dire questions that actually address Internet use by jurors.

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359. The Jury Survey sent to federal prosecutors and defenders was very similar to the one in the Appendix. Slight changes were made in the language (for example, "which you sit" was changed to "where you practice").

(c) Revise jury instructions with specific language about using the Internet during trial. Repeat these instructions throughout the trial.

(d) Have jurors sign declarations stating that they will not use the Internet to research the trial.

(e) Educate jurors about the importance of jurors deciding cases on the facts presented.

(f) Make it clear that using the Internet to access information about the trial is a violation of the court's instructions.

(g) Allow questions by jurors.

(h) Prohibit jurors from accessing items like cell phones, laptops etc.

(i) Other (please describe).

8. Do you have any additional views about jurors and the Internet not covered by this survey that you would like to discuss?

9. Do you think it is appropriate for opposing parties to conduct Internet research on jurors? If yes, do you believe that such research should be turned over as part of the Discovery process?

10. Do you think it is appropriate for jurors to communicate with one another online or otherwise prior to deliberations?

THE FUTURE OF ABANDONED BIG BOX STORES: LEGAL SOLUTIONS TO THE LEGACIES OF POOR PLANNING DECISIONS

SARAH SCHINDLER*

Big box stores, the defining retail shopping location for the majority of American suburbs, are being abandoned at alarming rates, due in part to the economic downturn. These empty stores impose numerous negative externalities on the communities in which they are located, including blight, reduced property values, loss of tax revenue, environmental problems, and a decrease in social capital. While scholars have generated and critiqued prospective solutions to prevent abandonment of big box stores, this Article asserts that local zoning ordinances can alleviate the harms imposed by the thousands of existing, vacant big boxes. Because local governments control land use decisions and thus made deliberate determinations allowing big box development, this Article argues that those same local governments now have both an economic incentive and a civic responsibility to find alternative uses for these "ghostboxes." With an eye toward sustainable development, the Article proposes and evaluates four possible alternative uses: retail reuse, adaptive reuse, demolition and redevelopment, and demolition and regreening. It then devises a framework and a series of metrics that local governments can use in deciding which of the possible solutions would be best suited for their communities. The Article concludes by considering issues of property acquisition and management.

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INTRODUCTION

> Living in the sprawl
> Dead shopping malls rise like mountains beyond mountains
> And there's no end in sight
> —Arcade Fire, *Sprawl II (Mountains Beyond Mountains)*[1]

> Once there were parking lots
> Now it's a peaceful oasis . . .
> This was a Pizza Hut
> Now it's all covered with daisies
> —Talking Heads, *(Nothing But) Flowers*[2]

Borders revealed in July 2011 that it would close its 399 remaining bookstores, after having closed approximately 200 earlier in the year.[3] In 2009, Linens 'n Things and Circuit City closed all of their retail locations, vacating approximately 1400

1. ARCADE FIRE, *Sprawl II (Mountains Beyond Mountains)*, *on* THE SUBURBS (Merge Records 2010).

2. TALKING HEADS, *(Nothing But) Flowers*, *on* NAKED (Sire Records 1988).

3. Stephen Ceasar, *Borders Group Files for Bankruptcy Reorganization*, L.A. TIMES (Feb. 17, 2011), http://articles.latimes.com/2011/feb/17/business/la-fi-0217-borders-bankruptcy-20110217; Michael J. De La Merced & Julie Bosman, *Calling Off Auction, Borders to Liquidate*, DEALBOOK (July 18, 2011, 8:31 PM), http://dealbook.nytimes.com/2011/07/18/borders-calls-off-auction-plans-to-liquidate/

big box stores.[4] In addition to the loss of tax revenues and jobs, these departing retailers left behind something else: the structures that housed their products.

"Big box" stores[5] are a defining image of suburban commercial development. With their plentiful parking and loss-leader[6] item pricing, these massive chain stores originally stood as triumphant symbols of American capitalism. However, many have begun to "go dark"; big boxes are being vacated at alarming rates. Of 870.7 million square feet of currently vacant retail space in the United States, almost 300 million square feet—nearly 35%—is empty big box space.[7] The reasons for big box vacancy are numerous. The general economic downturn and the rise of online shopping contributed to the bankruptcy of many large brick-and-mortar chain stores, including Borders.[8] Other retailers, such as Wal-Mart, upsize: They close older facilities and build new, larger structures on different sites in the same city.[9] Wal-Mart alone currently has 103

4. J.L. Cherwin, Jr. & Virginia M. Harding, *New Tenants for Big Boxes*, PROB. & PROP., Jan.–Feb. 2010, at 37, 37; *see also* Laura D. Steele, *Actual or Hypothetical: Determining the Proper Test for Trademark Licensee Rights in Bankruptcy*, 14 MARQ. INTELL. PROP. L. REV. 411, 412 (2010).

5. It is hard to set forth a precise definition for big box stores; like obscenities, you know them when you see them. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Much depends on surroundings and context, and what constitutes a big box for purposes of one city's zoning ordinance might not for another's; definitions range from 20,000 square feet (often called "junior boxes") to nearly 300,000 square feet. *See, e.g.*, AUSTIN, TEX., ORDINANCE NO. 20070215-072, § 25-2-813 (2007), *available at* http://www.ci.austin.tx.us/edims/document.cfm?id=100656 (defining "large retail use" as "100,000 square feet or more of gross floor area"). For purposes of this Article, a big box store is a predominantly one-room, single-story building of at least 35,000 square feet that housed a single retailer or grocer and that is surrounded by a large parking lot. Big boxes are typically stand-alone structures, but much of the discussion in this Article is also relevant to empty big boxes that are located in vacant strip malls and shopping centers as well. *See* JULIA CHRISTENSEN, BIG BOX REUSE 4–5 (2008) (addressing possible definitions and settling on one similar to that presented here). Examples that meet this definition include Wal-Mart, Target, Costco, Best Buy, Home Depot, Lowe's, Babies "R" Us, Kmart, Kroger, and Safeway.

6. Loss-leader pricing involves selling certain discounted products at a loss to bring in customers while selling other items for a profit. *See* Ellis v. Dallas, 248 P.2d 63, 64 (Cal. Dist. Ct. App. 1952).

7. GARRICK H.S. BROWN, COLLIERS INT'L, THE BIG BOX DILEMMA PART 1: SECOND GENERATION BIG BOX RETAIL 2 (Christine Schultz et al. eds., 2010), *available at* http://www.colliers.com/Markets/Retail_Services/content/Colliers_whitepaper_BigBoxDilemma_Summer2010.pdf.

8. *See, e.g.*, *Borders Files for Bankruptcy, To Close Stores*, NPR (Feb. 16, 2011), http://www.npr.org/2011/02/16/133802386/borders-files-for-bankruptcy-to-close-stores.

9. Wal-Mart closed 107 stores in Texas between 1987 and 2004. In 92 out of the 107 closures, a new Wal-Mart supercenter (supercenters are larger than

formerly occupied properties available for lease and 48 for sale throughout the country.[10]

Although changes in retail and retail structures are not in themselves novel,[11] the rate at which retailers are vacating big box stores, and the number remaining vacant and becoming abandoned, is problematic. Large, empty big box buildings contribute to blight as the structures deteriorate and the parking lots sprout weeds and lure squatters. Minor signals of disorder such as these symbolize and possibly accelerate an area's decline. Empty buildings also repel shoppers from other retail stores in the vicinity and lower nearby property values. While big boxes previously served as a source of sales and property tax revenue for a community, once abandoned, they often contribute neither.

Scholars acknowledge the problems caused by construction and operation of big box stores.[12] Those articles discuss ways to limit their construction and prospectively address the problem of big box abandonment.[13] However, this Article is concerned with legal strategies for confronting the problem of big box stores that have already gone dark: those that were

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traditional Wal-Marts and include a grocery store) opened in the same city as the store that closed. Harold D. Hunt & John Ginder, *Lights Out: When Wal-Marts Go Dark*, TIERRA GRANDE, Apr. 2005, *reprinted in* TEX. A&M U. REAL EST. CENTER, http://recenter.tamu.edu/pdf/1720.pdf.

10. WALMART REALTY, http://walmartrealty.com/Default.aspx (under "Building Disposition," follow "Buildings For Lease" and "Buildings for Sale") (last visited Sept. 10, 2011). It is impossible to talk about big boxes without addressing Wal-Mart because of its sheer size; as of 2007, it had over 4000 stores in the United States alone. *How Big Box Stores Like Wal-Mart Effect* [sic] *the Environment and Communities*, SIERRA CLUB, http://www.sierraclub.org/sprawl/reports/big_box.asp (last visited Sept. 3, 2011). One commentator put Wal-Mart's size in relative terms: "Wal-Mart is five times the size of the nation's second largest retailer, Home Depot. It's bigger than Target, Sears, Costco, JC Penney, Walgreens, Best Buy, The Gap, Staples, Toys "R" Us, Nordstrom, Blockbuster, and Barnes & Noble combined." STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES 13 (2006).

11. *See* Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L., no. 3, 2005, at 7, 14 ("Changes in retailing have been with us for as long as trade has existed.").

12. *See, e.g.*, *id*, at 29; Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251, 1251–52 (2008); Betsy H. Sochar, Note, *Shining the Light on Greyfields: A Wal-Mart Case Study on Preventing Abandonment of Big Box Stores Through Land Use Regulations*, 71 ALB. L. REV. 697, 699 (2008).

13. These techniques limit construction style and provide for disposal if the structures are abandoned. *See, e.g.*, Salkin, *supra* note 12, at 1261–80; Sochar, *supra* note 12, at 710–13, 715–16.

constructed without, or before the adoption of, prospective solutions.[14] The majority of existing abandoned big box stores in the United States fall into this category, yet the scholarly literature is bereft of a thorough discussion of abandonment and how to alleviate it.[15] The specific question of what to do with empty big box stores has received even less attention than abandonment of commercial and residential properties generally.[16] This Article aims to fill those gaps in the literature and to assist municipalities[17] in confronting what has become a common concern.

Local governments cannot simply sit back and rely on the market to fill these empty spaces. Indeed, such an approach

14. When discussing the trend of big box retailers, commentator F. Kaid Benfield states that this format of store can continue to be successful in the future; however, that success will involve placing these stores in traditional downtowns. F. KAID BENFIELD ET AL., ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY, AND SOCIAL FABRIC 149–51 (1999). This ignores the question of what cities should do with *existing*, suburban big box stores. This is the more difficult issue: to look at our existing suburban sprawl-based landscape and apply smart growth principles to its existing form. *See id.* at 151.

15. Two commentators believe that this is the case because scholars view property abandonment as a symptom of deeper community problems rather than a cause of those problems. John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000) (discussing the lack of scholarship). Some of the issues raised in this Article have been addressed in the related yet distinct context of brownfields reuse and redevelopment. *See infra* note 53 and accompanying text; s*ee, e.g.*, Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479 (2007) (discussing financing mechanisms available for brownfield redevelopment projects); Barry J. Trilling & Sharon R. Siegel, *Brownfield Development in Connecticut: Overcoming the Legal and Financial Obstacles*, 26 QUINNIPIAC L. REV. 919, 986–1009 (2008); Michael J. Minkus, Comment, *Fighting Uncertainty: Municipal Partnerships with Redevelopment Agencies Can Mitigate Uncertainty to Encourage Brownfield Redevelopment*, 1 GOLDEN GATE U. ENVTL. L.J. 267, 298–307 (2007).

16. *See* Merriam, *supra* note 11, at 29. There is a growing literature addressing the foreclosure crisis, but this tends to focus on mortgages and residential vacancies. *See, e.g.*, JULIE A. TAPPENDORF & BRIEN J. SHEAHAN, AM. LAW INST., DEALING WITH DISTRESSED PROPERTIES: LOCAL GOVERNMENT STRATEGIES TO MITIGATE THE IMPACT OF FORECLOSURES ON COMMUNITIES 1303 (2008); Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 103 (2009) [hereinafter Schilling, *Code Enforcement*]; Scott Horsley, *Town Compels Lenders to Care for Vacant Homes*, NPR (Aug. 9, 2007), http://www.npr.org/templates/story/story.php?storyId=12623065.

17. There are various forms of local governments, including counties, cities, municipalities, towns, townships, villages, and special districts. Although each form is distinct, for ease of readability, the terms will be used interchangeably throughout this Article. Thus, "city" does not necessarily imply an urban city center.

has not worked thus far.[18] Instead, a municipality should view an empty big box as an opportunity to create a new vision for its suburbs. To do this, it must first craft a strategy and a set of ordinances to address the problem of vacant and abandoned big box stores. Such a strategy should guide cities in: (1) tracking vacant property in the community; (2) requiring solvent building owners to maintain their vacant properties; (3) determining whether building reuse or redevelopment is most appropriate in a given community; (4) modifying existing zoning and building codes to incentivize market-based reuse or redevelopment of these properties; and, finally, (5) providing for direct intervention by the municipality.

Part I of this Article provides background on the history of suburban development and, specifically, big box development. It explains why municipalities invited big box stores into their communities and why these buildings are constructed as they are.

Part II addresses the problem of big box vacancy and abandonment. While some authors starkly distinguish between the terms "abandonment" and "vacancy,"[19] this Article uses both, as well as the term "empty," to describe properties of concern. While the terms are used interchangeably herein, generally, abandoned property is in poorer condition than vacant property.[20] After defining these terms in more detail, the Part reviews the academic literature concerning property vacancy and abandonment and its impact on local communities. It then focuses on the severity of the empty big box epidemic, the reasons for that problem, and the harms that have resulted therefrom.

Part III posits that, in addition to the harms they inflict on communities, abandoned big boxes also present an opportunity to re-imagine the suburbs. To that end, it considers and evaluates a variety of solutions to the problem of existing big box abandonment. These solutions include straight retail

18. *See* BROWN, *supra* note 7 and accompanying text; *infra* Part III.B.1.

19. *See, e.g.*, David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1140 n.4 (1999) (distinguishing "between vacant and abandoned buildings, defining the latter as vacant properties that are also tax delinquent and for which services are not paid or provided"). This Article presents abandonment and vacancy as two end points on a continuum, where abandonment is more severe than vacancy. *See infra* Part II.A.

20. *See infra* notes 54–55 and accompanying text.

reuse, adaptive reuse, demolition and redevelopment, and demolition and re-greening.

Part IV addresses implementation of the solutions. It first considers issues of federalism and the proper scale of government to address the empty big box epidemic. It concludes that local governments are well suited to address this issue and focuses on drivers that should motivate them to take action. This Part then lays out ways that municipalities can use their police powers to solve the existing empty big box problem. It proposes specific zoning changes that local governments can make to incentivize market reuse and redevelopment of vacant big box stores and thus alleviate the problems caused by those structures in their communities. It then discusses the need for direct intervention by municipalities and methods of abandoned property acquisition. This Part also proposes a series of metrics—economic state, ecological goals, existing retail landscape, and existing land development patterns—that a local government can use in deciding which of the possible solutions would make the most sense in its community. The Article concludes by briefly addressing issues of financing to show that these solutions are not merely academic but that actual funding exists to promote sustainable development and smart growth projects across the country.

I. BACKGROUND

A. The Rise of Suburban Development

To understand big box stores, one must first understand the culture that allowed for, and welcomed, a retail landscape saturated by big box chain retailers: the suburbs. Big boxes were not always a distinctive feature of American development. Before most people owned automobiles, when streetcars and walking were the primary methods of transportation, "traditional neighborhoods" evolved to address people's needs.[21] These neighborhoods contained a mix of uses—housing, shopping, and offices—within walking distance of one another.[22] Most traditional neighborhoods had a "Main Street"

21. ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 3–4 (2000) (contrasting "traditional neighborhood" development with suburban sprawl).

22. *See id.*

not far from houses, where local businesses such as hardware stores, bookstores, and produce markets sold their goods to people in the neighborhood.[23] These small stores, and perhaps even the lively sidewalks that connected them, served as what planners and architects call a "third place."[24] The third place provides a sense of community engagement and involvement, which is separate from those found at the first place (home) and the second place (work).[25]

The transition to suburbs began after World War II as young men returned home from war, started families, and wanted more space.[26] Although stores initially remained in city centers, their proprietors eventually realized that they needed to follow their customer base, and thus many moved their shops out of traditional downtowns and to the suburbs.[27] At the same time, national retailers began opening outlets near the new suburban houses.[28] However, because suburban neighborhoods exclusively contained housing, shops had to locate in separate areas, typically along the major roads that led to the suburban housing developments.[29] Euclidean zoning, under which different land uses are kept separate from one

23. *See generally* Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 742 (1993) (describing "traditional main street . . . as the place to locate necessities in close proximity").

24. *See* ELLEN DUNHAM-JONES & JUNE WILLIAMSON, RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS 59–60 (2009); *see generally* RAY OLDENBURG, THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY (Marlowe & Co. 1999) (1989).

25. *See* sources cited *supra* note 24.

26. *See* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 138–42 (1999) (summarizing literature addressing urban sprawl); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issu*e, 84 MARQ. L. REV. 301, 331 (2000) (describing how population congestion was remedied through suburban sprawl); Christopher B. Leinberger, *The Next Slum?*, THE ATLANTIC, Mar. 2008, at 70, 72, *available at* http://www.theatlantic.com/magazine/archive/2008/03/the-next-slum/6653/.

27. *See* DUANY ET AL., *supra* note 21, at 8–9; Lewyn, *supra* note 26, at 318–19 (describing how businesses moved to the suburbs to follow "highway-driven residential development").

28. *See, e.g.*, *Our History: Through the Years*, TARGET.COM, http://sites.target.com/site/en/company/page.jsp?contentId=WCMP04-031697 (follow "Start Exploring" hyperlink; then follow "1950" on the timeline; then go to "1956") (last visited Oct. 22, 2011) (describing the expansion of Target's predecessor store to the suburbs in 1956 "[t]o meet the needs of busy suburban families").

29. *See* sources cited *supra* note 27.

another, served to bolster these patterns and make them law.[30] In many ways, Euclidean zoning shaped the suburbs. Single-family homes—and their surrounding yards and the children playing in those yards—were viewed as the highest and best use of property, which would be sullied by proximity to uses like apartments (which were viewed as "parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district"), commercial uses, and industry.[31]

Thus, the suburbs were born: housing in one area, shopping in another, and work in yet another, all designed to be accessible by car, not by foot. Along traditional neighborhood Main Streets, people had lingered and shopped with their immediate neighbors. The suburban shopping experience, defined by stand-alone big box stores and strip malls, fosters a very different environment where people use their cars to run specific errands, rarely lingering in the large parking lots that serve as entryways to the stores. The result is that an individual's interaction with her neighbors and the larger community is much more limited in suburbia than in traditional neighborhoods because the "third place," which was so prevalent along Main Street, is lacking in suburbia.[32]

B. The Rise of the Big Box

Big box development began in the early 1960s with construction of the first Target and Wal-Mart.[33] The idea

30. *See* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) (validating zoning ordinances).

31. *See id.* at 394. There was fear of "fire, contagion, and disorder" spreading to the single-family homes from commercial and industrial uses. *Id.* at 391; *see also* Jay Wickersham, *Jane Jacobs' Critique of Zoning: From* Euclid *to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 553–54 (2001) (noting that the Standard Zoning Enabling Act expressly sought to reduce density and " 'prevent the overcrowding of land' ").

32. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 59–60.

33. *See Our History: Through the Years*, *supra* note 28 (follow "Start Exploring" hyperlink; then follow "1960" on timeline; then go to "1961"). In 1961, Target's predecessor announced plans to open "a new discount chain store" that would contain seventy-five departments in one store with "wide aisles, easy-to-shop displays, fast checkout and, 'loads of well-lighted parking . . . for 1,200 cars.' " *Id.* (quoting Minneapolis Tribune). Target was originally founded as the Dayton Dry Goods Company, a department store. *Id.* (follow "Start Exploring" hyperlink; then follow "1900" on timeline; then go to "1902"). Other predecessor suburban retailers included early, now defunct large department and catalogue stores such as Caldor, Rickle, and Service Merchandise. *See generally* Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV.

behind big box construction is that the building itself is just a shell in which to house low-price items.[34] Because the structure is so basic, it gives shoppers the impression that little money was spent on design and all of the savings are being passed on to them.[35] As for the retailers, they are able to offer low-cost goods, in part, because the stores' construction is standardized. It would require more time and money to develop an individual set of construction plans for each new store than it does to have a single plan that can be applied to developments throughout the country.[36] Additionally, the big box structure is consistent with the suburban life-choice: easy access to shopping and free parking.[37]

Another important reason that developers and retailers build big boxes is that local zoning ordinances dictate their structure and form.[38] Again, the standard Euclidean zoning ordinances in many suburban communities expressly disallow retail uses from being placed adjacent to, or intermingled with, residential, office, or industrial uses.[39] Thus, many towns have created commercial districts that only permit retail shops. Those ordinances also set forth height limits, which, in suburban neighborhoods, often cap buildings at a few stories. These restrictions prevent developers from constructing tall structures and instead promote low-density construction (and

437, 457 (2009) (discussing early department stores). There are currently three types of big boxes: (1) "discount department stores," such as Wal-Mart, Target and Kmart, which sell a variety of items; (2) "warehouse clubs," like Sam's Club, Costco, and Price Club, which require membership; and (3) "category killers," which are the majority of big box retailers and are so named because they carry primarily one type of product (e.g., Barnes & Noble and Borders: books; Best Buy and Circuit City: electronics; Home Depot and Lowe's: hardware) and tend to destroy the market for locally-owned, independent stores that carry the same goods. Karen ZoBell & Kevin Reisch, *Containing Big-box Retailers: Land Use and Planning Challenges Confronting the Large-scale Retail Industry*, 25 CAL. REAL PROP. J., no. 4, 2007, at 4, 4.

34. *See* Sara Beth McLaughlin, Large Scale Adaptive Reuse: An Alternative to Big-Box Sprawl 43–44 (Jan. 1, 2008) (unpublished masters thesis, University of Pennsylvania), *available at* http://repository.upenn.edu/hp_theses/111/.

35. *Id.*

36. Salkin, *supra* note 12, at 1253 (discussing the benefits of standardized big box construction).

37. *See* BENFIELD ET AL., *supra* note 14, at 11 (addressing "sprawl").

38. DUANY ET AL., *supra* note 21, at 27–28.

39. *See* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 365 (1926) (validating zoning ordinances); Rollin Stanley, e=mc² *The Relative City*, *in* THE FUTURE OF SHRINKING CITIES: PROBLEMS, PATTERNS AND STRATEGIES OF URBAN TRANSFORMATION IN A GLOBAL CONTEXT 127, 131 (Karina Pallagst et al. eds., 2009).

thus, more sprawl).[40] Therefore, even if a big box developer wanted to create an urban, dense, multi-story retail structure, many suburban zoning ordinances would prohibit it.[41]

Additionally, codes often require vast parking lots: Most suburban commercial zoning districts have minimum parking requirements keyed to a proposed building's floor area. For example, in Seattle at least one parking space is required for every 500 square feet of built retail space.[42] For a 200,000 square foot building, this equates to 400 parking spaces, which is a somewhat conservative requirement.[43] If a retailer or developer wanted to include fewer spaces, it would have to seek discretionary approval from the municipality, which might be denied. Setback requirements, which in most suburban communities prohibit a building from being constructed flush with the street or sidewalk,[44] also compel the big box model. Because setbacks require that the building be constructed a certain distance from the street, parking typically fills this space.[45] This standard suburban design discourages people

40. *See, e.g.*, PASADENA, CAL., ZONING CODE ORDINANCE art. 2, § 17.24.040 (2005) (limits buildings in commercial districts to forty-five feet), *available at* http://ww2.cityofpasadena.net/zoning/P-2.html#17.24; JOHNS CREEK, GA., ZONING ORDINANCE art. 9, § 9.1.3 (2009) (height restriction of sixty feet or four stories, whichever is less, in C-1 Community Business Districts, which include retail stores), *available at* http://www.johnscreekga.gov/pdf/zoning/article_9.pdf; GREENWOOD, IND., CODE ch. 10, § 10-73 to -74, -79 tbl.E (2011), *available at* http://www.greenwood.in.gov/egov/docs/1303311404_317260.pdf (limiting the height of buildings in C-1 ("[c]ommercial—[n]eighborhood [s]hopping") districts to three stories or thirty-five feet, whichever is less, and in C-2 ("[c]ommercial—[t]ourist") districts to four stories or forty-five feet, whichever is less).

41. *See* sources cited *supra* note 40.

42. SEATTLE, WASH., CODE tit. 23, ch. 23.54, § 23.54.015(A), tbl.A (2010), *available at* http://clerk.ci.seattle.wa.us/~public/code1.htm (requiring one parking space for every 500 feet for general sales and services institutions).

43. In Glen Carbon, Illinois, the requirement is four spaces per 1000 square feet for buildings over 150,000 square feet, which translates to 800 parking spaces for a 200,000 square foot big box store. GLEN CARBON, ILL., CODE tit. 10, ch. 13, § 10-13-1G (2011), *available at* http://sterlingcodifiers.com/codebook/index.php?book_id=599.

44. *See, e.g.*, JOHNS CREEK, GA., ZONING ORDINANCE art. 9, § 9.1.3(B), 2.3(B) (2009), *available at* http://www.johnscreekga.gov/pdf/zoning/article_9.pdf. In Johns Creek, a suburban city north of Atlanta, even the ostensibly mixed-use C-1 and C-2 districts require a forty-foot front yard setback and a four-story height limit. *Id.* § 9.1.3(A)–(B), 2.3(A)–(B); *see also* Julie Mason, *Urban Reviewal: Proposed Building Laws Seek an Appealing Look*, HOUS. CHRON., Aug. 18, 1997, at 1, *available at* ProQuest, File No. 13528235 (stating that the result of setbacks is that "most shopping centers . . . are designed with parking out front, creating a strip mall effect").

45. *See* sources cited *supra* note 44.

from walking in commercial districts and practically mandates driving to reach a store's entrance.

Though these controls seem to suggest big box-style construction, localities can limit big box development; in almost every municipality, a big box store requires discretionary approval from the city council or planning commission.[46] Thus, across the country, local officials have directly considered whether to allow big box stores into their communities and have voted to permit them.[47] The reasons for their decisions are multi-faceted, but the "growth machine" model[48] of local government suggests that cities' primary rationale for approving, and often enticing, big boxes into their midst is to provide new jobs and maximize revenue from sales tax. Local officials permit construction because they believe that big box development will improve and enrich their communities.

These predictions tend to be borne out when a big box store first opens in a community. However, after that store has been operating for a time, its true costs reveal themselves. Big box stores typically open on the edge of town, close to highway intersections but outside of a traditional downtown (if one exists). In a process known as filtering, the big box tends to draw business away from the traditional downtown and away from local, independent stores, which are unable to match the prices or selection of a big box.[49] Over time, this results not

46. For example, in Portland, Maine, any new construction that is over 10,000 square feet (or over 20,000 square feet in an industrial zone) and any parking lot with a capacity of over seventy-five cars is considered a "major" development, which requires approval by the Planning Board. PORTLAND, ME., CODE § 14-522 to -523(f) (2011), *available at* http://www.ci.portland.me.us/citycode/chapter014.pdf.

47. Importantly, some have voted not to allow these structures and have passed local laws for the express purpose of blocking big box development. *See infra* Part III.A.

48. *See generally* JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987); Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976). "[T]he scramble for sales tax dollars has led to what would otherwise be irrational land-use decisions, as cities forgo development of much-needed housing and high-wage enterprises in order to devote land to still more big-box stores and shopping malls." MITCHELL, *supra* note 10, at 169. This is especially true in states such as California and Colorado, whose ability to increase property taxes is limited. *See* CAL. CONST. art. 13A, § 1, cl. a ("The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property."); COLO. CONST. art. X, § 20 (TABOR); COLO. CONST. art. X, § 3, cl. (1)(b) (Gallagher Amendment).

49. *See* JEROME ROTHENBERG ET AL., THE MAZE OF URBAN HOUSING MARKETS (1991) (discussing filtering); *see also* MITCHELL, *supra* note 10, at 169; Jennifer S. Evans-Cowley, *Thinking Outside the Big Box: Municipal and Retailer*

only in a loss or blighting of the "third places" along Main Street, but in a loss of sales and jobs at the local competitor stores, many of which are unable to stay in business once a big box opens nearby.[50] Thus, a growing number of local governments are beginning to realize that the benefits promised by big box developers rarely outweigh their harmful secondary effects.[51]

II. THE PROBLEM: VACANT AND ABANDONED BIG BOX STORES

A. Building Vacancy and Abandonment Generally

Retailers are deserting big boxes in such large numbers that commentators have anointed the empty behemoths with their own name: ghostboxes.[52] They fit into a larger category of

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Innovations in Large-scale Retail, 13 J. URB. DESIGN 329, 332 (2008) (citing studies finding that "the entry of a Wal-Mart into a market does result in a decline of small retailers").

50. DAVID NEUMARK ET AL., FORSCHUNGSINSTITUT ZUR ZUKUNFT DER ARBEIT, DISCUSSION PAPER NO. 2545, THE EFFECTS OF WAL-MART ON LOCAL LABOR MARKETS 34 (2007), *available at* www.newrules.org/sites/newrules.org/files/images/neumarkstudy.pdf ("On average, Wal-Mart store openings reduce retail employment by about 2.7 percent, implying that each Wal-Mart employee replaces about 1.4 employees in the rest of the retail sector. Driven in part by the employment declines, retail earnings at the county level also decline as a result of Wal-Mart entry, by about 1.3 percent."); *see also* MITCHELL, *supra* note 10, at 36 ("[R]etail development does not represent real growth. It does not generate new economic activity . . . . The size of the retail spending 'pie' in a local market is a function of how many people live in the area and how much income they have. Building new stores does not expand the pie; it only reapportions it."); Evans-Cowley, *supra* note 49, at 332 ("While an average Wal-Mart store initially creates 100 retail jobs, a study of counties with Wal-Mart stores finds that overall retail employment declines by between 180 and 270 jobs. The result is that for every job a Wal-Mart store creates, 1.5 to 1.75 other retail employees are displaced.") (internal citations omitted).

51. *See, e.g.*, Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 424–25 (Cal. Ct. App. 2006) (upholding an ordinance prohibiting superstore development, which contained a finding that "the establishment of discount superstores in Turlock is likely to negatively impact the vitality and economic viability of the city's neighborhood commercial centers by drawing sales away from traditional supermarkets located in these centers") (internal quotation marks omitted).

52. *See, e.g.*, Jessica LeVeen Farr, *The Ghost-Box Dilemma: Communities Cope with Vacant Retail Property*, 15 PARTNERS COMMUNITY & ECON. DEV., no. 1, 2005; Annysa Johnson, *Razing Fees for Big Box Stores Get 2nd Look: Amid Downturn, Cities Prepare for Vacant Sites*, MILWAUKEE J. SENTINEL, May 18, 2008, at 1, *available at* NewsBank Inc., Record No. MERLIN_13303435; *'Ghostboxes' Haunt Communities Across U.S.*, MSNBC.COM, July 6, 2009, http://www.msnbc.msn.com/id/31748428/ns/businessreal_estate/t/ghost...#.To8ty3K2Z8E.

built-out commercial properties that are now underperforming or abandoned known as greyfields.[53] As was the case with defining big boxes, it is difficult to settle on a single definition for a vacant or abandoned structure.[54] For purposes of this Article, vacancy and abandonment should be viewed as end points on an empty building continuum. Thus, a vacant or abandoned big box store is one that was formerly inhabited by a retail or grocery store that has since moved out. The newly vacant structure may be one where a tenant has recently departed, and the landlord is maintaining the structure and actively seeking a new tenant. At the other end of the spectrum, the truly abandoned building may be one where the

53. There are numerous definitions for greyfields. According to one commentator:

> Greyfields are old, obsolete and abandoned retail and commercial sites, namely malls. . . . Some [define greyfields as] enclosed, climate-controlled shopping centers that contain at least 400,000 square feet of retail space. Others consider strip centers, power centers (a center once dominated by a few large anchors like Kmart or Walmart), and even neighborhood centers that serve smaller geographic units and are usually anchored by a grocery store to be.

KENNETH M. CHILTON, CENTER FOR ENVTL. POL'Y & MGMT., UNIV. OF LOUISVILLE, GREYFIELDS: THE NEW HORIZON FOR INFILL AND HIGHER DENSITY REGENERATION 1 (2005). Unlike brownfields—former industrial properties that have actual or perceived environmental contamination that must be mitigated before redevelopment can occur—greyfields carry little risk of severe environmental harm because they have typically only been used for retail and parking. *Id.* at 3. Brownfields and greyfields provide redevelopable land that is more sustainable than development on greenfields, or never-before developed, lands.

54. *See* N.J. STAT. ANN. § 55:19-81 (Supp. 2011) ("[A]ny property that has not been legally occupied for a period of six months and which meets any *one* of the following additional criteria may be deemed to be abandoned property upon a determination by the public officer that: a. The property is in need of rehabilitation . . . c. At least one installment of property tax remains unpaid and delinquent . . . or d. The property has been determined to be a nuisance . . . .") (emphasis added); ROBERT W. BURCHELL & DAVID LISTOKIN, THE ADAPTIVE REUSE HANDBOOK: PROCEDURES TO INVENTORY, CONTROL, MANAGE, AND REEMPLOY SURPLUS MUNICIPAL PROPERTIES 16 (1981) ("[V]acant structures, for which the original use is no longer economically viable, . . . are largely unoccupied due to their level of deterioration. The owners have walked away from these buildings and the services which normally keep them intact are no longer being provided. Additionally, required property taxes are frequently unpaid and the city is or may be in the process of taking title to the properties via tax foreclosure."); ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 1 (2006) [hereinafter MALLACH, BRINGING BUILDINGS BACK] ("An abandoned property is a property whose owner has stopped carrying out at least one of the significant responsibilities of property ownership, as a result of which the property is vacant or likely to become vacant in the immediate future.") (emphasis omitted).

landlord has given up trying to find a new tenant, stopped paying property taxes, and ceased all maintenance and upkeep. The existence of a big box store that sits anywhere on this continuum—empty and completely unused for a period of at least twelve months[55]—is significant and requires municipal attention. Municipalities should more aggressively pursue truly abandoned, deteriorating big box stores, as the harms they contribute are likely more severe. However, even recently vacated big boxes should be monitored because they also have negative effects and could become abandoned.

Some cities have begun to address vacant and abandoned property problems through vacant property regulations, many of which take the form of registration ordinances that track vacancy, finance programs to monitor vacant property, and authorize penalties for violations.[56] While these ordinances are a good first step, they are not comprehensive enough to solve the harms stemming from the vacancy epidemic. Ghostboxes have problems and particularities that are different from those of other abandoned property. First, their location is unique in that they are primarily located in suburban commercial areas, not traditional downtowns or inner city residential areas, which is where much of the abandoned property problem in the United States is located.[57] Second, their physical properties make them less suited for both redevelopment and reuse than other properties.[58] Thus, these structures pose unique challenges.

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55. This time period was selected based on the average amount of time it takes to re-tenant an empty big box store. *See* JEFF SIMONSON, COLLIERS INT'L, RE-TENANTING BANKRUPTED BIG BOXES: PAVING THE WAY FOR RETAIL'S REBOUND 3 (James Cook et al. eds., 2011), *available at* http://dsg.colliers.com/document.aspx?report=1207.pdf (showing that empty big boxes in densely populated areas found new tenants in 2.4 quarters, on average, while those in less populated areas took 3.4 quarters, on average, to re-let the structure). However, if a landlord is maintaining the structure and actively seeking new tenants after twelve months, a municipality can decide to wait.

56. *See* Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URB. LAW. 627, 631 (2010) (discussing vacant property ordinances and explaining that registration requirements "involve[] the disclosure of information that will ease the burdens of code enforcement and facilitate more effective communication with the owner").

57. *See* MALLACH, BRINGING BUILDINGS BACK, *supra* note 54, at 5.

58. Unlike industrial warehouses, which can be converted to lofts, or groups of abandoned homes, which can be demolished and redeveloped en masse, big box stores often sit on individual lots of less than ten acres, making large-scale redevelopment difficult. *See infra* Part III.B.1 (discussing the physical form of big box stores and its impact on adaptive reuse).

B. The Severity of the Empty Big Box Problem

Although turnover and short-term vacancy is normal in a retail landscape,[59] the vacancy rate for big boxes is unprecedented. One source estimated the national retail shopping center vacancy rate to be 11% after the first quarter of 2010.[60] This rate has increased since 2008, when the national retail vacancy average was 8.4%,[61] and 2000, when average retail vacancy was at a low of 6%.[62]

Not only are these stores going dark, but they are staying that way.[63] A study in Texas in 2005 found that the thirty empty former Wal-Marts in the state remained unoccupied for approximately three years on average.[64] A few of the stores remained empty for a decade; one stayed dark for seventeen years.[65] Similarly, a former Kmart in Hastings, Nebraska was vacated in 1992 and sat empty for a decade.[66]

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59. Kraut, *supra* note 19, at 1140 n.4 ("Short-term vacancy is a normal and healthy part of the real estate cycle . . . .").

60. BROWN, *supra* note 7, at 1 (noting that big box retail store losses have been "especially pronounced").

61. Verne Kopytoff, *Empty Big-box Stores Drag Down Their Neighbors*, SFGATE (May 11, 2009), http://articles.sfgate.com/2009-05-11/news/17199743_1_circuit-city-expo-design-center-big-box. At that time, San Francisco was on the low end of vacancies and Chicago was in the middle. *Id.*; Eddie Baeb, *Empty Big-box Stores Drive Up Retail Vacancy*, CHICAGOREALESTATEDAILY.COM (May 11, 2009), http://www.chicagorealestatedaily.com/article/20090511/CRED02/200033999/empty-big-box-stores-drive-up-retail-vacancy (noting that much of the empty space was in big box anchor stores, and that in the Chicago area alone in May 2009 there were 227 ghostboxes, contributing 10 million square feet). On the high end of retail vacancies, San Antonio, Texas was predicted to be at approximately 20%, and Kansas City at 17% in 2009. THEODORE C. TAUB, AM. L. INST., DEALING WITH DISTRESSED PROPERTIES: EMPTY STRIP MALLS, FRACTURED CONDOMINIUMS, AND FORECLOSED HOMES 2 (2008).

62. RREEF REAL EST. RES., PUB. NO. 50, US RETAIL MARKET–INVESTMENT OPPORTUNITIES AT THE PEAK OF THE MARKET 2 ex.2 (2006).

63. Merriam, *supra* note 11, at 29.

64. Hunt & Ginder, *supra* note 9. The study found that of 107 closed Texas Wal-Marts, 65 were occupied at the end of 2004. *Id.* Of those, approximately half were occupied by single tenants and half by multiple tenants. *Id.* As for the single-tenant occupancies, 10 were non-retail (including call centers, schools, and government offices). *Id.* The most common single retail tenant reuses were by Hobby Lobby (6 stores) and Tractor Supply (3 stores). *Id.* A few of the sites were purchased by private entities and then demolished and replaced by other uses, including a car dealership and big box home improvement stores. *Id.*

65. BIGBOXTOOLKIT, INST. FOR LOCAL SELF-RELIANCE, FACT SHEET—BIG-BOX BLIGHT: THE SPREAD OF DARK STORES (2007), *available at* http://www.bigboxtoolkit.com/images/pdf/bigboxblight.pdf.

66. CHRISTENSEN, *supra* note 5, at 104. The building is now inhabited by a Head Start program.

Regardless of the reasons for the long vacancies,[67] the number of communities plagued by empty big boxes is increasing, and the severity of the problem has not escaped local policymakers.[68] In a recent survey of city officials from the "200 most populous central [U.S.] cities," 69% of respondents said that abandoned property was a problem for their cities.[69] More than 500 cities have enacted or proposed vacant property registration ordinances,[70] and at least 75 cities have implemented ordinances to prevent or limit the construction of new big box stores and to prevent abandonment of those already in operation.[71]

67. There are many possible explanations for the long vacancies: the market cannot accommodate another retail establishment in that location; the former retail tenant prefers to continue paying rent under its lease to prevent competition from moving in; or the owner is waiting to see if the area or economy improve to get more rent or a higher purchase offer.

68. Artists and popular musicians also have taken note; Arcade Fire's album "The Suburbs," which contains the song *Sprawl II*, *supra* note 1, won the 2011 Grammy for Album of the Year. *Grammys 2011 Winners,* N.Y. TIMES ARTS BEAT BLOG (Feb. 14, 2011 12:06 AM), http://artsbeat.blogs.nytimes.com/2011/02/14/grammys-2011-winners/.

69. Accordino & Johnson, *supra* note 15, at 305 tbl.2 (showing that 69% of total respondents indicated that abandoned and vacant property was a "[p]roblem," a "[b]ig [p]roblem," or the "[b]iggest [p]roblem").

70. *Vacant Property Registration*, SAFEGUARD PROPERTIES, http://www.safeguardproperties.com/Resources/Vacant_Property_Registration/Default.aspx?filter=vpr (last visited Feb. 20, 2011) (interactive map) (online database of vacant property registration ordinances that have been proposed, have been enacted, are pending, and are dead). Notably, most vacant property registration ordinances only apply to residential properties. *See Vacant Property Registration Ordinances*, SAFEGUARD PROPERTIES, http://www2.safeguardproperties.com/vpr/city.php?p=1&l=&b=&s=&st= (last updated Mar. 2, 2011); Daniel T. Engle & Bernard I. Citron, *Vacant Property Registration Ordinances*, THOMPSON COBURN NEWSLETTER (Thomson Coburn, LLP, St. Louis, MO), http://www.thompsoncoburn.com/Libraries/Alerts/Vacant_Property_Registration_Ordinances.pdf.

71. *Economic Impact Review*, NEW RULES PROJECT, http://www.newrules.org/retail/rules/economic-impact-review (last visited Nov. 11, 2011) (documenting nineteen community impact review ordinances); *Formula Business Restrictions,* NEW RULES PROJECT, http://www.newrules.org/retail/rules/formula-business-restrictions (last visited Nov. 11. 2011) (documenting twenty-two formula business restrictions); *Local Purchasing Preferences*, NEW RULES PROJECT, http://www.newrules.org/retail/rules/local-purchasing-preferences (last visited Nov. 11, 2011) (documenting fifteen local purchasing preferences ordinances); *Preventing Vacant Boxes*, NEW RULES PROJECT, http://www.newrules.org/retail/rules/preventing-vacant-boxes (last visited Feb. 20, 2011) (documenting three dark store ordinances); *Store Size Caps*, NEW RULES PROJECT, http://www.newrules.org/retail/rules/store-size-caps (last visited Feb. 20, 2011) (documenting over thirty-six store size cap ordinances).

C. Reasons for Big Box Vacancy and Abandonment

There are a variety of forces behind the recent ghostbox trend, but they all have one element in common: the market. More specifically, there are two reasons: (1) over-retailing combined with decreased demand and (2) upsizing.

1. Over-Retailing and Market Demand

Since the construction of the first Target and Wal-Mart stores in 1962, big box development has grown exponentially.[72] Recently, however, retail and commercial establishments have been "overbuilt," creating more retail space than needed.[73] The amount of retail space per capita has increased 20% since 1970.[74] When developers build new commercial space, but demand for that space has not increased, competition (for shoppers as well as retail tenants) increases.[75] In many instances, the construction of new space also results in vacancies in older, existing structures.[76]

Not only has demand not increased enough to keep pace with new retail construction, but, in many instances, it has decreased. Since 2008, a number of retail chains have begun closing underperforming branches to reduce operating costs.[77] The recession has no doubt exacerbated this problem, contributing to the bankruptcy and liquidation of a number of

72. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66.

73. *See* Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 223 (Cal. Ct. App. 2004) (citing a report about the impact of two new Wal-mart Supercenters, which found that "[t]he two Supercenters represent significant excess capacity . . . . '[which] will result in oversaturation and fall-out of weaker competitors' "); Constance E. Beaumont, *Coping With Superstores*, PLAN. COMMISSIONERS J., Winter 1995, at 14, 14, 16; DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66.

74. James R. Valente & Leslie A. Oringer, *Retail's Evolving Footprint: Is Excess Capacity Beginning to Develop Across Markets, or Is the Ever-Evolving Retailing Format Hastening Locational and Functional Obsolescence?*, URB. LAND, July 1998, at 30, 31–35.

75. *See* Kirk McClure, *Managing the Growth of Retail Space: Retail Market Dynamics in Lawrence, Kansas, in* DOWNTOWNS: REVITALIZING THE CENTERS OF SMALL URBAN COMMUNITIES 223, 231–33 (Michael A. Burayidi ed., 2001).

76. *Id.*; *see also* ALAN MALLACH, BROOKING INST. METRO. POLICY PROGRAM, FACING THE URBAN CHALLENGE: THE FEDERAL GOVERNMENT AND AMERICA'S OLDER DISTRESSED CITIES 2, 6 (2010) [hereinafter MALLACH, FACING] ("[L]ack of demand . . . has created a new urban landscape dominated by vacant lots and abandoned buildings.").

77. BROWN, *supra* note 7, at 2 (noting that Sears and Home Depot have each closed fifty locations since 2008 due to underperformance).

large-format retailers.[78] The combination of overbuilding and lower demand has resulted in a glut of empty big box stores.

2. Upsizing

Despite overbuilding and the general lack of demand, some big boxes are doing well—so well that they need to move to larger stores. Most big box retailers that face this dilemma choose to build a new building and vacate their previous one.[79] It is typically less expensive for a big box retailer to create a new structure on an undeveloped parcel of land than it is to modify and reuse an existing structure or clean up and build on a brownfield site.[80] Moreover, retailers often prefer to construct a new building rather than add on to their existing building because revenue lost due to interruption of operations while the existing store is under construction would be too great.[81]

Wal-Mart upsizes regularly, though it refers to the practice as "consolidation."[82] Pursuant to its business plan, Wal-Mart moves out of its original Discount Stores, which contain between 50,000 and 100,000 square feet, and builds new Supercenters—big boxes housing traditional discount department store goods as well as groceries—which may exceed 200,000 square feet.[83] Instead of relocating to a different market, Wal-Mart constructs the new Supercenter in the same community where its smaller, now-vacant store is located; sometimes the new store is on the same street as the empty one.[84] Because this is part of Wal-Mart's business plan, it intentionally constructs big box stores that have a short life span; these buildings are not made to last.[85]

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78. *Id.* (shuttered retailers include "Linens 'n Things, Circuit City, Steve & Barry's, Mervyns, Goody's, Gottschalks and Sportsman's Warehouse"). Online shopping is also at fault. *Borders Files for Bankruptcy, To Close Stores, supra* note 8.

79. *See* Salkin, *supra* note 12, at 1278 (addressing the costs of big box construction).

80. *Id.* at 1256. This calculation ignores environmental costs.

81. CHRISTENSEN, *supra* note 5, at 8.

82. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 66 (describing consolidation).

83. *Id.* ("In 1994 Wal-Mart had 147 supercenters; in 2002 it had 1,258.").

84. Cherwin & Harding, *supra* note 4, at 38 (describing Wal-Mart upsizing techniques); Sochar, *supra* note 12, at 699 (same).

85. Merriam, *supra* note 11, at 29.

While these practices originally resulted in the shuffling of various retailers within the community,[86] it is becoming less common for another retailer to move into an abandoned big box store.[87] Many of the big box retailers who upsize are also under long-term leases that do not contain an operating covenant, which would require the tenant to continuously operate the store for a given period.[88] Thus, the retailer vacates and the store goes dark, but the building owner has no incentive (and, in some cases, no legal ability) to locate another tenant for the structure because the vacating retailer is still paying rent.[89]

D. What Is the Harm in a Ghostbox? Reasons That Empty Big Boxes Are Problematic

Empty big box stores impose numerous negative externalities on local communities.[90] Depending on where the physical structure lies on the vacancy/abandonment continuum, these harms may include blight, reduced property values, loss of tax revenue, decrease in social capital, and environmental problems. These externalities affect

86. *See generally* McClure, *supra* note 75.

87. This is because fewer retailers are expanding and because of structural reasons. *See* Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 223–24 (Ct. App. 2004) (relying on a study finding "that it had been difficult to find tenants for buildings that formerly housed Wal-Mart stores"); David Winzelberg, *Empty Big-boxes on Long Island Struggle to Find Tenants*, ALLBUSINESS.COM, http://www.allbusiness.com/real-estate/commercial-residential-property-commercial/12938534-1.html (last visited Nov. 11, 2011); *infra* Part III.B.1.

88. Allan M. Kaufman, *Operating Clauses in Shopping Centre Leases: Lights Out for the Vacating Tenant*, 18 CAN. BUS. L.J. 245, 245–46 (1991).

89. BAY AREA ECON. FORUM, PUB. ECON. GRP., SUPERCENTERS AND THE TRANSFORMATION OF THE BAY AREA GROCERY INDUSTRY: ISSUES, TRENDS, AND IMPACTS 71–72 (2004) (discussing recapture clauses); ZoBell & Reisch, *supra* note 33, at 8. When a store upsizes, there is typically a solvent building owner and/or lessee who may be involved. Thus, this Article will propose different solutions based in part on the reason for the big box vacancy.

90. Accordino & Johnson, *supra* note 15, at 306. See, for example, S.C. CODE ANN. § 6-34-20(C) (Supp. 2010) stating that:

> As a result of the existence of these abandoned facilities, there is an excessive and disproportionate expenditure of public funds, inadequate public and private investment, unmarketability of property, growth in delinquencies, and crime in the areas together with an abnormal exodus of families and businesses so that the decline of these areas impairs the value of private investments and threatens the sound growth and the tax base of taxing districts in the areas, and threatens the health, safety, morals, and welfare of the public.

communities in direct and specific ways and thus provide an incentive for cities to take action.

1. Blight and Symbolic Decline

Abandoned properties have "blighting effects," including weeds, graffiti, litter, loitering, and crime,[91] and big box impact studies have shown that "physical decay and deterioration result[] from store closures."[92] The extent to which blight is physically manifested on the site of an empty big box store often depends on whether the store is empty due to upsizing or downsizing and whether the building owner or lessee continues upkeep after it has vacated the premises.[93] While not every empty big box store would meet every state's definition of blighted property,[94] many ghostboxes share characteristics that can generally be deemed blight.[95]

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91. Evans-Cowley, *supra* note 49, at 337 (noting that abandoned big box stores are often "neglected, surrounded by chain link fences and covered in graffiti"); *see also* WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 4 (1990); Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, *in* THE CULTURAL MEANING OF URBAN SPACE 139, 140 (Robert Rotenberg & Gary McDonogh eds., 1993) (addressing abandoned properties as a source of blight); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 481 (1993) (discussing a residential property survey finding that blocks containing abandoned buildings had higher rates of property crime than those that did not, even if the buildings were not obviously abandoned). See, for example, CONN. GEN. STAT. § 8-290 (1958), stating that:

> [T]here exists within the municipalities of this state a large number of real properties containing vacant and abandoned buildings that were once used for industrial or commercial purposes, [and] many of these vacant and abandoned buildings are located in areas which are blighted or dilapidated and . . . the existence of such vacant and abandoned buildings contributes to the further decline of such blighted or dilapidated areas.

92. *Bakersfield*, 22 Cal. Rptr. 3d at 223–24.

93. Wal-Mart has an asset management division that "protect[s] the value of [its] assets by working with landlords, tenants and communities to properly maintain [its] excess buildings." *Asset Management*, WALMART REALTY, http://walmartrealty.com/Buildings/PropertyManagement.aspx (last visited Sept. 10, 2011).

94. In the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005), many states enacted statutes defining blight such that non-blighted parcels of land could not be condemned for economic development purposes. *See* George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 51 (2008) (addressing state legislative changes after *Kelo*). See, for example, N.C. GEN. STAT. § 160A-515 (2007), stating that:

The blighting effects of abandoned big box stores often contribute to more vacancies in the surrounding commercial district, perpetuating the problem.[96] The "broken windows" theory asserts that even minor signals of disorder, such as weeds in a parking lot or a single broken window in a building, contribute to and accelerate the decline of a neighborhood.[97] A broken window signals that "no one cares" (about the window or the community). As a result, there is no control over, or punishment for, vandalism, so there is no harm or cost imposed on one who breaks another window.[98] Though classically applied in urban environments, the theory translates to the suburbs; ghostboxes are a harm to be avoided.[99]

> "Blighted parcel" shall mean a parcel on which there is a predominance of buildings or improvements . . . and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare.

See, for example, GA. CODE ANN. § 22-1-1 (Supp. 2011), stating that:

> As used in this title, the term: (1) "Blighted property," "blighted," or "blight" means any urbanized or developed property which: (A) Presents two or more of the following conditions: (i) Uninhabitable, unsafe, or abandoned structures; (ii) Inadequate provisions for ventilation, light, air, or sanitation; . . . (v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or (vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation . . . .

95. *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 833 (2007) (defining blight as "a vivid term used to describe conditions ranging from true dangers to the public health and safety, through obsolescent features reducing market value, to a scary pretext for the acquisition of land which is desired by others").

96. *See* Greenbaum, *supra* note 91, at 140; Hirokawa & Gonzalez, *supra* note 56, at 627–28 (recognizing the connection between vacant properties and blight).

97. *See* S.C. CODE ANN. § 6-34-20(B) (Supp. 2010) ("Many abandoned retail facility sites pose safety concerns."); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/2/.

98. *See* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 2–3 (2004); *see generally* Kelling & Wilson, *supra* note 97.

99. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986) (allowing a suburb to rely on empirical evidence gathered in a nearby city, and holding that the suburb did not need "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [suburb] relies upon is reasonably believed to be relevant to the problem that the [suburb] addresses"); Bakersfield Citizens for Local Control v.

2. Economic Harm to the Surrounding Community

Empty big box stores also harm communities economically.[100] When operational, many big box stores serve as "anchor stores" for larger shopping areas.[101] The anchor can be a big box store that sits in the middle or on the end of a larger strip shopping mall (often referred to as "power centers"), or it can be a stand-alone building surrounded by other free-standing shops or strip malls.[102] The role of the anchor store is to draw customers to an area; while they are there, they will stop into the other smaller satellite shops as well.[103] The combination of big boxes and smaller stores creates a new, suburbanized version of Main Street.

When cities approve new big box development, they often invest taxpayer money in the construction of infrastructure and provisions of support for these stores, including widened roads, streetlights, and increased police service.[104] Moreover, many local governments provide public subsidies to entice big box developers and retailers to locate in their communities.[105]

City of Bakersfield, 22 Cal. Rptr. 3d 203, 221 (Ct. App. 2004) ("[P]roposed new shopping centers do not trigger a conclusive presumption of urban decay. However, when there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact.").

100. *See* CONN. GEN. STAT. § 8-290 (2009) ("[T]he abandonment and forfeiture of real properties with structures thereon is adversely affecting the economic well being of the municipalities and is inimical to the health, safety and welfare of the residents of this state.").

101. Raymond G. Truitt, *Retail Giants Rule Power Centers*, PROB. & PROP., Mar.–Apr. 1996, at 38, 38–42 (discussing power centers and anchor stores).

102. *Id.*

103. *Id.*

104. The less desirable a given market, the more likely it is that the city paid for these improvements. *See* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1090–91 (2005).

105. Farr, *supra* note 52, at 3 ("A 2004 study by Good Jobs First identified 244 Wal-Mart stores that received public subsidies totaling over $1.0 billion from communities where they opened stores or distribution centers.") (citation omitted). "Financing usually comes from tax funds that help finance the retrofitting of the abandoned building, providing an incentive to companies that are willing to reuse buildings rather than building new ones." Sochar, *supra* note 12, at 707 n.78. For example, the city of Brookings, South Dakota bought "a vacant Kmart site for $3.1 million, demolishing the building at a cost of about $250,000, and selling the improved property to Lowe's for $618,000—giving the chain a subsidy of $2.7 million." MITCHELL, *supra* note 10, at 163; *see also* PHILIP MATTERA & ANNA PURINTON, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS NEVER-ENDING GROWTH, GOOD JOBS FIRST 15–17 (2004); Constance

These take the form of property tax abatements, state corporate income tax credits, the use of tax-increment financing (TIF) districts, reduced land prices, public-private partnerships, and infrastructure assistance such as new highway exits.[106]

After all of these sunk costs have been invested—often to the detriment of existing downtowns—many retailers then abandon their structures. When a big box store goes dark, it harms the smaller shops that it was anchoring. The closure of the big box means less traffic will be drawn to an area, which results in fewer potential customers. Further, the sight of an empty ghostbox parking lot tends to repel many shoppers who might otherwise have shopped at the smaller, still-open stores.[107] Thus, the abandonment of a single big box may result in the shuttering of an entire strip mall.[108] Julia Christensen provides a stark example: "When Kmart moved, so did the surrounding businesses. A grocery store across the street vacated the area, as did supporting businesses nearby. The vacancy left a footprint two blocks long ghostly and barren for over a decade."[109]

The existence of vacant and abandoned structures also lowers surrounding property values.[110] A study of residential property values in Philadelphia found that houses located adjacent to vacant, derelict sites had an approximately 18% reduction in property value.[111] That study also found that basic

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Beaumont & Leslie Tucker, *Big-Box Sprawl (And How to Control It)*, MUN. LAW., Mar.–Apr. 2002, at 7, 30.

106. Farr, *supra* note 52, at 3 (discussing subsidies); *see also* CHRISTENSEN, *supra* note 5, at 15.

107. *See* McClure, *supra* note 75, at 232; Winzelberg, *supra* note 87; *see, e.g.*, *Atlanta-area Cities Find Abandoned 'Big-box' Stores a Big Nuisance*, BUS. LIBR., http://findarticles.com/p/articles/mi_qn4182/is_20010202/ai_n10142927/?tag=content;col1 (last visited Nov. 11, 2011).

108. Kris Hudson, *More Vacancies at U.S. Malls*, WALL ST. J. (July 8, 2011), http://online.wsj.com/article/SB10001424052702304793504576432151521531880.html; *see, e.g.*, *Big-Box Store Closures Hit Plaistow, Salem, N.H. Especially Hard*, ALLBUSINESS.COM, http://www.allbusiness.com/retail/retailers/11853217-1.html (last visited Nov. 11, 2011). Moreover, even after a big box store or strip mall has gone dark, environmental problems related to the structure and parking lot continue.

109. CHRISTENSEN, *supra* note 5, at 123.

110. CHILTON, *supra* note 53, at 1; *cf.* Greenbaum, *supra* note 91, at 140 (noting that abandoned properties devalue nearby houses, even if those houses themselves are well taken care of).

111. CLEVELAND LAND LAB, CLEVELAND URB. DESIGN COLLABORATIVE, KENT STATE UNIV., RE-IMAGINING A MORE SUSTAINABLE CLEVELAND: CITYWIDE STRATEGIES FOR REUSE OF VACANT LAND 6 (2008) [hereinafter RE-IMAGINING A

landscaping and cleanup of those vacant lots could increase nearby home values up to 30%.[112] Although these trends are often more obvious in urban, residential neighborhoods, which are denser, the analysis holds true for abandoned big box stores in suburban communities and is often exceedingly evident with respect to the effect of big box abandonment on surrounding retail properties.[113]

Abandoned big box stores further harm communities through loss of local sales and property taxes.[114] This is especially troubling for communities that rely to a large extent on sales tax to fund their operations. Moreover, not only do cities no longer have money coming in after abandonment, but they often must expend additional public money after a piece of property has been abandoned.[115] These expenses include greater police service to monitor the property, greater fire services due to the likelihood of fires in abandoned structures, and the provision of cosmetic improvements meant to make the property look occupied.[116] Further, once a property is abandoned and in a blighted condition, any private party engaging in redevelopment of that parcel will want, and expect, public funding to aid in a redevelopment project.[117]

MORE SUSTAINABLE CLEVELAND], http://neighborhoodprogress.org/uploaded_pics/reimagining_final_screen-res_file_1236290773.pdf.

112. *Id.*

113. *Supra* notes 99, 108 and accompanying text.

114. Garnett, *supra* note 98, at 12–13; McClure, *supra* note 75, at 245.

115. See, for example, S.C. CODE ANN. § 6-34-20(B) (Supp. 2010), stating that:

> The abandonment of retail facility sites has resulted in the disruption of communities and increased the cost to local governments by requiring additional police and fire services due to excessive vacancies. A public and corporate purpose of the local governments will be served by restoring the retail facility sites to a productive asset for the communities and result in increased job opportunities.

116. Garnett, *supra* note 98, at 16 n.79; *see also* INST. FOR LOCAL SELF-RELIANCE, WAL-MART'S IMPACT ON LOCAL POLICE COSTS, www.newrules.org/retail/policefactsheet.pdf ("[B]ig-box stores can also increase [police and] other municipal costs, particularly road maintenance, and eliminate tax revenue from small businesses that are forced to close or downsize. Altogether, these costs may even *exceed* the tax revenue a big-box store generates."); Schilling, *Code Enforcement*, *supra* note 16, at 110 ("In Austin, Texas, blocks with vacant buildings had 3.2 times as many drug calls to police, 1.8 times as many theft calls, and twice the number of calls for violent behavior as those neighborhoods without vacant properties. Annually, there is over $73 million in property damage as a result of more than 12,000 fires in abandoned structures.").

117. McClure, *supra* note 75, at 245 ("[T]he public sector is looked to as a major source of capital for the redevelopment of blighted areas and as a party that must

3. Community Health, Social Capital, and Public Space[118]

All of these harms are connected. Pursuant to the broken windows theory, if a community seems to lack order, people will believe that it is dangerous (not just disorderly).[119] This may result in people being less comfortable in their communities, staying inside, and disconnecting from their neighbors.[120] They may tend to use the streets less frequently (which, in the suburbs, is already a small amount) and grow increasingly atomized.[121] In her classic book about urban environments, Jane Jacobs explains that a neighborhood is made safe, lively, and inviting through the presence of activity and "eyes on the street," which in turn reduces crime.[122] By their nature, the suburbs lack this type of street life; indeed, many lack sidewalks. When the few semblances of third places that people in the suburbs have to be social and interact—their commercial retail spaces—begin to decline, it can accelerate this atomization and reduce social capital,[123] leading to a

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minimize the risk of the other parties who participate in the redevelopment process.").

118. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 287 (2000) [hereinafter PUTNAM, BOWLING ALONE] ("By virtually every conceivable measure, social capital [in the United States] has eroded steadily and sometimes dramatically over the past two generations."); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 628 (2006) (describing Joel Kotkin's idea of a sacred city and noting that " 'sacredness' is an expression of the kind of social capital that correlates with, and is promoted by, healthy city life" and noting that "[a]rchitectural beauty may indeed help build such social capital"); Robert D. Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT, no. 24, Winter 1996.

119. *See supra* Part II.D.1.

120. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1177–78 (1996) (discussing "a general apprehension in pedestrians" associated with "chronic street nuisance").

121. Kelling & Wilson, *supra* note 97, at 31. *See generally* PUTNAM, BOWLING ALONE, *supra* note 118 (discussing the erosion of civic engagement).

122. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 35 (1961) ("[T]he sidewalk must have users on it fairly continuously, both to add to the number of effective eyes on the street and to induce the people in buildings along the street to watch the sidewalks in sufficient numbers.").

123. *See* Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1476–77 (2005). Cross writes that:

> Despite the vagueness of attempts to define social capital, something in the concept seems to be closely related to levels of societal trust and trustworthiness, and to the participation in private groups . . . . It is thought to be embedded in a network or networks in which members cooperate thanks to some level of mutual trust.

breakdown of community.[124] As Professor Nicole Stelle Garnett recognizes, "[s]ocial scientists have long linked property conditions with community health. Put most simply, the presence of an 'eyesore' is a negative indicator of neighborhood health."[125] A decrease in public space, and thus in social capital, may also lead to a decrease in economic productivity.[126] The damage to urban and suburban vitality that results from the loss of these quasi-third spaces provides yet another incentive for cities to take action to alleviate the harms caused by ghostboxes.

III. SOLUTIONS

In the face of these harms, it is easy to forget that in ghostboxes also lies opportunity for revisioning. Traditionally, vacant greenfield[127] space exemplifies opportunity, while vacant and abandoned structures symbolize decline.[128] Perhaps this is because "[r]ather than comprehensive, forward planning which reflects a community's considered vision of its future, we in the United States have a land-use 'plan' produced in reaction to individual developer's proposals."[129] This approach is

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Id. (footnotes omitted).

124. JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE 175–216 (1993) (addressing urban sprawl as a cause of loss of community); *cf.* John N. Tye & Morgan W. Williams, *Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans*, 44 HARV. C.R.-C.L. L. REV. 255, 257–58 (2009) ("Scholars have found relationships between high levels of social capital and positive social phenomena, including well-functioning democratic governments, better health and education outcomes, and happiness and life satisfaction.") (footnotes omitted).

125. Garnett, *supra* note 98, at 4 (footnotes and parentheses omitted).

126. *See* Cross, *supra* note 123, at 1477 ("[T]here is a widespread and growing belief that social capital is important to economic growth.").

127. *See* Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 791 (1995) (defining a greenfield as "land that has never been used for manufacturing or commercial activities and which carries with it none of the potential for environmental liability of a Brownfield"); Lincoln L. Davies, Note, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 293 (1999) (defining greenfields as "open areas of land not yet consumed by growing cities and suburbs").

128. H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 29, 44 (1996) ("Abandoned houses are not only symbols of decline, but they actively cause decline.").

129. John L. Horwich, *Environmental Planning: Lessons from New South Wales, Australia in the Integration of Land-Use Planning and Environmental Protection*, 17 VA. ENVTL. L.J. 267, 271 (1998).

beginning to change, both in the scholarly literature and in practice.[130] Local governments can work with their communities to create a new image and identity.[131] Thus, the failure or departure of a big box retailer reveals the opportunity for something creative, sustainable, and community-serving to enter in its place, which can in turn create a more competitive economic and business climate.

Having presented the extent of the ghostbox epidemic and the evidence that communities are suffering as a result, this Article will now briefly discuss what some municipalities have done to prevent the construction of big box stores. It will then turn to the heart of the problem at hand—existing empty big box stores—and present and evaluate the primary solutions: reinhabitation and reuse, or demolition and redevelopment or regreening.[132] The Article proposes a framework to aid local officials in choosing the best solution for their community, and Part IV.B provides specific ways that officials can use their police powers to implement those solutions.

A. Prospective Solutions

As municipalities come to understand the destruction that big box stores have wrought in their communities, many have begun to control and limit their construction. While the scholarly literature pertaining to big box abandonment is thin, it is nearly all concentrated on forward-looking policies and prospective solutions.[133] One of the most popular solutions is to

130. Jerrold A. Long, *Sustainability Starts Locally: Untying the Hands of Local Governments to Create Sustainable Communities*, 10 WYO. L. REV. 1, 2 (2010) ("Sustainable communities must emerge from a *local* exercise in creating an imagined future and developing the means to achieve that future.").

131. Peter Pollock, *A Comment on Making Sustainable Land-Use Planning Work*, 80 U. COLO. L. REV. 999, 1001 (2009) (discussing Boulder, Colorado's "history of using a variety of different land-use planning tools in order to achieve the community's vision").

132. *See generally* DUNHAM-JONES & WILLIAMSON, *supra* note 24 (using the term "regreening").

133. *See, e.g.*, Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County's Police Power and Its Comprehensive Plan: California's Experience*, 6 VT. J. ENVTL. L., no. 3, 2005, at 31; Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907 (2005); Evans-Cowley, *supra* note 49, at 330 (recognizing that "there has been limited research on the design impacts" of big box retailers); Salkin, *supra* note 12; Sochar, *supra* note 12, at 699–700; ZoBell & Reisch, *supra* note 33, at 4; Akila Sankar McConnell, Note, *Making Wal-Mart Pretty: Trademarks and Aesthetic Restrictions on Big-Box Retailers*, 53 DUKE L.J. 1537 (2004).

impose a size cap ordinance that limits the square footage of new development.[134] Setting a cap of 20,000 or 30,000 square feet might allow for a grocery store, but would prohibit a Wal-Mart Supercenter from entering the community.[135] Some municipalities have also begun to require certain design standards, such as roof and façade modulation or the specification of certain building materials.[136] Design requirements can make it easier for a big box store to be broken down into multiple smaller stores should it become vacant.

Some municipalities are now imposing bonding measures on big box retailers. These ordinances require the retailer or developer to provide money at the time of construction that can be used to demolish the building in the event of its future abandonment.[137] Similarly, some new ordinances include accountability clauses, which require a big box developer to provide, at the time of permit approval, plans for reuse of the building if it were to be vacated.[138] Various communities have adopted formula retail ordinances, which require special

134. *See, e.g.*, Paul Shigley, *Big Box Regulations Sweep the State: Proposed Wal-Mart Supercenters Are at Center of Debate*, CAL. PLAN. & DEV. REP., Jan. 2004 (noting that numerous California cities and counties have regulations that limit big box style development).

135. *See, e.g.*, BOXBOROUGH, MA., ZONING BYLAW art. 4, § 4003(4) (2000), *available at* http://www.town.boxborough.ma.us/ZoningBylaws.pdf (establishing a 25,000 square foot cap on business and industrial uses); ROCKVILLE, MD., CODE § 25-332(a)(1) (2000), *available at* http://www.newrules.org/retail/rules/store-size-caps/store-size-cap-rockville-md ("[N]o retail establishment shall exceed 65,000 square feet of total gross floor area."); SANTA FE, N.M., CODE § 14-8.8(C) (2011), *available at* http://clerkshq.com/default.ashx?clientsite=Santafe-nm ("In no case shall any one retail establishment exceed 150,000 square feet of gross floor area . . . .").

136. Façade modulation serves to "break up the overall bulk and mass of the exterior of buildings and structures" in order to provide visual interest. MERCER ISLAND, WA., CODE § 19.12.030(B)(2) (2010), *available at* http://www.codepublishing.com/wa/mercerisland/; *see also* Evans-Cowley, *supra* note 49, at 334–35 (describing adopted regulations).

137. *See, e.g.*, OAKDALE, CAL., CODE § 36-23.35(R) (2011), *available at* http://clerkshq.com/default.ashx?clientsite=oakdale-ca (requiring all major retail development to carry a performance/surety bond that provides sufficient funding to demolish the building and maintain the vacant site if the building is abandoned for more than a year). These ordinances fail to confront a key underlying issue: whether demolition is better than the possibility of reuse.

138. *See, e.g.*, BOZEMAN, MONT., CODE § 18.66.040(A) (2003), *available at* http://www.newrules.org/retail/rules/development-moratoria/store-size-cap-bozeman-mt ("Applications for large scale retail development shall include a renewal plan that will afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the structure in the event of closure or relocation by the original occupant.").

discretionary approval, such as a conditional use permit, for any "chain" store that has more than a given number of existing locations or branches.[139] Finally, developers wishing to construct a big box store in certain municipalities must conduct traffic and/or economic impact analyses showing what effects the new big box store will have on the community.[140]

These anti-big box ordinances are innovative and have had some success.[141] Unfortunately, most communities in the United States do not currently have such ordinances in place.[142] Further, even in those towns that have adopted these types of regulations, there are existing big boxes that were constructed prior to enactment of the ordinances and thus are not subject to them. Therefore, the focus of this Article is the numerous existing, empty big box stores—those that were constructed without a demolition bond or reuse plan in place.

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139. *See, e.g.*, S.F., CAL., PLANNING CODE § 703.3(a)(9) (2011), *available at* http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca. The formula retail use ordinance sets forth findings, including that:

> [T]he unregulated and unmonitored establishment of additional formula retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.

Id.

140. *See, e.g.*, BRATTLEBORO, VT., ZONING ORDINANCE art. 2, § 2337(A) (2010), *available at* http://www.brattleboro.org/vertical/Sites/%7BF60A5D5E-AC5C-4F97-891A-615C172A5783%7D/uploads/%7B38BE2D4F-F65A-482E-8A84-2AAA3D4DDFB1%7D.PDF ("No single Retail Store . . . shall have a Floor Area greater than 65,000 square feet, unless it . . . provide[s] . . . detailed analyses" of: (1) the "[i]mpact on employment;" (2) the "costs of public and social services attributable to the project;" and (3) the "[i]mpact on commercial and residential property values.").

141. A recent study of U.S. planners found that these big box regulatory techniques have had only moderate success. *See* Evans-Cowley, *supra* note 49, at 342.

142. There is some question about the ability of these ordinances to withstand constitutional challenge. *See* Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844, 848 (11th Cir. 2008) (holding that the formula retail ban violated the Dormant Commerce Clause); Brannon P. Denning, *Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update*, 58 CASE W. RES. L. REV. 1233 (2008). *But cf.* Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1022 (E.D. Cal. 2006) (upholding an ordinance that banned discount superstores).

B. The Possible Second Lives of Existing Empty Big Box Stores

1. Reuse

When considering what should be done with an empty big box building, the simplest answer would be reuse by another big box retail tenant: The location is probably suitable, the general structure of most big boxes (warehouse and loading areas) is identical, and the parking is sufficient. However, there are a number of problems that make reinhabitation by another big box retailer less common than one might expect.

First, many big box leases have clauses that expressly disallow a competitor from leasing space after it is vacated.[143] For example, Wal-Mart leases commonly disallow a Kmart or Target from taking over after Wal-Mart vacates a building.[144] Additionally, if the abandoned big box store is in a popular suburban retail shopping destination, it is possible that the other, successful big box stores already have outlets in the vicinity.

In some cases, economics are the cause of abandonment: Some big boxes go dark because a location can no longer sustain retail use.[145] Thus, that location would no longer be "appropriate or viable" for another big box retailer.[146] In today's market, the owners of empty big box stores that are releasing space to other retailers are often forced to do so at dramatically low rental rates.[147] Further, new leases are for

143. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 67; TAUB, *supra* note 61, at 2.

144. Cherwin & Harding, *supra* note 4, at 39.

145. CHILTON, *supra* note 53, at 3–4. While the location might not support a year-round retail use, there has been some success with seasonal "pop-up" stores: The big box retailer is only present and open during the holidays when people tend to shop more. *See* Julie Bosman, *Borders to Open 25 Temporary Stores for Holiday Sales*, N.Y. TIMES, Sept. 29, 2010, at B2 (noting that Borders opened pop-up stores during the holiday season in malls where they once had stores that they had recently closed); Keith Mulvihill, *Very Brief Tenants, and Why Landlords Like Them*, N.Y. TIMES, June 23, 2010, at B5 ("[I]n the last few years pop-ups have flourished in New York regardless of the holiday calendar. For building owners they are a way to fill vacant space . . . .").

146. BURCHELL & LISTOKIN, *supra* note 54, at 2 (discussing property reuse).

147. Some evidence shows that current rents are nearly half of what the prior tenant was paying. BROWN, *supra* note 7, at 3 (noting that most leases signed in the first half of 2010 for reuse of empty big box stores "have been executed at rates from 30 to 40 percent below the peak levels of just a few years ago" and sometimes "as much as 50 percent or more").

shorter periods of time—often ten years instead of twenty.[148] In the face of these figures, some owners of vacant big box stores would prefer to find different paths forward. Thus, because direct reuse is often unlikely or unsatisfactory, cities and developers have begun to think of ghostboxes as sites for potential *adaptive* reuse, the objective of which is to use

> surplus structures or land for something different from their original purpose. . . . [I]t is the conversion of these structures into sufficiently unique economic entities that secure a potential to succeed in the future where a reinstitution of uses similar to those of the past would be likely to fail.[149]

a. Benefits of Adaptive Reuse

Local governments are beginning to recognize the sustainable development opportunities embodied in adaptive reuse projects and thus some have passed adaptive reuse ordinances.[150] Adaptive reuse is popular in urban cores, where old, historic, industrial properties are reborn as lofts and mixed-use buildings. Many of these ordinances have historic preservation as their goal.[151] Others, however, seek to foster economic development and sustainable, infill development. For example, Los Angeles recently adopted an adaptive reuse ordinance that incentivizes developers to reuse existing

148. *Id.*

149. BURCHELL & LISTOKIN, *supra* note 54, at 2.

150. *See, e.g.*, MANHEIM TOWNSHIP, PA., ORDINANCE art. 23, § 2309 (2011), *available at* http://www.manheimtownship.org/DocumentView.aspx?DID=944; BURLINGTON, VT., ORDINANCE app. A, art. 4, pt. 4, § 4.4.5(d)(7)(C) (2011), *available at* http://library.municode.com/index.aspx?clientID=13987&stateID=45&statename=Vermont (Adaptive Reuse Bonus).

151. *See, e.g.*, PHX, ARIZ., ZONING ORDINANCE ch. 5., § 507 TAB I(K)(2) (2011), *available at* http://www.codepublishing.com/az/phoenix/ ("[H]istorically significant buildings and their related landscape setting should be retained and restored, or put to adaptive reuse . . . ."); LAWRENCE, KAN., LAND DEVELOPMENT CODE art. 5, ch. 20, § 20-501(1) (2006), *available at* http://www.lawrenceks.org/planning/documents/DevCode_2009.pdf ("Special Use approval may be granted in any Zoning District for an Adaptive Reuse provided the property is listed individually or as a contributing Structure to a historic district . . . ."); BELLINGHAM, WASH., CODE tit. 20, ch. 37, § 20.37.210(B)(2) (2011), *available at* http://www.cob.org/web/bmcode.nsf/f6281a531e9ead4588257384007b2367/b89877bad63f7d9e882577cf008038a5%21OpenDocument ("Height limits and building square footages are lowered to . . . discourage demolition of buildings with historic integrity and encourage adaptive reuse of structures by providing additional flexibility of use.").

buildings by lowering the cost of renovation projects[152] and also promotes the city's goal of smart growth.[153]

Adaptive reuse of abandoned big box stores is a burgeoning topic in the architecture and design communities. Julia Christensen recently published *Big Box Reuse*, which provides case studies of vacant big boxes across the United States that have been adaptively reused.[154] Further, there have been many competitions seeking creative ideas for proposed reuses, such as the Dead Malls[155] and ReBurbia contests.[156] These competitions have resulted in some outstanding proposals, such as turning big box stores into greenhouses and farms.[157] Though some would argue that these ideas are too idealistic or utopian, they are beginning to be put into practice.[158]

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152. Costs are reduced through incentives such as waivers of density restrictions, parking requirements, and exemption from site plan review requirements. *See, e.g.*, L.A., CAL., CODE ch. I, art. 2, § 12.22-A(26)(h)–(j) (2011), *available at* http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm &vid=amlegal:lamc_ca.

153. *See* James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001) ("Smart growth includes *a modernization of land use policy* that can affect land use, growth management, public infrastructure and facilities, social welfare, natural resources, environment quality, and the quality of life."); Matthew A. Young, Note, *Adapting to Adaptive Reuse: Comments and Concerns About the Impacts of a Growing Phenomenon*, 18 S. CAL. INTERDISC. L.J. 703, 703–11 (2009).

154. *See generally* CHRISTENSEN, *supra* note 5.

155. In 2003, the Los Angeles Forum for Architecture and Urban Design launched the Dead Malls competition to "challenge[] the design and planning community to counter the trend towards the dereliction, abandonment, and 'death' of the regional mall and invite[] approaches to rethinking its urbanistic and architectural milieu." *Dead Malls Competition*, L.A. F. ARCHITECTURE & URB. DESIGN, http://www.laforum.org/content/competitions/dead-malls (last visited Sept. 5, 2011).

156. The ReBurbia design competition sought submissions from architects, urban designers, planners and engineers to "re-envision[]" the suburbs. *Announcing the Reburbia Design Competition!*, REBURBIA, http://www.re-burbia.com/about/ (last visited Oct. 8, 2011). The second-runner-up proposed turning a ghostbox parking lot into a farm and the structure into a greenhouse and restaurant. *Reburbia Winners Announced!*, REBURBIA, http://www.re-burbia.com (last visited Sept. 5, 2011).

157. *Reburbia Winners Announced!*, *supra* note 156.

158. For example, the Galleria Mall in Cleveland, Ohio, is growing food for local restaurants in space where retail stores have closed. Katie McCaskey, *Future Farmers of the Mall*, AOL REAL EST. (Mar. 12, 2010, 5:04 PM), http://www.rentedspaces.com/2010/03/12/future-farmers-of-the-mall/. A portion of the mall now functions as an indoor greenhouse called "Gardens Under Glass." GARDENS UNDER GLASS, http://web.me.com/gardensunderglass/gardens underglass/Welcome.html (last visited Sept. 5, 2011). Those who run the program have a number of long-term goals, including serving as an educational resource for urban gardeners and cultivating a community of like-minded businesses in the

There are a number of benefits to adaptively reusing existing structures. In addition to furthering infill development goals and promoting reuse of existing buildings instead of new construction, adaptive reuse also allows for more diversity, which is especially relevant in the suburban context. Typically, the rent in an existing, abandoned big box building will be much cheaper than that in a newly developed shopping center.[159] Thus, businesses that might not be able to afford space in a new development, such as community-serving non-profit enterprises or ethnic specialty stores, can reinhabit an abandoned big box.[160] These types of uses can then serve as a new "third place" for local communities.[161]

Another benefit to adaptive reuse is that, from a green building and sustainable development perspective, it is always more efficient to modify and reuse an existing building than it is to construct a new building—even an energy-efficient or LEED-certified one.[162] This is so for a number of reasons. First, the infrastructure surrounding and supporting an existing big box store is already in place. Water, electrical feeds, and telephone and sewer systems are connected; lighting is installed; roads leading to the area are constructed and maintained; and intersections leading to store entrances have often been widened and traffic lights have been installed.[163]

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unused portion of the mall. *Our Mission*, GARDENS UNDER GLASS, http://web.me.com/gardensunderglass/gardensunderglass/our_mission.html (last visited Sept. 5, 2011). Of course, examples such as these are still the exception, not the rule.

159. BROWN, *supra* note 7, at 3.

160. Many first-ring suburbs—the innermost, original suburbs—now predominantly house immigrants. The location of ethnic restaurants and specialty stores in abandoned big box stores contributes to the diversity of these neighborhoods. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 68.

161. One concern with this approach is that the adaptive use would not serve as an anchor and thus could result in failure of satellite stores.

162. Michele Lamprakos, *The Greenest Building Is One Already Built*, BUS. J., http://www.bizjournals.com/triad/stories/2009/04/20/editorial1.html (last modified Apr. 20, 2009, 2:49 PM) (quoting Carl Elefante); *see also* Sarah Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 349 (2010).

163. *See* CHILTON, *supra* note 53, at 2–3 (noting that redevelopment of older structures may be less expensive than new development because of the existing infrastructure); *Greyfields Can Be Green Too*, GREEN-BUILDINGS.COM, http://www.green-buildings.com/content/78241-greyfields-can-be-green-too (last visited Oct. 22, 2011).

Adaptive reuse reduces new sprawl by concentrating development on greyfields instead of greenfields.[164]

Additionally, existing big box stores have a tremendous amount of embodied energy, which is "all the energy necessary to extract, refine, transform and utilize the materials."[165] Because new building codes are more arduous to comply with than they once were,[166] it may be less expensive from a purely monetary standpoint to construct a new building than to retrofit an existing building to current code standards. However, because there is so much embodied energy in an existing building, the carbon investment in constructing a new building is much higher, and thus it is more sustainable to retrofit an existing one.[167] A new building requires not just the purchase of building materials but the construction and fabrication of those materials, as well as their shipping to the construction site.

Just as there are problems with straight reinhabitation by an existing big box retailer, there are also problems with adaptive reuse of abandoned big boxes. Nevertheless, most of these can be overcome.

b. Problems with Adaptive Reuse

The biggest hurdle in adaptive reuse of empty big box stores is the structures themselves, which are cavernous and lack windows or interior walls. Thus, difficulties arise when trying to put new uses in these spaces; especially problematic are the dark back corners and an inability to comply with the placement of exits pursuant to the fire code.[168] While these problems prohibit many uses from reinhabiting an abandoned

164. Philip Carter Strother, *Brownfields of Dreams in the Old Dominion: Redeveloping Brownfields in Virginia*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 269, 270–71 (2000) (addressing brownfield redevelopment).

165. William A. McDonough, *A Dialogue on Design*, 30 U. RICH. L. REV. 1071, 1089 (1996); *see also* HOWARD T. ODUM, ENVIRONMENTAL ACCOUNTING: ENERGY AND ENVIRONMENTAL DECISION MAKING 1 (1996) (defining embodied energy as "both the work of nature and that of humans in generating products and services").

166. This is especially true in earthquake-prone areas such as San Francisco and Los Angeles.

167. *See generally* Schindler, *supra* note 162.

168. Paul Alongi, *Communities Struggle with Empty 'Big Box' Stores*, GREENVILLE NEWS, Apr. 6, 2005, at 15B (addressing difficulties with reusing abandoned big box stores). If multiple tenants attempt to reuse a ghostbox, it is difficult to provide easy access to the outside, as most big boxes have a single entrance and exit.

big box store, a small number of these structures have been successfully modified and reused as churches, bowling alleys, charter schools, museums, and libraries.[169] However, the modifications required to make ghostboxes suitable for these new uses are varied and expensive.[170] For example, because big boxes lack windows, skylights must usually be installed for new uses. Also, because big boxes are constructed as large warehouses, there are no internal walls or divisions, which other uses typically need or desire.[171]

In addition to interior spatial problems, big box stores are typically constructed with inexpensive exterior materials and little to no façade modulation. This makes it extremely difficult to divide a big box store into multiple smaller stores after it has been vacated.[172] If a prospective re-user wants to make drastic exterior modifications and structural alterations, it is possible that new site requirements will be triggered, such as setback or open space requirements that were not yet in place when the

169. *See* CHRISTENSEN, *supra* note 5 (providing examples of reuse); Bryan J. Paulsen, *Smart Moves in Small Towns: Creative Reuse Strategies Help Put Local Communities on the Map*, COM. INV. REAL EST., July–Aug. 2004, *available at* http://www.ciremagazine.com/article.php?article_id=92; Don Walker, *Milwaukee May Get Indoor Bike Park*, MILWAUKEE WIS. J. SENTINEL (Mar. 2, 2010), http://www.jsonline.com/blogs/business/85995622.html (announcing the conversion of a Menard's department store into a BMX park).

170. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 75 ("[I]mplementation of redevelopment projects is usually more difficult—and more costly—than new construction."); Cherwin & Harding, *supra* note 4, at 40 ("Refitting the space for a use often can be more expensive than new construction, particularly in communities where land is relatively cheap.").

171. *See* LISA REAGAN ET AL., COUNCIL OF EDUC. FACILITY PLANNERS INT'L, BUILDING COMMUNITY: A POST-OCCUPANCY LOOK AT THE MARYVALE MALL ADAPTIVE REUSE PROJECT 2 (2006), *available at* http://web.archive.org/web/20060929024822/http://www.cefpi.org/pdf/issuetrak0206.pdf. When an entity leases a space, it typically installs its own "tenant improvements" (T.I.s), which can also be costly and time-consuming. *See* John C. Murray, *The 2001 Leasehold Endorsements for Owner's and Lender's Policies (With Forms)*, PRAC. REAL EST. LAW., May 2006, at 53, 55 (2006) (discussing "major tenants (such as large law firms) who may have hundreds of thousands (or even millions) of dollars invested in tenant improvements"). However, rental space is typically constructed with potential T.I.s in mind and has windows and partitions in place. *Cf.* 1 REAL ESTATE TRANSACTIONS: STRUCTURE AND ANALYSIS WITH FORMS § 3:119–20 (2011) (describing the benefits from the landlord, rather than the tenant, making improvements).

172. Some building owners are finding ways to work around these problems, such as subdividing former big box stores into a few smaller stores. *See* Winzelberg, *supra* note 87. However, "this process is far more complex and expensive than merely putting up drywall. Plumbing, heating, air conditioning and ventilation systems need to be adapted and can cost $4 to $6 per square foot." BROWN, *supra* note 7, at 9. Further, when dividing a big box into smaller stores, the result is a series of long, narrow stores.

original structure was built.[173] This adds an additional level of costly permits and approvals.[174]

Moreover, there are a number of legal and real estate considerations that must be taken into account before an empty big box can be adaptively reused. First, one must examine the ownership and leasing structure of the store. If the structure and the land are both owned by the vacating big box retailer, that retailer will have control over—and will want to restrict—those who may use the space in the future. For example, when Wal-Mart sells a structure that it formerly owned, it requires the purchaser to sign a letter of intent that prohibits the property from being used as a large discount store, warehouse membership club, grocery store, pharmacy, large bowling alley, movie theatre, or health spa in the future.[175] Similarly, the retailer could have been leasing the store from the owner but might have required the owner to include a non-compete clause in the original lease, restricting the ability of the owner to lease the site to a retail competitor for a certain amount of time after the original lease ends.[176] These restrictive covenants and contract clauses are legally permissible but they severely limit the possibilities for creative reuse.[177] It is also important to examine whether there is a master lease in place that covers the empty big box; the existence of such an agreement might mean that multiple parties have interests in the land and structure, and multiple leases might cover a single big box store.[178] If the store is vacant but the tenant is continuing to

173. CHILTON, *supra* note 53, at 5.

174. However, cities could alleviate these problems through ordinances that promote adaptive reuse.

175. *See* Cherwin & Harding, *supra* note 4, at 39; Walmart Realty, Purchaser's Letter of Intent, *available at* www.walmartrealty.com/Media/128566298747968750.doc (last visited Sept. 5, 2011).

176. *See* Cherwin & Harding, *supra* note 4, at 39.

177. As between a restrictive covenant and a zoning ordinance, the more restrictive controls, unless the zoning makes the covenanted use or non-use illegal. *See* Byrd v. City of N. Augusta, 201 S.E.2d 744, 746 (S.C. 1974); *see also* 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 242 (1995). Thus, it is possible that a well-crafted zoning ordinance intended to avoid prolonged abandonment, especially when conditions of blight become visible, could override these restrictions. *See infra* note 270 and accompanying text.

178. If the ghostbox is part of a larger shopping center, there might be an agreement in place governing the relationship between the developer and retail tenants; these interests might need to be consolidated before reuse could take place. *See* Cherwin & Harding, *supra* note 4, at 39; Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622–23 (1998) (noting that part of the reason empty storefronts in Moscow remained empty was because there were multiple levels of

pay the rent, the owner might not be interested in finding a replacement tenant or new use. This scenario is not uncommon, and is used by some big box retailers to protect their market share and prevent competition from moving in, especially if the vacating retailer has upsized and opened a new store nearby.[179]

These problems combine to explain the reason that letting the private market find adaptive reuses for these structures has not been successful on a large scale.[180] Thus, municipalities must step in and support or require adaptive reuse of empty big box structures. The biggest question that cities must answer when considering adaptive reuse of big box stores is what they want the future of their communities to look like.[181] "The primary objection is that the [big box] site is culturally toxic; it was probably imposed upon the town with such corporate voracity that they question whether the building should even be there in the first place . . . ."[182] Abandoned big box stores are legacies of poor planning decisions made by planners and city councilpersons; they are seen as "symbols of a deeper-rooted pattern of haphazard development."[183] They are often located in suburban commercial districts that are removed from homes and offices on land that was cheap to purchase.[184] So, despite the multifarious benefits of adaptive

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ownership within a single building, and "each owner can block the others from using the space as a storefront. No one can set up shop without collecting the consent of all the other owners").

179. If the vacating retailer is still paying a mortgage on the property, the lender might also have rights, especially as to the structure's reuse by another retailer. Loan documents often provide lenders with the ability to approve or deny a new building tenant, use, or proposed demolition. *See* Brad Messer, *Redeveloping Mall and Shopping Center Space Vacated by Big Retailers*, PRAC. REAL EST. LAW., Nov. 2003, at 39, 41–42.

180. "[L]and banks arose from the recognition that an increasing number of parcels of land, whether privately owned or held by the local government as a result of foreclosure procedures, were not being reclaimed or redeveloped by market forces." Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., no. 2, Winter 2005, at 140, 142.

181. *See* CHRISTENSEN, *supra* note 5, at 121 ("Is this the building typology that we want our future museums, churches, and libraries to operate out of?").

182. *Id.* at 119.

183. CHILTON, *supra* note 53, at 1.

184. Before constructing a new building, a developer typically conducts a feasibility analysis. While some big boxes are built on cheap land, and then draw traffic out to these former greenfields, some are constructed at busy intersections and highway exchanges—sites that already had large amounts of traffic. *See* CHILTON, *supra* note 53, at 2.

reuse, cities must seriously examine whether they want to reuse these structures just because they are there. If one were able to reverse the poor planning decisions of the past and start with a clean slate, it is unlikely that one would choose to place all the big box structures in their current locations.

2. Demolition and Redevelopment or Regreening

Because big box stores are most often constructed on inexpensive parcels of suburban land, rather than in town centers,[185] municipal officials must consider whether their communities would be better served by reuse of these structures in their current locations or by their demolition. The goal of many city planners is to move away from sprawl-style construction and toward a smart growth ideal of clustered, walkable, mixed-use development—housing and office space over ground-floor retail.[186] Placing a library or a community center where a Wal-Mart used to be will only continue to require people to get in their cars in order to participate in civic life. Instead, some see the existence of ghostboxes as an opportunity to bring new urbanism[187] to suburbia; these spaces can be repurposed into new town centers, traditional main

185. *Supra* Part I.B.

186. *See* PEORIA, ILL., LAND DEVELOPMENT CODE § 1.5(B), *available at* http://www.formbasedcodes.org/files/Peoria%20Land%20Development%20Code.pdf. Peoria's code states that:

> New development regulations for the Heart of Peoria are necessary because the existing zoning and subdivision ordinances include provisions that work against the realization of revitalized, pedestrian-friendly commercial areas, and the renovation and preservation of inner city neighborhoods. This development code in contrast with previous codes focuses on the creation of mixed-use, walkable neighborhoods.

Id. See generally DUANY ET AL., *supra* note 21.

187. "New urbanists want to transform the current mix of residential neighborhoods, office complexes, strip malls, shopping centers, and underused city land that now dominates America's metropolitan landscape into 'neighborhoods of housing, parks, and schools placed within walking distance of shops, civic services, jobs, and transit.' " Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1091 (1996) (quoting PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM 16 (1993)). Examples of new urbanist communities include Seaside, Florida, and Celebration, Florida. *See* Michael J. Stewart, Comment, *Growth and Its Implications: An Evaluation of Tennessee's Growth Management Plan*, 67 TENN. L. REV. 983, 995 (2000); Michael Pollan, *Town Building Is No Mickey Mouse Operation*, N.Y. TIMES, Dec. 14, 1997, (Magazine), at 56.

streets, or public open space.[188] In order for such sweeping change to occur, though, it will first be necessary to demolish the existing structures and modify the existing zoning ordinances to allow for dense, mixed-use development in formerly low-density, commercially zoned areas.

Once an abandoned structure has been demolished, there are two options for the site: redevelopment of a new structure or structures in its place or "regreening" of the parcel—turning it into a park, community garden, or other environmentally sensitive, non-built use.[189] Complete demolition and rebuilding is not uncommon and has been used widely in the housing sector.[190] It is now becoming more common in the case of abandoned commercial structures as well.[191] There have also been recent successes with regreening. For example, a project is underway to convert large swaths of abandoned property in

188. Some commentators see demolition and redevelopment as a panacea, ushering in a new era of suburbia done correctly. Peter Calthorpe and William Fulton "advocate the 'maturation' of the suburb, via redevelopment of suburban 'greyfields' (old or abandoned commercial areas and mall sites), which they propose should be recycled into walkable village and town centers." Ashley S. Miler, Book Note, *Developing Regionalism: A Review of* The Regional City: Planning for the End of Sprawl *by Peter Calthorpe and William Fulton*, 11 N.Y.U. ENVTL. L.J. 842, 848 (2003) (quoting PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL 204–08 (2001)). According to Stacy Mitchell, the author of *Big-Box Swindle: The True Cost of Mega-Retailers and the Fight for America's Independent Businesses*, "[m]ost of these buildings are pretty cheaply constructed, not made to last a century . . . . The ideal situation is that these sites are redeveloped completely as multistory properties, and that the building isn't saved." Lisa Selin Davis, *What Should Be Done with the Empty Big Box?*, GRIST (Dec. 4, 2008, 12:38 PM), http://www.grist.org/article/always1 (internal quotation marks omitted).

189. *See infra* Part III.B.2.c (discussing regreening options).

190. For example, the city of Baltimore obtained title to a number of abandoned houses in the city, demolished those structures, and constructed new homes in their place. James L. Dunn, Jr., *Bureaucracy and the Bulldozer*, GOVERNING MAG., July 1994, at 22, 22, 24.

191. In their book, *Retrofitting Suburbia*, Ellen Dunham-Jones and June Williamson present a number of case studies involving strip centers and empty malls that have been turned into new urbanist town centers. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 95–171 (describing Mashpee Commons in Cape Cod, Massachusetts, which has assumed the role of town center but used to be the site of an early suburban strip center, and Belmar in Lakewood, Colorado, which involved the complete demolition of an enclosed mall and replacement with a series of urban blocks and a mixed-use downtown). *See also* CALTHORPE & FULTON, supra note 188, at 230–31 (noting how the Old Mill Site in Mountain View, California, once housed a mall, but the mall became underutilized and was completely demolished. It has since been redeveloped into a mixed-use neighborhood containing housing surrounded by office and retail uses).

Detroit to urban agriculture and farming.[192] In Cleveland, the National Science Foundation awarded an Ultra-Ex (Urban Long-Term Research Area Exploratory) grant for the study and documentation of the ecological benefits that reclaimed vacant lots can provide to neighborhoods.[193] And Minneapolis recently adopted a new plan that will permit commercial farms on vacant urban plots of land.[194] Despite their successes, these examples are few and thus far are mostly being implemented in residential areas. Further, like adaptive reuse, there are both positive and negative elements that municipalities should consider before adopting a policy supporting demolition of ghostboxes.

a. Benefits of Demolition

In many ways, the benefits of demolition mirror the problems with adaptive reuse. First, demolishing an abandoned big box store addresses one of the biggest concerns present with reuse: the structure itself. Imagining a future filled with reused one-story sprawling big box stores is much bleaker than one filled with interesting and varied façades that sit flush with the sidewalk or vast swaths of suburban greenspace. Further, not only is reusing a big box store difficult from an architectural standpoint, but sometimes the spaces are so specialized that remodeling them is nearly impossible.[195]

Demolition also provides an opportunity for a municipality to implement smart growth and sustainable development visions. Rebuilding on the site of a former big box store allows for new construction at a higher density along commercial corridors, which can help transform those corridors from car-

192. *See* David Whitford, *Can Farming Save Detroit?*, ASSIGNMENT DETROIT (Dec. 29, 2010, 11:37 AM), http://money.cnn.com/2009/12/29/news/economy/farming_detroit.fortune/index.htm; *Introducing Hantz Farms*, HANTZ FARMS DETROIT, http://www.hantzfarmsdetroit.com/introduction.html (last visited Feb. 19, 2011).

193. *See* [GREATER] CLEVELAND ACTION PLAN FOR VACANT LAND RECLAMATION, 9 (2010) (draft), http://www.gcbl.org/system/files/reimag+action+plan_8-24-10.pdf; Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES (Aug. 3, 2011), http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all.

194. *See generally* CITY OF MINNEAPOLIS CMTY. PLANNING & ECON. DEV. DEP'T, URBAN AGRICULTURE POLICY PLAN: A LAND USE AND DEVELOPMENT PLAN FOR A HEALTHY, SUSTAINABLE LOCAL FOOD SYSTEM (2011), http://www.ci.minneapolis.mn.us/cped/docs/UAPP_Chapter1.pdf.

195. Winzelberg, *supra* note 87 (discussing Circuit City stores, which are extremely specialized, making reuse difficult).

centered arterials to walkable boulevards. For example, Uptown District is a mixed-use retail and housing development in San Diego's Hillcrest neighborhood. It was constructed on a fourteen-acre site that contained an abandoned Sears store.[196]

Demolition can also result in an increase in the amount of public open space available and a greater diversity of housing choices.[197] Although projects that replace a single abandoned big box store might not be big enough to create an entirely new neighborhood, they can restore a sense of urbanism to a suburban area, which is a step in the right direction toward sustainable development and building social capital.[198] Thus, demolition provides local governments with the opportunity to

196. Originally, the city bought the property for $9 million for use as a library. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, TERRAIN.ORG, http://www.terrain.org/unsprawl/1/ (last visited Sept. 5, 2011). However, local neighborhood groups convinced the city that they would prefer a mixed-use development with a residential component, so the city issued a request for proposals to private developers. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. The winning developer purchased the property from the city for $10.5 million; the project cost $70 million. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. While the Sears store sat on one large superblock, the redevelopment demolished the structure and broke the area into four smaller blocks. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. The development, which has been in operation for nearly twenty years, includes a mix of residential unit types, as well as retail space and a large community center. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. Many of the retail stores are built up to the sidewalk fronting on a major thoroughfare. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*. While the residential portion of the project has been a success, a number of retail uses in the project have failed. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72–73; *Unsprawl Case Study: San Diego's Uptown District*, *supra*.

197. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 14 (discussing the benefits of "retrofit[ting]" the suburbs).

198. Ellen Dunham-Jones & June Williamson, *Retrofitting Suburbia,* URB. LAND, June 2009, at 38, 43 [hereinafter Dunham-Jones & Williamson, URB. LAND], http://www.uli.org/ResearchAndPublications/Magazines/UrbanLand/2009/June/~/media/Documents/ResearchAndPublications/Magazines/UrbanLand/2009/June/Jones.ashx ("Projects as small as 15 acres . . . such as San Diego's Uptown District . . . can transform the character of suburban areas and generate local input concerning future changes. But larger parcels can more easily justify the inclusion of public space, decked parking, and a fine-grained street network on suburban superblocks.").

be forgiven for their poor decisions, as well as the opportunity to choose a different way forward.[199]

b. An Evaluation of Demolition and Rebuilding

There are some problems with an approach that envisions large-scale demolition and rebuilding on abandoned big box sites. First, from a sustainable development and embodied energy perspective, demolition is not green. It is always more environmentally sound to reuse an existing building than to tear it down and reconstruct, even if the new construction is "green."[200] Big box demolition requires a tremendous amount of energy, and the resulting debris winds up in already overflowing landfills.[201]

Second, a municipality must seriously consider whether there is a local market for a new development located on the site of an old big box store. In most communities, those stores sit on land that is surrounded by other large retail stores and malls, isolated from other uses, not connected to mass transit, and located at the intersection of major highways. Imagining new urbanist mixed-use communities on the sites of abandoned big box stores is idyllic, but that type of transformative power is more likely if the redevelopment sites are located near a new or existing public transit station, as is the case for many of the Washington D.C. suburbs.[202] New transit-oriented

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199. *See* Shannon Kincaid, *Democratic Ideals and the Urban Experience*, 6 PHIL. & GEOGRAPHY 145, 149 (2003) (quoting LEWIS MUMFORD, THE URBAN PROSPECT, at x (1956)). Kincaid described Mumford's argument:

> Mumford argues that as a society, we face a profound choice in determining urban development, and we can either "rob ourselves of [the benefits of civic development] by adjusting our plans to the forces that were dominant in the recent past; or we can remold our plans and guide our actions in terms of a more desirable future."

Id. (alteration in original).

200. Lamprakos, *supra* note 162.

201. This criticism holds true whether the site is redeveloped or left as green space. The only counter to the criticism is that the demolition of the parking lot, as well as the building, can bring some environmental benefits. Removal of existing parking lots and black rooftops can decrease the heat island effect as well as negative impacts from impervious surfaces, and thus runoff and pollution that tend to increase river temperatures and raise stream levels, harming fish and other wildlife. *See* Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 434 (2011).

202. *See, e.g.*, *Transforming Tysons*, FAIRFAX COUNTY, VA., http://www.fairfaxcounty.gov/tysons/ (last visited Feb. 19, 2011); *Transportation*, FAIRFAX COUNTY, VA., http://www.fairfaxcounty.gov/tysons/transportation/ (last visited Oct. 9, 2011) (redevelopment in Tysons Corner aided by four planned metro stations).

development projects have the potential to become new destinations. Unfortunately, since most of the big box stores that go dark are not located in these areas, creating a new town center or new urbanist redevelopment alongside a major suburban arterial may become nothing more than a "stand-alone fragment[]."[203]

Third, and perhaps the greatest argument against demolition and rebuilding, is that "it is difficult to establish a sense of place or urban synergy on less than 15 acres."[204] Most of the suburban renewal success stories have succeeded only because they were able to rebuild on very large areas of land by demolishing extremely large structures—an entire enclosed mall or strip mall.[205] It is less clear whether demolition of a single big box store—for example, one that sits alongside a suburban commercial arterial without sidewalks or anywhere to which a person might want to walk—would allow for large-scale changes in a community. However, such demolition could replace a low density single-use building with a higher density, multi-story, mixed-use one. While this is a step in the right direction toward more sustainable development, a single building will not change an entire community.

A final concern, which is more prominent if the demolished site is redeveloped (as opposed to regreened), is whether current members of society, specifically planners and city officials, know what will be lasting and timeless.[206] As

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203. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 10–11; Dunham-Jones & Williamson, URB. LAND, *supra* note 198, at 44. It is possible that if enough suburban greyfields are densified suburban transit may become feasible. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 10–11. The redevelopment may even encourage transit to be built.

204. *See* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72; *see also* LEE S. SOBEL, EPA, 231- R-10-001, MARKET ACCEPTANCE OF SMART GROWTH 5 (2011), http://www.epa.gov/smartgrowth/pdf/market_acceptance.pdf (examining smart growth projects of at least 15 acres and setting that requirement because sites must be "large enough to include a variety of public and private uses to create a complete neighborhood or community"). Most stand-alone big box store lots are nine to fourteen acres. BAY AREA ECON. FORUM, SUPERCENTERS AND THE TRANSFORMATION OF THE BAY AREA GROCERY INDUSTRY: ISSUES, TRENDS, AND IMPACTS 54 (2004), http://againstthewal.com/studies/norcalstudy.pdf (discussing Wal-Mart supercenters).

205. Decommissioned military bases, amusement parks, and former hospitals could also succeed. *See* CALTHORPE & FULTON, *supra* note 188, at 227–29.

206. Some academics question whether it is possible to plan intelligently. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROL: CASES AND MATERIALS 65–69 (3d ed. 2005); John Rahenkamp, *Land Use Management: An Alternative to Controls*, *in* FUTURE LAND USE: ENERGY, ENVIRONMENTAL, AND LEGAL CONSTRAINTS 191, 191–92 (Robert W. Burchell & David Listokin eds.,

Professor Vicki Been has noted, "[t]he end result may be a uniformity that is just as, or even more, stultifying than the current predictability in suburban design";[207] perhaps all planning decisions will eventually be viewed as poor by some segment of the population.[208] The history of urban design is littered with poor decisions, as well as many great ones. When the highway system and the suburbs were envisioned and created, planners thought that they would revolutionize the way people lived, traveled, and communicated for the better. Urban renewal was going to clear the slums and revitalize cities.[209] The wisdom of those decisions is now less clear.

1975) (suggesting that "any fixed plan is inevitably wrong"). *But cf.* John R. Nolon, *The Law of Sustainable Development: Keeping Pace*, 30 PACE L. REV. 1246, 1254–55 (2010) (tying origins of the power to zone to German zones and efficient planning).

207. *See* Vicki Been, *Comment on Professor Jerry Frug's* The Geography of Community, 48 STAN. L. REV. 1109, 1114 (1996); Stanley, *supra* note 39, at 132 ("New urbanist communities springing up in farmer's fields are simply better sprawl.") (internal quotation markes omitted). A related concern is the permanence of the decision to demolish; once the economy recovers, perhaps more big box retailers will be looking for vacant space.

208. One common criticism of suburban renewal projects is that they create "instant cities." *See, e.g.*, Thaddeus Herrick, *Fake Towns Rise, Offering Urban Life Without the Grit*, WALL ST. J., May 31, 2006, at A1, *reprinted in* TOWN OF HURLEY, http://townofhurley.org/plan/assets/WSJ%20Faux%20Centers.pdf; John King, *Instant Urbanism: Citified Suburbs Becoming New Model for the Bay Area*, SFGATE (Apr. 8, 2007), http://articles.sfgate.com/2007-04-08/news/17238280_1_stapleton-project-stapleton-international-airport-lakewood. People are able to live and shop in these urban-style communities, but avoid problems of homelessness, garbage, and graffiti that plague some true downtowns. Further, because lifestyle centers tend to house upscale shops that cater to middle and upper-middle class suburbanites, they do not allow for the same diversity as would a refurbished or renovated abandoned big box. *See* Parija Bhatnagar, *Not a Mall, It's a Lifestyle Center*, CNN MONEY (Jan. 12, 2005, 3:14 PM), http://money.cnn.com/2005/01/11/news/fortune500/retail_lifestylecenter/.

209. Many of the same concerns and problems that plagued urban renewal are present in the context of suburban renewal—the key difference is that urban renewal destroyed functional neighborhoods, not abandoned buildings. For example, a pamphlet entitled *Tomorrow's Chicago* was created in 1953 to inform the public about the need for and benefits of urban renewal and comprehensive planning. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 28–29 (2003). In describing that pamphlet, Professor Pritchett wrote:

> In Chicago, planners envisioned a central city that, once cleared, would be opened up into 'superblocks' one-fourth square mile in area. Each community within the newly organized city would have a school and park in the center, and clusters of high and low-rise apartment buildings would surround the central square. . . . With a master plan, 'as we build and rebuild, we would leave the right places vacant, and what we build would be where it belongs,' argued *Tomorrow's Chicago*.

c. An Evaluation of Demolition and Regreening

Instead of seeking a new retail or mixed-use project for the demolished site, municipalities have another option: They may choose to regreen the space. For example, in Cleveland, fifty-six pilot projects are underway to regreen vacant sites.[210] The regreening idea has an especially strong hold in areas where the market demand for additional retail or vacant building space is low; [211] it makes little sense for cities to spend money on incentives to lure private development projects to a commercial area when the market might not support those projects if not for the incentive funding. The money that might otherwise be used for subsidies and incentives could instead provide an opportunity to do something truly creative with these properties. Further, the size of the big box parcel is typically large enough to accommodate any of these regreening techniques.

Regreening is a key element in any attempt at suburban revitalization.[212] The term "regreening" is very broad and can encompass many different non-structural "green" uses of formerly abandoned properties. The most basic of these uses would be for a city to take ownership of and then demolish the big box store and its parking lot and replace them with public

Id. at 29. The irony of this pamphlet is all too clear today; proponents of urban renewal thought they were being progressive, but the result was perhaps more problems than solutions.

210. MALLACH, FACING, *supra* note 76, at 2, 57. Cleveland, in collaboration with a non-profit group, selected the projects based on responses to a Request for Proposals. *See* David Beach, *Vacant Property Initiatives in Greater Cleveland*, GREENCITYBLUELAKE, http://www.gcbl.org/neoeco/research-projects/vacant-property-initiatives-greater-cleveland (last modified Mar. 19, 2010, 11:25 AM). Projects underway include community and market gardens, orchards, vineyards, native plant projects, pervious pavement parking lots, and pocket parks. *Id.*; *see also* RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111. St. Paul, Minnesota, bought a failed twenty-acre strip center that sat on the site of a former lake. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 73. Using a plan created by the University of Minnesota's College of Architecture and Landscape Architecture, the city restored the lake and wetlands and created a public park on the property. *Id.*; *see also* LEE SOBEL, GREYFIELDS INTO GOLDFIELDS 50–51 (2002); Jennifer Dowdell et al., *Replacing a Shopping Center with an Ecological Neighborhood*, 17 PLACES, no. 3, 2005, at 66, 66–68.

211. RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 3 (addressing regreening projects in Cleveland and noting that "[t]he lack of strong market demand and an abundance of vacant land create unprecedented opportunities to improve the city's green space network and natural systems").

212. MALLACH, FACING, *supra* note 76, at 3 (noting that neighborhood regeneration requires focusing on the goal of "identifying long-term non-traditional and green uses for vacant lands and buildings").

open space, such as a park or field that would be owned and maintained by the city.[213] Due to standard suburban zoning, there are surprisingly few large public parks in the commercial districts of suburbs. Public spaces foster community and connectivity, and they "are an important facility for public discussion and political process."[214] Thus, such a resource—true public open space—could function as a new gathering place, akin to a traditional town center, or a place to rest after a day at the mall.[215]

Another regreening technique that is gaining force throughout the country is to turn these demolished parcels into community gardens or urban agriculture plots.[216] For example,

213. The antithesis of Joni Mitchell's famous line, "[t]hey paved paradise and put up a parking lot," JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON (Warner Bros. Records 1970), is the Talking Heads' song *(Nothing But) Flowers*, which describes a re-greened suburbia: "There was a shopping mall / Now it's all covered with flowers . . . . This used to be real estate / Now it's only fields and trees / Where, where is the town / Now, it's nothing but flowers / The highways and cars / Were sacrificed for agriculture." TALKING HEADS, *supra* note 2.

214. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12 (1965); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). *See generally* EVERYDAY URBANISM (John Chase et al. eds., 1999).

215. Increasingly, truly public spaces are being supplanted by privately owned space made available to the public, such as the corridors of shopping malls, the lounge areas in a Barnes & Noble store, or privately owned parks that are open to the public. *See, e.g.*, Michael Kimmelman, *In Protest, the Power of Place*, N.Y. TIMES (Oct. 15, 2011), http://www.nytimes.com/2011/10/16/sunday-review/wall-street-protest-shows-power-of-place.html?pagewanted=all (discussing the Occupy Wall Street movement, the base camp of which is located in the privately owned Zuccotti Park). Some commentators even argue that public space is becoming less important for building community because people are turning to the Internet, Skype, and social networking websites for their public interaction. *See, e.g.*, WILLIAM J. MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN 7–8 (1995) (noting that gatherings have traditionally taken place in physical public space, but the Internet changes this reality); HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (1993) (discussing the difference between virtual and real-life communities); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003) (discussing physical metaphors that have been applied to cyberspace). *But see* JESSE DUKEMINIER ET AL., PROPERTY 175 n.36 (7th ed. 2010) (" 'Some say there is no need for a city, a center . . . . They say you can communicate in the future with television phones. You may be able eventually to talk to your girl friend by television, but you can't kiss her that way.' ") (quoting Victor Gruen).

216. *See, e.g.*, Catherine J. La Croix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 231–35 (2010); Brian Meyer, *Urban Farming Touted As Tool for Neighborhood Revival*, BUFFALONEWS.COM

the Philadelphia Green program, which is run by the Philadelphia Horticultural Society, has redeveloped hundreds of abandoned properties into community gardens.[217] Community gardens have a variety of excellent functions: they provide food for the local community;[218] they function as a third place, where members of the community can come together and socialize;[219] and they have been shown to raise nearby property values.[220] Municipalities could also consider replacing abandoned big box stores with green energy generation sites.[221]

(Mar. 23, 2010, 3:57 PM), http://www.buffalonews.com/city/article39994.ece; GROW YOUNGSTOWN, http://www.growyoungstown.org/ (last visited Oct. 9, 2011).

217. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 72.

218. In this way, community gardens serve both as a form of economic development and as a "food security resource." MALLACH, FACING, *supra* note 76, at 32. This function is especially important in "food deserts"—areas with few grocery stores and many fast-food restaurants—where those who live nearby tend to eat fewer fruits and vegetables and suffer from an increased likelihood of diabetes. *See* Avi Brisman, *Food Justice As Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 8–11 (2009). Brisman describes the health impacts associated with residing in a food desert and notes that when a neighborhood becomes a food desert due to the loss of a grocery store, concerned residents often attempt to launch community gardens or farm vacant land. *Id.* at 11 n.37, 17–19. Interestingly, the closure of a Wal-Mart or other big box store that included a grocery section can turn an area into a food desert. *See* RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 26–29 (noting that community gardens result in increased consumption of fruits and vegetables).

219. This function decreases atomization and provides for a sense of place. *See* RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 26–29 (noting that community gardens "bring neighbors together and make neighborhoods safer and more attractive"). One suburban town in Georgia, Johns Creek, recently created a community garden program; all of the plots sold out the first year it was implemented. Interview with Stephen Schindler, Resident & Member, Leadership Johns Creek, in Alpharetta, Ga. (Aug. 13, 2010); *see also Newtown Community Garden Growing and Thriving*, CITY OF JOHNS CREEK, GA. (May 20, 2010), http://www.johnscreekga.gov/news2010/2010-05-20_newtown-garden.asp. The city provides water but does not expend any other funds on the garden. Interview with Stephen Schindler, *supra*; *Newtown Community Garden Growing and Thriving, supra.* Supplies were donated by Home Depot and Whole Foods, each of whom has a dedicated plot in the garden. *Newtown Community Garden Growing and Thriving, supra*; Interview with Stephen Schindler, *supra.*

220. Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values,* 36 REAL EST. ECON. 241, 242–43 (2008); *see also* SUSAN WACHTER, THE DETERMINANTS OF NEIGHBORHOOD TRANSFORMATION IN PHILADELPHIA IDENTIFICATION AND ANALYSIS: THE NEW KENSINGTON PILOT STUDY 2 (2005), http://www.kabaffiliates.org/uploadedFiles/KAB_Affiliates.org/Wharton%20Study%20NK%20final.pdf (finding that improving vacant land via mowing lawns and planting trees caused surrounding housing values to increase by up to 30%).

221. These parcels could be used as solar fields (covered with solar panels to collect solar energy), geothermal wells, tree or plant nurseries, wind turbine farms, stormwater management sites, or ethanol or biodiesel production sites. RE-

Nontraditional reuse strategies such as these contribute to the local economy and go far in fostering healthier local ecosystems and communities.[222]

The biggest problem with regreening suburban spaces is a fiscal one. Whereas reuse and new development will likely result in some tax revenue, public open space will not. That said, some of the options addressed above, such as community gardens or energy generation sites, could provide some taxes to the municipality.[223] Similarly, the increase in property values that results from adjacent regreening projects will contribute to the locality's property tax base.[224] Further, in terms of funding and maintenance, there are a number of ways that regreened suburban sites could be maintained, whether by the municipality or others.[225] Thus, there are maintenance solutions that would not cost the municipality additional money,[226] yet could increase the beauty and sense of community in these suburban landscapes, again providing an otherwise lacking third place.

IV. IMPLEMENTATION OF THE SOLUTIONS

A. Who Should Take Responsibility for Implementing Solutions?

In examining the harms created by ghostboxes, it becomes clear that in addition to the vacating big box retailer, the local governments themselves are at the heart of the problem.

IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 29–31 (suggesting green energy land uses).

222. *See* MALLACH, FACING, *supra* note 76, at 28.

223. For example, the city could tax sales of the items produced, and these uses may increase surrounding property values and thus property taxes. *See* Been & Voicu, *supra* note 220.

224. JOSEPH SCHILLING, BLUEPRINT BUFFALO—USING GREEN INFRASTRUCTURE TO RECLAIM AMERICA'S SHRINKING CITIES 149, 154 (2007) [hereinafter SCHILLING, BLUEPRINT BUFFALO] (noting that "profit is achieved by the stabilized and improved values of adjacent properties").

225. For example, the Philadelphia Green program helps community groups organize and maintain vacant sites that have been transformed to green spaces. *Id.* at 153 (describing ways to support green infrastructure). High schools, senior groups, and other volunteer organizations have also shown willingness to help man community gardens. *See* Kathryn A. Peters, Note, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 236–37 (2010) (describing how in Portland, Oregon, community gardeners receive assistance and advice from volunteer garden managers).

226. *See* sources cited *supra* note 225.

Municipal decision makers crafted zoning ordinances and granted permits allowing development of big box stores in their communities, which led to a decline of their downtowns. As the big boxes began to go dark, local suburban shopping areas were destroyed as well; this reduces the local tax base, harms property values, and leads to general neighborhood malaise. At the same time, municipalities have expended large amounts of money: luring the big boxes in with subsidies; providing and maintaining infrastructure leading to these fringe shopping areas; and contributing funds to redevelopment projects. By failing to regulate and monitor how much retail development they have approved, and by allowing new stores to be constructed while numerous vacant ones exist, cities have exacerbated the ghostbox problem.[227]

The suggestions in this Part flow from the conclusion that local governments should alleviate the harms caused by ghostboxes within their jurisdictions. Thus, before moving forward, it is necessary to examine why local governments, as opposed to federal or state governments, should take the lead.

1. Authority, Federalism, and the Scale of Governance

Municipalities use their police power to regulate land use in the interests of health, safety, morals, and general welfare;[228] they do this through zoning, planning, subdivision, and building codes.[229] Because empty big box stores impact the health and safety of a neighborhood, as well as its aesthetics,[230] regulation of ghostboxes is well within the ambit of local government authority.

Though municipalities have the authority to address the problem, one must consider issues of scale to determine whether they are well-suited to do so.[231] Big box stores are

227. *See* McClure, *supra* note 75, at 231–33.

228. Berman v. Parker, 348 U.S. 26, 32–33 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.") (citation omitted).

229. ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROL: CASES AND MATERIALS 74 (3d ed. 2005).

230. *See* Curtin, *supra* note 133, at 40 ("[C]oncern for neighborhood aesthetics has long been justified as a legitimate governmental objective.").

231. I addressed similar issues of scale in the context of municipal green building regulations in Sarah Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV 285 (2010).

being abandoned on a nationwide scale—often by companies with a national presence—and they impose similar externalities on each of the communities in which they are situated. This might lead some to assert that big box abandonment is an interstate commerce issue with localized impacts, and thus federal regulation is constitutionally permissible and logistically advisable.[232] Thus far, however, there has been no federal attempt to address ghostbox-related harms.[233]

Some commentators assert that a regional government structure would be best suited to address the problem of empty big box stores and, more generally, the problem of declining suburbs.[234] "New regionalists" argue that governments acting at a regional level benefit from economies of scale to a greater extent than individual municipalities and thus may be able to obtain greater amounts of revenue, enabling larger scale revitalization of the suburbs.[235] Further, one reason for over-retailing, and thus eventual abandonment, is the willingness of communities to pirate retail activity from surrounding towns. While a regional system might be beneficial, the bottom line is that regional governance is still relatively uncommon; land use regulation traditionally is a local concern.[236]

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232. Perhaps a federal solution could emulate Superfund. *See* Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, YALE L. & POL'Y REV., symposium issue, 1996, at 23, 25 ("[T]he size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution."); *see also infra* note 327 and accompanying text;.

233. *See generally* Tanya Marsh, *Too Big to Fail vs. Too Small to Notice: Addressing the Commercial Real Estate Debt Crisis*, 63 ALA. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1775984 (noting that the federal government's response to the commercial real estate debt crisis "has been to allow the market to work itself out"). Although no national response has been forthcoming, that is not to say that one would not be welcomed; indeed, it could work in conjunction with the solutions suggested in this Article. *See infra* note 240 and accompanying text.

234. Some proponents of regional government assert that "decisions about land use and infrastructure policy should be centralized to prevent fragmented local governments from making decisions that exacerbate regional inequities." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 484 (2005). *See generally* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

235. Thomas J. Vicino, *The Quest to Confront Suburban Decline: Political Realities and Lessons*, 43 URB. AFF. REV. 553, 569–70 (2008).

236. Merriam, *supra* note 11, at 17 (asserting that these issues will continue to be addressed at a local level).

Local governments have already begun to take the lead in enacting experimental, forward-thinking, smart growth policies and ordinances, including those that combat sprawl.[237] Further, through their code enforcement offices, local governments have "special legal powers to address blight and vacant properties that no other entity possesses."[238] Finally, solutions to the empty big box problem will vary by locality, and local governments need the flexibility to discover and attract new uses for these structures and spaces in accordance with the needs of their particular locations.[239] Thus, because there are important local dimensions to both the problem and the solutions, local action is key.[240]

2. Drivers

In addition to the fact that local governments are well-suited to combat the problem of ghostboxes, they should do so for two primary reasons, one pragmatic and one normative. From a pragmatic standpoint, cities have a direct economic incentive to eliminate abandoned big boxes from their communities. From a normative perspective, cities have the

237. *See, e.g.*, DURHAM, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 10, §§ 10.3.1.D., 10.5.1.C. (2010) (allowing for modification to parking requirements for smart growth and transit-oriented development); CITY OF PORTLAND, OR., BUREAU OF PLANNING, COMPREHENSIVE PLAN: GOALS AND POLICIES, at V-2 (1988) (establishing the need to balance new development with reduction of urban sprawl and an increase in energy efficiency); *see generally* John R. Nolon, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENVTL. L. REV. 757, 758 (2006) (describing "dramatic local inventions emanating from [a city's] approach to smart growth").

238. Schilling, *Code Enforcement*, *supra* note 16, at 150.

239. "A state, let alone the national government, sits far removed from the idiosyncratic qualities that make each locality unique." Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision* Euclid v. Ambler *in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 383 (2010); *see also* Schilling, *Code Enforcement*, *supra* note 16, at 151 ("State and federal policymakers are less likely to recognize code enforcement's special powers to stabilize neighborhoods and protect federal and state investments in neighborhood revitalization. Alternatively, they see code enforcement as the domain of local governments and, therefore, do not support using state or federal funds.").

240. This does not mean that there is no role for federal and state governments to play in the context of abandoned properties and the declining suburbs. Municipalities and community organizations could greatly benefit from financial and technical state and federal support. For example, some states have enacted enabling legislation expressly allowing cities to create land-banking agencies to acquire and manage vacant and abandoned property. *See, e.g.*, MICH. COMP. LAWS §§ 124.751–.754 (2006); *see infra* Part IV.B.1.c (discussing land banks).

civic responsibility to their citizens to alleviate the harms caused by empty big box stores.[241]

a. Pragmatic Claim: Economic Incentive

In light of the harms addressed in Part II.D, municipalities have a clear economic incentive to get rid of abandoned big box stores in their communities and spur them toward a productive second life. If a new retail tenant reoccupies a vacant big box store, this aids the municipality by increasing its tax revenue. By getting rid of these eyesores in the community, municipalities may be able to attract additional residents.[242] The existence of a ghostbox also gives municipalities an opportunity to consider possible alternative uses for the site that might contribute to economic development within the locality: a new, urban-style mixed-use development that includes retail and housing, or public open space that enhances surrounding property values and thus increases the tax base in the community as a whole. Nearly any use would be more economically beneficial to a municipality and its residents than an abandoned property. Thus, especially during this time when many cities face budget deficits, they should play a key role in remedying the abandonment situation.[243]

b. Normative Claim: Civic Responsibility

Municipalities should also take responsibility for alleviating the harms caused by empty big box stores out of an inherent civic responsibility owed to their citizens.[244] By doing

241. *See* Schilling, *Code Enforcement*, *supra* note 16, at 104 ("Local code enforcement officials have the legal and policy responsibilities to enforce a wide array of building, housing, and property maintenance codes and to administer special nuisance abatement processes.").

242. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (espousing the idea of residents as consumer-voters who express their preferences by seeking out municipalities that provide the public goods and services that appeal most to them).

243. *See* Hirokawa & Gonzalez, *supra* note 56, at 627–30 (discussing financial problems facing cities).

244. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 365 (2008) (describing "the cardinal civic responsibilities of protecting health, safety, and welfare") (internal quotation marks omitted); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 331–32 (2007) ("[G]overnment's important responsibilities to protect the health, safety, and welfare of its citizens set it apart from a typical private business.") (citation omitted); Sean Carey, *Post-*Davis *Conduit Bonds: At the Intersection of the Dormant Commerce Clause and*

so, these localities would be accepting responsibility for the negative impacts on local health, safety, and welfare that resulted from poor land use decisions. Further, only when municipalities carry the burden and the consequences of their actions will they internalize the harms imposed by abandoned big box stores. Such internalization forces municipalities to factor the approval of big box stores into their cost-benefit analysis and thus would hopefully deter them from making similar, anti-forward-thinking determinations in the future.

Some may argue that the retailers are at least as responsible as the cities, if not more so: they are the ones who decided to construct, and then exit, the stores (arguably, with more foresight about that result than the municipality possessed).[245] With respect to stores that have upsized, and solvent owners or lessees who have abandoned, there is some validity to this point. Indeed, there is a role for those actors to play.[246] However, in the discretionary land use-permitting arena, the municipality holds the cards: Retailers can only do what local governments allow them to do.[247] Thus, as landlords often have a duty to mitigate if a tenant abandons the premises,[248] cities should now accept responsibility for the demise of their neighborhoods caused in part by the stores' abandonment.

B. How Can/Should Municipalities Implement the Solutions?

Having analyzed and evaluated the benefits and harms of the two primary options for empty big box stores—reuse and demolition—this Article now presents specific ways that municipalities can implement these options through market-tweaking mechanisms and a strategy for direct intervention and provides a series of metrics to assist decision makers in

Municipal Debt, 78 FORDHAM L. REV. 121, 125–26 (2009) (explaining that governments sell municipal bonds and collect taxes so that they may "fulfill the basic civic responsibilities of government").

245. However, even though criminals cause crime, cities still take action to address it.

246. *See infra* Part IV.B.1.a.

247. *See supra* Part II.D.2.

248. *See* Sommer v. Kridel, 378 A.2d 767, 773 (N.J. 1977) (holding that landlords have a duty to mitigate damages and must show that they used reasonable diligence in attempting to re-let abandoned premises). Although this is a duty owed to the tenant, I would argue that in this instance, the duty is owed to the citizens of the community.

deciding which solution would work best in a given community. By creating a strategy and municipal ordinances designed expressly to implement these solutions, local governments can start to see ghostboxes as opportunities to create more sustainable places out of their sprawling suburbs, instead of as symbols of suburban decline and blight.

1. Create and/or Revise Existing Ordinances

To solve its empty big box problem, a municipality should start by examining its zoning and building codes to determine which provisions allowed the big box to be constructed and then to become vacant or abandoned. Because empty big box stores are often scattered throughout a community, they may not be as visually noticeable as a cluster of abandoned houses, or an entire shuttered shopping mall, and thus local governments may believe it is appropriate to deal with them on a case-by-case basis. However, because "the difficulties of dealing with individual treatment of numerous discrete parcels, particularly in administrative front-end costs, may be quite consequential," municipalities should adopt a strategy and ordinance that will allow them to approach the problem in an organized, consistent, and cost-effective manner.[249]

a. Setting the Stage: Creating a General Abandoned Property Ordinance

As a first order of business, if the municipality does not already have a general vacant or abandoned property ordinance in place, it should create one. Such an ordinance can take many forms.[250] I propose a structure for an abandoned property ordinance that is adapted from the four-step process for managing abandoned properties described by Robert W.

249. BURCHELL & LISTOKIN, *supra* note 54, at 24.

250. For example, the town of Sleepy Hollow adopted the Abandoned Industrial Property Reclamation Law, which applied to the owners of industrial properties that housed manufacturing space and took effect when those owners proposed termination of their operations. Nolon, *supra* note 237, at 790–92. The ordinance required the property owner to demolish all structures on the site and remediate environmental problems within eighteen months after termination of the use. *Id.*; *cf.* SAN DIEGO, CAL., MUN. CODE art. 4, ch. 5, div. 3, § 54.0315 (2006) (the owner of a structure vacant for more than ninety days will be liable for a $500 civil penalty, with incremental increases of $500 for every ninety days, not to exceed $5,000 per vacant structure per year).

Burchell and David Listokin in their seminal work on the issue of abandoned properties.[251] This ordinance should allocate the burden of action between empty big box building owners or lessees, to the extent they are solvent, and the local government.

The first stage of abandoned property management—and thus the first part of an ordinance—should involve planning and inventory, wherein the municipality develops a strategy and creates a surplus or vacant property inventory system. Recently, a number of local governments have created vacant property registration ordinances that track vacancy, finance programs to monitor vacant property, and authorize penalties for violations.[252] While this is a good first step, cities should take these ordinances further. The ordinance should expressly place the burden of reporting vacancy or abandonment on the property owner and should either incentivize them to do so or punish them if they do not.[253] It should also seek to determine whether the property is owned by the vacating retailer, another private owner, or a lender.[254] If funding is available, the local government should seek to create an entity that is tasked with the management of this inventory.[255]

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251. BURCHELL & LISTOKIN, *supra* note 54, at 41–43.

252. *See, e.g.*, COCONUT CREEK, FLA., CODE pt. II, ch. 6, art. III, § 6-39(i) (2011), *available at* http://library.municode.com/index.aspx?clientID=10928&stateID=9&statename=Florida (requiring mortgagee to register vacant property's occupancy status and owner information upon default by mortgagor); MIAMI, FLA., CODE pt. II, ch. 10, art. IV, § 10-61 (2011), *available at* http://library.municode.com/index.aspx?clientID=10933&stateID=9&statename=Florida; *see* Hirokawa & Gonzalez, *supra* note 56, at 630–31 (noting the "striking" number of cities that have adopted such ordinances and listing some of those ordinances); sources cited *supra* note 70.

253. For example, fines could increase each day the vacating or abandoning owner fails to report, or the property owner could be prohibited from obtaining additional permits for similar projects in the future for failure to report.

254. Because lenders are not in the business of commercial property management, they might be more willing to strike a deal with a municipality.

255. For example, a redevelopment agency or land-banking agency. *See* FRANK S. ALEXANDER, LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS 5 (2005), *available at* www.lisc.org/content/publications/detail/793/ (describing a land bank as "a governmental entity that focuses on the conversion of vacant, abandoned, and tax-delinquent properties into productive use"); MALLACH, FACING, *supra* note 76, at 66 n.49 (noting that this entity would be dedicated to this task and would ideally be created at the county or regional level). Some states expressly grant this power to their municipalities via statute. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 33000–33855 (West 2010); CONN. GEN. STAT. ANN. §8-292 (West 2010) ("Any municipality may, by ordinance, establish an urban rehabilitation program and may authorize any existing board, commission, department or agency to be the

Step two of Burchell and Listokin's process involves property control, including stabilization and maintenance of the property.[256] An ordinance should therefore compel the owner or lessee of a vacant piece of property to maintain it: weed the parking lot, scrub graffiti off the walls, and perhaps maintain a security guard to keep out squatters and others who would use the property for illegal purposes.[257] The ordinance might include other affirmative requirements, such as landscaping or operating lights to make the property appear neater, if not inhabited.[258] An ordinance should provide the municipality with the power to enter the premises and undertake these tasks at the property owner or lessee's cost if that party cannot or will not comply.[259] The municipality could then attach a lien to the property, which, if not paid, could

urban rehabilitation agency or may, by ordinance, establish a new board, commission, department or agency to act as the urban rehabilitation agency."). The City of Lakewood, Colorado established the Lakewood Reinvestment Authority as an urban renewal authority pursuant to its City Charter and the Colorado Urban Renewal law. *See* COLO. REV. STAT. § 31-25-104 (2009); *Lakewood Reinvestment Authority*, LAKEWOOD, COLO., http://www.lakewood-colorado.org/urbanrenewal/urbanrenewal.htm (last visited Nov. 15, 2011).

256. BURCHELL & LISTOKIN, *supra* note 54, at 41.

257. *See* Adjile, Inc. v. City of Wilmington, No. 432, 2007, 2008 WL 660139 (Del. Mar. 13, 2008) (upholding the Wilmington ordinance that assessed fees and required action by vacant property owners). Before the enactment of an ordinance, the city would have the power to control these elements through its nuisance abatement authority and general police powers. *See* Hirokawa & Gonzalez, *supra* note 56, at 629–30.

258. In the absence of mandates, property owners and vacating lessees typically do not want to expend funds to landscape the vacant parcel, which exacerbates problems of neighborhood blight. Sochar, *supra* note 12, at 705. Some cities have solved this problem through prospective ordinances requiring performance bonds, which are used to perform upkeep on a vacant store until it is leased, purchased, or used by another tenant. *Id.* at 715; *see also* CHILTON, *supra* note 53, at 6.

259. This is not a novel idea. Some cities have instituted a program for abandoned residences wherein the city will enter, hang curtains, mow lawns and keep lights on to provide an appearance that the house is not abandoned and thus preserve the property values in the surrounding neighborhood. *See, e.g.*, HOLLYWOOD, FLA., CODE tit. XV, ch. 157, §§ 157.77, 90.09 (2011), *available at* http://www.amlegal.com/nxt/gateway.dll/Florida/holywood/cityofhollywoodfloridacodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:hollywood_fl_mc$anc= (authorizing trash removal, hedge trimming, and lawn-mowing). To avoid charges of warrantless searches, the municipality should first obtain the property owner's consent. *See* Camara v. Mun. Court, 387 U.S. 523, 534 (1967) (holding that municipal administrative searches for health and safety purposes "are significant intrusions upon the interests protected by the Fourth Amendment").

eventually result in the municipality obtaining ownership of the structure.[260]

Regardless of who has control over the property—the owner, the municipality, or a third party to whom the original owner sells it—the third aspect of the abandoned property ordinance should address ongoing management and disposition of the property. In crafting this portion of the ordinance, municipalities should consult the metrics proposed in Part IV.B.2 to determine their long-term goals for the property. These may include continued maintenance of the empty structure while waiting for it to be purchased, re-leased, reused, demolished and redeveloped, or regreened. In pursuit of those goals, the municipality should then implement market-tweaking mechanisms—code revisions that should spur market reuse or redevelopment, described in Part IV.B.1.b—as well as a plan for direct intervention if the market fails to find a new use for the parcel within a given period of time. The local government should also ensure that there is dedicated funding for maintenance or demolition.[261]

This step ties into the fourth step in Burchell and Listokin's process, which is the actual physical revitalization of the property. If the market-tweaking mechanisms are successful, the market should take care of this step; if they are not, the municipality should directly intervene.

b. Market-Tweaking Mechanisms: Modifying Existing Zoning Ordinances to Minimize Disincentives to Reuse or Redevelopment

Once the municipality has created its abandoned property ordinance, it should examine other elements of its existing zoning code, which, if modified, could alleviate harms stemming from the existence of empty big box stores in the community and allow for the creation of better suburbs. These code changes should incentivize redevelopment or reuse and disincentivize new greenfield development.[262] After these

260. Obtaining ownership in this manner may be a long process, and the specifics vary between states. *See* Dunn, *supra* note 190, at 22; *infra* Part IV.B.1.c (discussing vacant property acquisition).

261. *See* MALLACH, FACING, *supra* note 76, at 30; *infra* Part IV.B.2.1.C (addressing availability of funding).

262. Most zoning codes provide that if a nonconforming use is discontinued for a set period of time, it cannot be restarted. *See, e.g.*, PORTLAND, ME., CODE art. III, ch. 14, § 14-387 (2011), *available at* http://www.ci.portland.me.us/citycode/

changes are implemented, the market will decide what will become of the ghostbox, but the municipality can steer that determination to meet its predetermined goals for the empty big box parcels in its community based on which of these code modifications it chooses to implement.

i. Incentivizing Reuse

As previously noted, many big boxes exist in exclusive commercial or retail zones; residential and office uses are often not permitted.[263] This type of Euclidean zoning may work to dissuade or discourage adaptive reuse of ghostboxes. Thus, if a municipality has set a long-term goal of ghostbox reuse or retrofitting, the municipality should adopt a new mixed-use zoning designation for the area containing the vacant big box.[264] The ordinance could expressly permit large-scale formula retail use,[265] which would allow for reuse by another retailer, but the zoning would also allow for a school or community center to adaptively reuse the space.

In addition to focusing on the specific site or commercial district where the empty big box is located, municipalities with ghostbox problems should look at their entire land use map and comprehensive plan. One way to encourage reuse of big box stores is to limit or eliminate any existing retail zones that encompass undeveloped greenfield space.[266] Such a change

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chapter014.pdf ("If a nonconforming use . . . is discontinued for a period of twelve (12) months . . . the building or premises shall not thereafter be occupied or used except in conformity with the provisions of this article."). Thus, any suggested modifications to the zoning code proposed in this Article that make big boxes a nonconforming use would apply to ghostboxes, assuming they have been abandoned for the requisite period of time.

263. *See supra* notes 27–30 and accompanying text.

264. To avoid charges of spot zoning, the city should rezone entire commercial strips, not just the big box parcel. Because this is a form of upzoning—allowing a greater range of uses—the likelihood of a Fifth Amendment takings claim is low. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (holding that a state landmark preservation law did not effect a taking of property); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101, 117 n.117 (1993) ("[T]he developer bringing a ripe claim after an upzoning request faces an uphill battle to establish an unconstitutional taking on the merits . . . .").

265. *See supra* note 139 and accompanying text.

266. This type of downzoning could so severely impact a property owner's investment-backed expectations as to result in an unconstitutional regulatory taking of property. *See Penn Cent. Transp. Co.*, 438 U.S. at 124, 127–28. *But see* Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1057 (1999) (noting that a taking is less likely if the land was purchased for

would be helpful because big box developers and retailers have little incentive to reuse an existing store, which will necessitate costly changes to the structure and format, when there is an empty, inexpensive piece of land across town that is already zoned for retail use and ready to be built upon. A land use plan that limits sprawl has the effect of encouraging reuse of existing empty structures and fostering a culture of infill development.

Similarly, municipalities could incentivize reuse through the implementation of a building moratorium. A moratorium gives a municipality time to consider its needs and future land use planning while halting approval of new development.[267] This approach would be beneficial in an area that has a number of vacant big box stores as well as retailers who are submitting applications to create new ones.[268] The moratorium might prohibit a developer or retailer from constructing any new retail or commercial structure for a given period of time, or while there are existing ghostboxes in the municipality; in either case, reuse of an existing structure becomes more likely. Though a moratorium might decrease revenue or developer interest in investment in the short-term, the goal is not to limit development indefinitely; rather, it is to allow a municipality time to determine what location and what type of new development make sense for the community.

A final important market-tweaking change that local governments should make to incentivize ghostbox reuse is related to the leases that govern those stores. Big box retailers who lease stores commonly include a provision in their leases that restricts the building's owner from leasing the property to

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agricultural, as opposed to development, purposes); La Croix, *supra* note 216, at 227, 247–74 (discussing potential takings claims when a city "downzon[es] urban property for urban agriculture and other green uses" and concluding "that takings issues, though potentially difficult, can for the most part be overcome" but cautioning that rezoning privately-owned land "for exclusive use as 'green infrastructure' would be vulnerable to attack as a taking").

267. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (upholding a temporary moratorium but leaving open the possibility that certain moratoria could constitute impermissible takings of private property).

268. *See generally* Home Depot U.S.A., Inc. v. Vill. of Rockville Ctr., 295 A.D.2d 426, 428–29 (N.Y. App. Div. 2002) (upholding a temporary moratorium on large retails structures); BELLINGHAM, WASH., CODE tit. 20, ch. 10, § 20.10.025 (2010), *available at* http://www.cob.org/web/bmcode.nsf/f6281a531e9ead4588257384007b2367/91d83026b9a5e8d188257297005d5b72!OpenDocument (imposing a moratorium on retail development over 90,000 square feet unless the proposed development meets or exceeds LEED standards).

a competing retail tenant if the original big box retailer vacates the premises.[269] Some cities have begun to proactively eliminate these contract clauses.[270] The extent to which local governments can interfere with existing private contracts is more questionable, but likely to be acceptable in this context. Under the Contract Clause,[271] the government can only substantially impair existing private contracts if (1) there is "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,"[272] and (2) "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' "[273] Thus, relying on the significant and legitimate economic and social harms addressed earlier in this Article as a basis for the use of its police power, a municipality might consider passing an ordinance that voids such existing non-compete clauses in the leases of big box retail tenants or prohibits them from including such provisions if they are to renew their leases.[274] Such a provision would make it easier for an empty big box store to be reused, and thus would lessen the likely amount of time it will remain dark, as well as reduce the impact of other related harms.[275]

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269. *See, e.g.*, TAUB, *supra* note 61, at 1253.

270. For example, Peachtree City, Georgia, passed an ordinance that requires conditional use approval for buildings over 10,000 feet; to obtain that approval, the retail tenant must submit a copy of its lease agreement to the city attorney, who then verifies that it does not contain a non-compete clause. PEACHTREE CITY, GA., ORDINANCE pt. II, app. A, art. X, § 1006.3(a)(6) (1999), *available at* http://library.municode.com/index.aspx?clientid=11414 ("If such tenant . . . voluntarily vacates such premises or otherwise ceases to conduct its retail business on the premises, the landlord shall be free to market and lease such premises to another person or company."). Because these ordinances are forward-looking and do not interfere with performance of already existing contracts, the Contract Clause does not apply. *See* Ogden v. Saunders, 25 U.S. 213, 262 (1827).

271. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

272. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (citation omitted).

273. *Id.* at 412 (quoting U.S. Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)) (alterations in the original).

274. *But see* Note, *Constitutionality of the New York Emergency Housing Laws*, 34 HARV. L. REV. 426, 430 (1921) ("Where . . . the contract in question is an ordinary private contract, valid when made, it would seem to be going counter to the plain words of the Constitution to hold that a state, even in the exercise of the police power, could impair it.").

275. The counterargument is that a tenant who insists on such a lease provision might refuse to renew its lease if such an ordinance were adopted. This

Of course, municipalities can also provide direct financial incentives for reuse in order to induce developers to do what the city hopes they will do.[276] Because reuse of an existing big box building is often more costly than constructing a new one,[277] some communities have begun to provide tax credits to developers if they reuse existing big box stores.[278] Similarly, municipalities can encourage reuse of existing structures by adopting the International Existing Building Code.[279] Developers and retailers who reuse a building would thus be subject to the existing building code instead of requirements for new construction, which are often more stringent and costly to implement in older structures.[280] Finally, municipalities could provide fast-tracked permitting, which can be very helpful in communities where the queue for major development approval might be months or years long.[281]

ii. Incentivizing Redevelopment

There are also a number of changes that a municipality can make to its zoning ordinances to incentivize redevelopment of its empty big box stores and encourage replacement with more sustainable development projects. First, just as to

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may create an additional ghostbox in the short run, unless the city had other suggested provisions in place, such as a moratorium.

276. James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 426 nn.5–6 (2001) (discussing sticks and carrots).

277. *See supra* note 170 and accompanying text.

278. At the state level, South Carolina adopted the Retail Facilities Revitalization Act, which provides tax credits to developers who improve, renovate or redevelop abandoned big box stores of 40,000 square feet or larger. S.C. CODE ANN. § 6-34-10 to -40 (2010).

279. *International Existing Building Code*, INT'L CODE COUNCIL, http://publicecodes.citation.com/icod/iebc/2009/index.htm (last visited Sept. 19, 2011). The International Existing Building Code (IEBC) "is designed to encourage the re-use of older existing buildings and help efforts to revitalize older areas of the city." Ellen Krafve, *Tyler Adopts Existing Building Code*, KLTV (Mar. 10, 2010, 12:13 PM), http://www.kltv.com/Global/story.asp?S=12117573.

280. *See* Krafve, *supra* note 279; *Effective Use of the International Existing Building Code*, INT'L CODE COUNCIL, http://publicecodes.citation.com/icod/iebc/2009/icod_iebc_2009_effectiveuse.htm (last visited Oct. 10, 2011).

281. Expedited permitting is often used to incentivize green building and affordable housing projects. *See, e.g.*, MIAMI-DADE COUNTY, FL., CODE pt. 3, ch. 8, art. I, § 8-6 (2010), *available at* http://library.municode.com/index.aspx?clientID=10620&stateID=9&statename=Florida (expedited permit program for green buildings); San Diego, Ca., Affordable/In-fill Housing and Sustainable Buildings Expedite Program, Council Policy, No. 600-27 (effective May 20, 2003).

incentivize reuse, the municipality should rezone the area to allow for a mix of uses—not just commercial, but also residential, urban agriculture, office, and light industrial.[282] Further, if a municipality decides to adopt a regreening strategy and demolish its existing vacant big box stores, it could rezone the land containing the ghostboxes from commercial to open space.[283] This would prohibit new commercial development in those locations, while at the same time limiting and thus increasing the value of the existing supply of actively used commercial and big box buildings.[284]

Because funding assistance is a strong incentive to developers, some municipalities have created a public improvement fee system, whereby a private developer partially finances a reuse or redevelopment project through bonds. The city then passes a resolution or ordinance allowing the developer to pay off the bonds by charging a public improvement fee, which looks a lot like a sales tax (e.g., 1% on top of existing sales tax) that is paid by shoppers and remits to the developer.[285] The developer records a private covenant requiring retailers to charge the fee, which may continue until the debt has been paid or for a given time period.[286]

Because the physical layout of a site is dictated by the zoning code, revising these physical requirements can encourage redevelopment of ghostbox sites,[287] as well as better-

282. "Simply rezoning the commercial properties along strip corridors to allow for residential use can stimulate gradual transformation in a hot market area." DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 87.

283. *But see supra* notes 264, 266 (discussing potential regulatory takings claims that could result from rezoning).

284. Jonathan Lerner, *Turning Failed Commercial Properties into Parks*, MILLER-MCCUNE (Dec. 28, 2010), http://www.miller-mccune.com/business-economics/turning-failed-commercial-properties-into-parks-26410/.

285. *See, e.g.*, Lakewood, Colo., Ordinance § 0-2002-7 (Feb. 26, 2002), *available at* http://www.lakewood.org/index.cfm?&include=/citycouncil/2002archive/ordinances/o200207.cfm; *see* Kieran Nicholson, *Villa Italia Successor Wins Tax: Improvement Fee Will Pay Off Developer's Bonds*, DENVER POST, Dec. 20, 2001, at B02, *available at* ProQuest, File No. 96175911.

286. Lakewood, Colo., Ordinance § 0-2002-7, *supra* note 285; *see also* DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 159. Though it is beyond the scope of this Article, a city considering a public improvement fee should consult state law to ensure that it will be considered a fee and not a tax, to which special requirements might attach. *See* Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000) ("To determine whether a particular charge is a 'fee' or a 'tax,' the general inquiry is to assess whether the charge is for revenue raising purposes, making it a 'tax,' or for regulatory or punitive purposes, making it a 'fee.' ").

287. *See supra* Part I.B.

designed suburbs. Any redevelopment would be subject to the new regulations. Commercial zones, especially those in suburban areas, often have setbacks that require a structure to be constructed a certain distance from the street or sidewalk (if there is one),[288] minimum parking requirements (meaning a developer must provide at least a given number of parking spaces),[289] and maximum building height limits.[290] These requirements serve to foster low-density sprawl development. Thus, municipalities should do away with minimum setbacks, instead requiring buildings to be placed up to the edge of the sidewalk. This design encourages more pedestrian traffic and fosters a more comfortable pedestrian environment. Such a change can turn major arterial streets into boulevards that promote walking and shopping instead of driving and parking. Local governments should also implement a maximum parking requirement instead of a minimum, which would cap the number of parking spaces permitted, or require shared or stacked parking. By reducing the amount of land that could be used for parking, localities increase the efficiency of land being used.[291]

Although these changes would encourage suburban redevelopment "done right," some developers will balk at them—especially those involving implementation of a maximum parking requirement.[292] Under current minimum

288. *See, e.g.*, SPOKANE, WA., CODE, tit. 17C, ch. 17C.120, § 17C.120.230A (2011), *available at* http://www.spokanecity.org/services/documents/smc/?Section=17C.120.230 ("The required structure setbacks promote streetscapes that are consistent with the desired character of the different commercial zones.").

289. *See supra* notes 42–43 and accompanying text.

290. *See, e.g.*, YARMOUTH, ME., ZONING ORDINANCE, ch. 701, art. II, § K (2010) (imposing a thirty-five foot height limit).

291. This is because sites can be demolished and redeveloped at greater densities, since square footage that previously would have been required for parking can now be used as part of the new structure. This change also increases the tax base. *See* Tyler Cowen, *Free Parking Comes at a Price*, N.Y. TIMES (Aug. 14, 2010), http://www.nytimes.com/2010/08/15/business/economy/15view.html ("Many suburbanites take free parking for granted, whether it's in the lot of a big-box store or at home in the driveway. Yet the presence of so many parking spaces is an artifact of regulation and serves as a powerful subsidy to cars and car trips. Legally mandated parking lowers the market price of parking spaces, often to zero.").

292. One could argue that while new regulations would result in a better quality of design and environment, they might in fact hinder redevelopment of the site. If a city's goal is simply to get *anything* in place of the abandoned big box, perhaps these revisions would not be beneficial. However, if its goal is to learn from past mistakes, and foster what it views as better development in the future, these suggestions are applicable.

parking standards, parking lots are large enough to accommodate every shopper on the busiest shopping day of the year.[293] One purported purpose of these minimums is to reduce the negative externalities such as pollution and green house gas emissions that are caused by cars driving around and idling while looking for parking spaces.[294] Further, if a potential shopper is driving by and sees available parking spaces, she will believe that the store is not overly crowded and that it will be easy to get in and get shopping done. Conversely, parking maximums provide a reduced number of parking spaces to potential shoppers, which might regularly all be taken up. Thus, some potential shoppers will choose not to stop and shop, because finding parking elsewhere and walking to the store is not part of the big box shopping culture. Further, while parking maximums may make sense in locations that are well served by mass transit or are accessible by bicycle, they make less sense in areas that are strictly accessed via car (as is the case for many big box locations).[295] Thus, a town that decides to implement parking maximums on sites containing ghostboxes should be serious about its desire to urbanize the area at issue. The town's goals should likely not be to attract another big box retailer to reuse the vacant space but to foster a redevelopment project that will bring more pedestrian activity into the community. Although the changes that will result from these zoning revisions will occur slowly—redevelopment of one abandoned parcel at a time—in the aggregate they will make a dramatic difference in the look and feel of a community.[296]

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293. *See* Evans-Cowley, *supra* note 49, at 335 (discussing minimum parking requirements and demand, and noting that retailers often provide *more* parking than is required under the code); Richard W. Wilson, *Suburban Parking Requirements: A Tacit Policy for Automobile Use and Sprawl*, 61 J. AM. PLAN. ASS'N 29, 30 (1995) (discussing minimum parking standards).

294. Stroud v. City of Aspen, 532 P.2d 720, 723 (Colo. 1975) (suggesting that minimum parking requirements might address pollution caused by drivers looking for places to park). *But see* Michael Lewyn, *What Would Coase Do? (About Parking Regulation)*, 22 FORDHAM ENVTL. L. REV. 89, 91 (2010) (noting that minimum parking requirements might result in more negative externalities than they eliminate).

295. One could argue that even in areas that are well-served by mass transit, people will still want their cars when they shop at big box stores, as they often buy large items, or bulk supplies, and thus cannot easily carry their purchases home on transit.

296. *See, e.g.*, DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 3 ("A decade after Boulder, Colorado, revised zoning and setback regulations along suburban

A municipality with a ghostbox problem could implement all or a combination of these suggested zoning revisions. They will serve to better the physical appearance of the abandoned property, and will also increase the likelihood that it will be redeveloped or reused in a way that will further higher density, new urbanist redevelopment of suburban, sprawl-ridden areas.

c. Direct Intervention: Acquiring Title

Even if a municipality selects a goal and implements market-tweaking devices in pursuit of that solution, the market might not produce a new use for the space within a reasonable period of time. In that event, the municipality should have a plan in place to take control of the ghostbox and seek an alternative use.[297] To do so, it must first obtain title to the property.

In the event that the abandoned big box store has unpaid taxes, the municipality might be able to obtain title through the state tax foreclosure laws.[298] For example, some states have enabled local land banks to automatically gain title to properties that fail to sell at a tax foreclosure sale.[299] Many state tax foreclosure laws are outdated, so this process may take quite a long time.[300] States could also play a role by revising their tax laws to allow property owners to donate their abandoned big box (or other) stores to the municipality in

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arterials, new mixed-use buildings with sidewalk cafés appear cheek by jowl with older carpet-supply stores set behind large parking lots.").

297. If a city is hesitant to take action, but the citizens within the community want to force the city to address harms caused by abandoned big box stores, those citizens might consider using the state initiative process to place such a requirement on the ballot.

298. *See* MALLACH, FACING, *supra* note 76, at 51; Accordino & Johnson, *supra* note 15, at 307–08 (noting that if property is tax delinquent for a certain amount of time, a city can initiate a tax sale).

299. *See* Alexander, *supra* note 180, at 150 (describing Louisville and St. Louis Land Banks). Ohio has gone a step further, empowering land banks to purchase properties that are delinquent even before a public auction takes place. OHIO REV. CODE ANN. §§ 323.78, 1724.02 (LexisNexis Supp. 2011). This reduces the risk of an absentee owner purchasing the property at a tax foreclosure sale. *See* La Croix, *supra* note 216, at 231–32.

300. MALLACH, FACING, *supra* note 76, at 51; *see also* TERESA GILLOTTI & DANIEL KILDEE, GENESEE INST., LAND BANKS AS REVITALIZATION TOOLS: THE EXAMPLE OF GENESEE COUNTY AND THE CITY OF FLINT, MICHIGAN 143 (describing the old system in Michigan where "abandoned properties were either transferred to private speculators through tax lien sales or became state-owned property through foreclosure," which meant that *local* government officials could not intervene).

which they are located and receive a tax write-off or other benefit for that donation.

Depending on the physical state of the abandoned big box parcel, its level of blight, and its impact on the surrounding community, the local government could declare it to be a nuisance property. A nuisance determination might allow a locality to obtain civil penalties, appoint a receiver, or take physical possession of the property.[301] Cities also may use their power of eminent domain to acquire abandoned buildings, though this is costly—and now somewhat more difficult due to state legislation passed in the wake of *Kelo*.[302] Depending on the financial situation of the ghostbox owner, cities may also purchase dark big box stores at bargain prices.[303] This approach has the benefit of avoiding tax foreclosure proceedings. Finally, some vacant property ordinances impose daily fines for noncompliance, which may lead a property owner to turn its vacant property over to the city to avoid large fine payments.[304]

After acquisition, the local government must manage the property until it is reused or redeveloped. Because property management requires time and expertise, the local government

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301. Some cities arrive at a nuisance determination only after using their code enforcement process. *See* Accordino & Johnson, *supra* note 15, at 309 (noting that code enforcement can result in fines or demolition).

302. *See, e.g.*, Accordino & Johnson, *supra* note 15, at 309 (describing use of eminent domain if a building is in a redevelopment area); Thomas J. Vicino, *The Quest to Confront Suburban Decline: Political Realities and Lessons,* 43 URB. AFF. REV. 553, 564 (2008) ("The county acquired, condemned, and demolished the Victory Villa Gardens Complex in the Glenmar neighborhood. In its place, [the] Office of Community Conservation Director . . . and [the] County Councilor . . . enticed . . . the region's largest homebuilder, with $20 million to redevelop the site."). *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (discussing state legislative responses to *Kelo*).

303. For example, after a 600,000 square foot outdoor shopping mall went dark, the municipality in which it was located purchased the property for $185,000 and a promise to forgive unpaid taxes. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 52; *see also* Alexander, *supra* note 180, at 154–55 (describing Atlanta Land Bank, which has the power to extinguish certain taxes). Of course, even at bargain prices, in this economy, many municipalities are unable to purchase anything. *See* Sara Behunek, *Three American Cities on the Brink of Broke*, CNN MONEY (May 28, 2010, 1:06 PM), http://money.cnn.com/2010/05/28/news/economy/american_cities_broke.fortune/index.htm.

304. *See, e.g.*, BALTIMORE, MD., CODE art. 13 § 4-13 (2011); CHICAGO, ILL., CODE art. I, tit. 13, ch. 13-12, §13-12-125(d) (2010), *available at* http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il; *see also* Hirokawa & Gonzalez, *supra* note 56, at 632 n.22 (citing ordinances that impose fines).

should delegate this task. If the state or locality has already created a Land Bank Authority or Redevelopment Agency, that entity should be tasked with obtaining title to ghostboxes and managing their disposition.[305] Land banks, a relatively new phenomenon, exist expressly "to convert the vacant and abandoned land of our central cities to assets contributing to the health and vitality of a community,"[306] and they have the power to acquire, manage, and dispose of vacant and abandoned property.[307] For those without Land Banks, some cities have found success in partnering with Community Development Corporations (CDCs) to work on redevelopment projects.[308] CDCs are "community-based organizations that conduct revenue-generating business with the primary purpose of economic and social development of their community," and thus are well suited to property acquisition, management, and disposition.[309]

2. Metrics: Which Solution for Which Community?

Once a municipality has determined that it will address its empty big box problem, it must decide which of the solutions discussed above to promote and which zoning changes to adopt. This Section proposes a set of metrics—criteria for choosing a

305. SCHILLING, BLUEPRINT BUFFALO, *supra* note 224, at 154–55 (addressing why land banks can effectively manage the disposition of vacant property).

306. Alexander, *supra* note 180, at 141.

307. For example, Michigan recently adopted a new law, the " 'land bank fast track act,' " MICH. COMP. LAWS §§ 124.75–124.774 (2004), the purpose of which is "to assemble or dispose of public property, including tax reverted property, in a coordinated manner to foster the development of that property and to promote economic growth in this state and local units of government," *id.* § 124.752. The statute also gives power to a land bank authority "to acquire, assemble, dispose of, and quiet title to property." *Id.* Under the statute, local governments are able to obtain control of vacant land more quickly, and they have more authority to do so than they did under the previous law. *See generally* GILLOTTI & KILDEE, *supra* note 300, at 143 (describing problems with previous law, including the tax foreclosure system).

308. *See generally* James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210 (2004) (describing benefits of community development corporations).

309. Note, *Community Development Corporations: Operations and Financing*, 83 HARV. L. REV. 1558, 1560 (1970). Although CDCs have traditionally focused on development of new housing as a route to revitalizing neighborhoods, they are finding new roles to play in revitalizing "shrinking cities." *See* Alan Mallach, *Where Do We Fit in? CDCs and the Emerging Shrinking City Movement*, SHELTERFORCE, Spring 2011, at 40, 43, 45.

remedy—that a local government can use to determine which approach or proposed solution makes the most sense for its community.[310] These metrics are: economic state (including the municipality's financial concerns and market demand); ecological goals (including the municipality's commitment to sustainable development and new urbanist ideals); existing retail landscape (including the location and number of existing retail structures); and existing land development patterns (including not just buildings, but also open space, landfill space, parking structures, etc.).[311]

310. *Cf.* SETH TULER ET. AL., ENVIRONMENTAL PERFORMANCE METRICS FOR OIL SPILL RESPONSE 7 (2006), *available at* http://www.crrc.unh.edu/progress_reports/tuler/oilspillmetricslitreviewapr06.pdf. Tuler writes that:

> [A]ny set of metrics is incomplete and may at best be considered only *representative* of the myriad of decision factors that could be brought to bear on the situation. For this reason, metrics are often referred to as *indicators* to emphasize the representational relationship these measures have to the state of complex systems. They are indicative – but not definitive – gauges, and consequently must be interpreted with their limitations in mind.

Id.

311. The matrix demonstrates the interaction between the metrics and the options for the second life of the ghostbox. The following Parts present each metric, and discuss how each metric would weigh in favor of or against each possible solution.

Table 1: Metrics for Selecting a Solution to the Problem of Empty Big Box Stores

Solutions ***Metrics***	**Straight Retail Reuse**	**Adaptive Reuse**	**Demolition and Redevelopment**	**Demolition and Regreening**
Economic State	City lacks funding for acquisition or redevelopment Low market demand for redevelopment projects	Demand for large-scale entertainment uses, schools, or municipal buildings Demand for community-serving retail use	Sufficient city or market-based funding available for acquisition and redevelopment Sufficient market demand to support redevelopment projects	City or volunteer partners available to maintain greenspace Lack of market demand for new big box or redevelopment projects
Ecological Goals	Decrease waste Reduce carbon footprint / energy consumption	Decrease waste Reduce carbon footprint / energy consumption	Comprehensive planning envisions high density / smart growth	Reduce impervious cover Increase public open space Support locally produced foods
Existing Retail Landscape	No other big box shopping options No traditional downtown shopping district	Sufficient number of operational big box stores	Sufficient number of operational big box stores Many ghostboxes	Sufficient number of operational big box stores
Existing Land Development Patterns	Ghostbox located in area not targeted for future development Limited landfill space	Struggling traditional downtown with empty storefronts Ghostbox located in area not targeted for future development Limited landfill space	Struggling traditional downtown with empty storefronts Ghostbox is located on large parcel or is part of a larger vacant strip mall Shrinking City	Struggling traditional downtown with empty storefronts Ghostbox site surrounded by forested areas Lack of open space Food Deserts Shrinking City

a. Economic State

In determining which option to promote—and thus how to revise and structure its zoning ordinances to support that goal—the local government should begin by examining its economic state, including an analysis of its finances and market demand for retail and other uses.

Many local governments are in financial distress[312] and thus are unable to secure funding that would allow them to take ownership, or invest in redevelopment, of an empty big box store. From a financial perspective, localities would need to invest little money if their goal was straight reuse of the vacant big box. Similarly, straight retail reuse might be appropriate if market demand is so lacking that no private developer expresses an interest in constructing new development in the area. Assuming a new tenant could be located, straight reuse would bring the most immediate relief to the community and would require little to no expenditure on the part of the municipality.

In contrast, even in a locality with weak finances, there might be demand for large-scale entertainment uses (such as a bowling alley or roller rink), schools, or municipal building space. Suburban areas with strong immigrant communities might desire community-serving ethnic market space. In these situations, a municipality might choose to support a goal of adaptive reuse for its ghostboxes. By incentivizing adaptive reuse of these structures, the municipality can spur the market to find new uses for these spaces. Unless it decides to reinhabit the space with a public use, it need not expend much money in pursuit of adaptive reuse.

In order for a municipality to support a goal of demolition and redevelopment, it needs assurance that sufficient market demand exists to support the redevelopment project. In contrast, lack of market demand for development would suggest regreening as an appropriate goal. Funding must also be considered; even if a private developer will demolish and redevelop the site, redevelopment projects often involve some public funding assistance.[313] Financing is also important if the end goal is regreening. First, the municipality will need to acquire the property and demolish the ghostbox. Then, funding

312. *See supra* note 303.
313. *See supra* note 117 and accompanying text.

or adequate community partnership, such as a non-profit or local business, would be needed to install or maintain the greenspace. Although property acquisition and demolition cost money, even financially distressed municipalities should keep in mind that the existence of the ghostbox is causing some of the financial distress, and thus its demolition and regreening may make a positive economic contribution.

b. Ecological Goals

Though many local governments are most interested in fiscal balance and economic viability,[314] some are moving toward ecological goals such as sustainable development, carbon footprint reduction, and increased energy efficiency. Because reusing a big box store is more ecologically sound than demolishing it,[315] municipalities that are committed to ecological goals such as these should pursue a plan of straight or adaptive reuse over demolition.

However, demolition and redevelopment allow a community to reimagine itself and rebuild itself in a sustainable way, fostering ecological goals.[316] Demolition and regreening can also contribute to ecological goals, especially in a community that has water quality concerns and wishes to decrease its impervious cover, or desires to create additional public open space. The general rule, however, is that reuse does more to further ecological goals than does demolition, no matter the end product.

c. Existing Retail Landscape

In examining its existing retail landscape, a municipality should consider the number of existing ghostboxes, the number of existing operational big box stores, and whether it has a

314. ELLICKSON & BEEN, *supra* note 229, at 56–57, 57 tbl.2-1.

315. *See supra* notes 162–67 and accompanying text.

316. In the context of suburban redevelopment, commentators have asserted:

> [T]he focus for redevelopment should be those parts of the metropolis with the highest auto dependency and [vehicle miles traveled], highest per capita greenhouse gas emissions and per capita runoff, and least diverse social, housing, and transportation choices. By retrofitting unsustainable suburban properties into networks of more urban, compact, and connected places we can incrementally retrofit the sprawling region into a greener polycentric metropolis.

DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 230–31.

traditional downtown with operational community-serving retail uses. If the community lacks other shopping options—for example, if Kmart, the only large discount retailer within fifty miles, closed, and there is no traditional downtown—the town might desire that another large discount retailer move into the abandoned big box space to serve the public need. Straight reuse would be most appropriate in this situation.

In contrast, if the town has enough operational big box stores, but also has ghostboxes and a traditional downtown with empty storefronts, it should learn from its ghostbox legacy. Instead of supporting straight retail reuse, the town should make changes to encourage local, community-serving retail development in the traditional downtown and adaptive reuse of the ghostbox site.

Perhaps the ghostbox is in a "shrinking city"[317] that has enough operational retail uses to meet demand, but that also has a number of ghostboxes and dead malls, some of which are located in areas where the city wants to target new growth and development. Demolition and redevelopment of ghostboxes in the targeted growth areas might be appropriate. In contrast, if they were located in areas not targeted for new growth, demolition and regreening with conversion to public open space would make sense. Finally, in examining its existing retail landscape, a municipality should consider whether the parcel has been abandoned due to upsizing or lack of market demand. If it is the latter, it is possible that another retailer would not survive in the space, and thus regreening would make sense.

d. Existing Land Development Patterns

Finally, the local government should examine its comprehensive land use plan and the existing land development patterns in the community and consider where it wants to target future development. The status quo—reuse—makes the most sense if the ghostbox is located in an area that has not been targeted for future high-density development or growth; it would not make sense to demolish and rebuild on this land. Further, if the municipality lacks sufficient landfill space to accommodate the amount of demolition debris

317. *See* La Croix, *supra* note 216, at 227 (defining shrinking cities as those with "long-term trends of significant population decline, associated with the loss or diminution of the industries that caused the cities to grow in the first place").

generated from a demolished big box, reuse of the structure would be more appropriate.

A number of existing land development patterns suggest a regreening solution, including: sites containing forested areas that might link to other areas to maintain or improve species habitat and enhance migration; areas that lack open space; ghostboxes located close to high density residential development that lacks its own yards; and the existence of covered streams on the property that perhaps could be daylighted—liberated from a pipe or culvert—as part of a regreening project.[318] Municipalities should also incentivize regreening if the ghostbox is located in a food desert and people lack the ability to purchase or harvest fresh produce in the area.[319] Specifically, that space could be used for community gardens or farmers' markets.

In considering existing land use patterns, municipalities should also focus on the size and location of the abandoned parcel itself. A large-scale redevelopment project that aims to create a new center or downtown will typically only succeed if at least fifteen acres of land is available for redevelopment.[320] Further, many abandoned big box stores are located in undesirable areas that were drained of life when the store closed. Perhaps housing in the area has also fallen into disrepair. Because patterns of suburban development are often not part of any larger plan, the ghostbox site might not be in a location where people would want to live, work, or shop. Similarly, even if the surrounding area is still vibrant, it is likely surrounded by numerous other free-standing big boxes. It may be difficult to convince someone to move into a new development surrounded on all sides by big box strip centers, even if that new development itself contains a coffee shop, restaurant, and office space. Thus, both the condition of and the existing uses in the surrounding area should be considered before a redevelopment project is approved.

318. *See* RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, *supra* note 111, at 6, 15.

319. One could also argue that a city with these land development patterns should encourage reuse of the space by a grocer.

320. *See supra* note 204.

3. Mechanics and Financing

All of these solutions further sustainable development goals because they provide for reuse of an existing building or infill development and redevelopment at a higher density and in a more urban fashion than traditional suburban sprawl development. The "green" characterization is important because there are a number of new funding opportunities being developed for cities that are moving toward sustainable development. Specifically, federal money has recently become available for sustainable development projects,[321] and state and regional funding may also be available.[322]

Cities could also use Tax Increment Financing (TIF)[323] to aid in the redevelopment of abandoned big box parcels.[324] The

321. For example, in June 2009 the Obama administration launched the Partnership for Sustainable Communities to assist local governments in building more sustainable cities. Press Release, U.S. Dep't of Hous. & Urban Dev., USDOT and HUD Launch Groundbreaking, Collaborative Effort to Create Sustainable, Livable Communities (June 21, 2010), *available at* http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-131; *see also* MALLACH, FACING, *supra* note 76, at 27 (noting that money from the Sustainable Communities Initiative is to be used for Metropolitan Challenge Grants to create "sustainable communities") (internal quotation marks omitted). Part of this program involves TIGER II (Transportation Investment Generating Economic Recovery) planning grants and Sustainable Community Challenge Grants. These are available to local governments that create projects linking transportation with affordable housing, mixed-use development, and building reuse. Press Release, U.S. Dep't of Hous. & Urban Dev., *supra*; *see also* MALLACH, FACING, *supra* note 76.

322. *See, e.g.*, MD. CODE ANN., STATE FIN. & PROC. § 5-7B-01 to -03 (LexisNexis 2009) (providing for loans, grants, or tax credits to fund neighborhood revitalization projects); MINN. STAT. ANN. § 473.25 (West Supp. 2010) (establishing the Livable Communities Act, an incentive-based program that provides communities with development funds); Nolon, *supra* note 237, at 816–17 (noting that many towns receive grants from state agencies and nongovernmental organizations to get their smart growth programs started, hire staff, undertake studies, and develop plans for moving forward); *Livable Centers Initiative*, ATLANTA REGIONAL COMMISSION, http://www.atlantaregional.com/land-use/livable-centers-initiative (last visited Feb. 20, 2011). Unfortunately, these programs often make funds available only to projects that are located in areas that have been designated for growth or those that contain lands that the state wants to protect. *Cf.* Nolon, *supra* note 237, at 817 (noting that funds will be allocated to "designated growth areas that contain significant natural resources or fertile agricultural lands"). While such policies do much to further the objectives of smart growth, they may exclude suburban greyfield redevelopment unless a city has targeted its suburban commercial core for dense redevelopment.

323. A city establishes a TIF or redevelopment area and issues bonds to fund development in the area. The tax or assessment value of property within the TIF area is frozen at the time the bonds are issued, then redevelopment occurs and property taxes in the area increase. Any increase above the frozen level is diverted

idea behind TIF is, without the redevelopment within the TIF district, property values would have remained the same or even declined.[325] While TIF districts have been created to spur investment in communities throughout the United States, some commentators believe that it would be cumbersome to create a TIF for an individual parcel, such as a single abandoned big box store.[326]

States should also consider creative financing mechanisms, perhaps using Superfund as a model.[327] Superfund was originally funded in large part by a tax on crude oil, imported petroleum, and chemical industries based on the theory that those industries were partially responsible for hazardous waste cleanup problems and should thus collectively shoulder the burden of cleanup.[328] Perhaps a similar tax on big box or greenfield development could generate funds to assist municipalities in acquiring ghostboxes and implementing some of the solutions suggested in this Article.

Municipalities must keep in mind that the existence of a ghostbox in their community is an economic harm; high density, mixed-use development has been shown to provide more tax revenue per acre than big box development.[329] Because the proposals in this Article further goals of sustainable development and suburban renewal, there are numerous options for cities to fund and actually implement these proposals.

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to a special fund to pay off the bonds, while the frozen portion is paid into a general fund to pay off general obligation bonds that the city has issued. Wolper v. City Council, 336 S.E.2d 871, 874 (S.C. 1985).

324. This would be an ironic turn of events, as many communities used TIFs to lure big box construction into areas that are actually non-blighted, such as unbuilt greenfield space. *See* MITCHELL, *supra* note 10, at 168.

325. *See* ELLICKSON & BEEN, *supra* note 229, at 845.

326. DUNHAM-JONES & WILLIAMSON, *supra* note 24, at 77.

327. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006); EPA, *Basic Information*, SUPERFUND, http://www.epa.gov/superfund/about.htm (last updated Oct. 3, 2011).

328. 26 U.S.C. §§ 4611–4612, 4661–4662 (2006); *see also* Patricia L. Quentel, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 150 n.43.

329. Philip Langdon, *Best Bet for Tax Revenue: Mixed-Use Downtown Development*, NEW URB. NETWORK (Sept. 13, 2010), http://newurbannetwork.com /article/best-bet-tax-revenue-mixed-use-downtown-development-13144 (describing a study by a real estate development firm showing that big box retail generates approximately $8,350 per acre per year, while lifestyle center redevelopment—" 'two or three stories, with housing or offices over retail' "—generates between $70,000 to $90,000 per acre per year) (quoting Peter Katz, Dir. of Smart Growth & Urban Planning, Sarasota Cnty., Fla.).

CONCLUSION

As the ghostbox epidemic continues to expand across the country, local governments have two choices: they can sit back, do nothing, and let the market try to take care of the problem (which has thus far been unsuccessful on a large scale), or they can view the problem as an opportunity to reconsider their prior poor planning decisions. Local governments have begun taking the lead in implementing a variety of experimental sustainable development policies; there is no reason that those same policies should not be applied to ghostboxes. Big box abandonment is a nationwide problem that should be addressed at the local level. Although finding a way to fully fund this proposal will be challenging, local governments have the incentive, the responsibility, and an exciting opportunity to adopt new ordinances that will assist them in turning these blighted, empty parcels into community assets.

The matrix presented in this Article provides local governments with a number of potential solutions that will alleviate the problems caused by vacant and abandoned big box stores. There is no "one size fits all" solution. Suburban greyfields and ghostboxes present a new opportunity for municipalities to remake themselves. Some will be reused, retaining their boxy structure but delivering new vibrancy to the community; some will be demolished and the areas will be turned into dense, mixed-use villages, adding urban flavor to the suburbs;[330] and still others may become open space or solar energy generation facilities. The future of these ghostboxes is yet to be determined; local governments have the power to shape that future.

330. CALTHORPE & FULTON, *supra* note 188, at 208 (addressing options for greyfields).

WALTZING THROUGH A LOOPHOLE: HOW *PARENS PATRIAE* SUITS ALLOW CIRCUMVENTION OF THE CLASS ACTION FAIRNESS ACT

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This Note explores the applicability of the Class Action Fairness Act's (CAFA) mass action removal provision to parens patriae *suits. CAFA amended the federal rules governing aggregate litigation, replacing the complete diversity requirement with a minimal diversity requirement. CAFA's applicability to* parens patriae *suits, a type of representative lawsuit brought by a state alleging injuries to its citizens, was first addressed in* Louisiana ex rel. Caldwell v. Allstate Insurance Co. *In* Caldwell, *the Fifth Circuit held that a* parens patriae *suit was mislabeled because the real parties in interest—the parties whose interests constitute the basis of the* parens patriae *standing—represented in the action were the citizens and the suit should have been treated as a mass action for purposes of removal under CAFA. This Note examines CAFA's mass action provision and the concept of* parens patriae *actions and concludes that the Fifth Circuit's approach to removing mislabeled* parens patriae *suits is supported by existing jurisprudence and statutory analysis and is consistent with CAFA's intent.*[1]

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1. For an interesting counterpoint to this Note, see Alexander Lemann, Note, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121 (2011).

INTRODUCTION

The Class Action Fairness Act of 2005 (CAFA)[2] was a congressional solution to address abuses of the class action litigation system.[3] CAFA expanded federal diversity jurisdiction to include class actions[4] with minimal diversity,

2. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

3. S. REP. NO. 109-14, at 4–5 (2005), *reprinted in* 2005 U.S.C.A.A.N. 3.

4. The term "class action," as used in this Note, will generally include "mass actions." The Federal Rules Decisions explains why this conflation is appropriate: "CAFA treats a 'mass action'—defined as a civil action 'in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact—as a class action." 238 F.R.D. 504, 518 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). Mass actions also "must meet the same jurisdictional requirements as class actions (i.e., minimal diversity and more that [sic] $5 million in controversy) and [are] subject to the same exclusions and exceptions" as class actions. *Id.* Similarly, courts have held that these two terms can be used interchangeably because "class action" "is used throughout CAFA to describe those actions over which the Act creates expanded diversity jurisdiction" and those actions include "mass actions." Lowery v. Ala. Power Co., 483 F.3d 1184, 1195 n.27 (11th Cir. 2007).

replacing the prior removal rule that required complete diversity.[5] This relaxed requirement allows defendants to remove cases from state court to federal court more easily, thereby limiting defendants' exposure to "homecooking": the bias against out-of-state defendants that tends to exist in plaintiff-friendly state courts.[6] Homecooking has led to a disproportionate number of class actions being tried in a select number of state venues[7] with markedly higher damages awards.[8] Richard Neely, a former West Virginia Court of Appeals judge, described elected state judges' incentives to homecook:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[9]

There are, however, important differences between mass actions and class actions, especially relating to *parens patriae* actions. These differences principally concern the certification requirements for parties to participate in the suits. These differences will be discussed in detail *infra* Part I.B.3.

5. *Compare* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1473 (2010) ("In CAFA, Congress opened federal-court doors to state-law-based class actions so long as there is minimal diversity, at least 100 class members, and at least $5,000,000 in controversy."), *with* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 556 (2005) ("As the jurisdictional statutes existed [prior to CAFA], . . . the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action.").

6. *See* Alexander T. Tabarrok, *Home Cooking a Class Action*, E. BAY BUS. TIMES (Apr. 5, 2002), http://www.independent.org/newsroom/article.asp?id=415.

7. S. REP. NO. 109-14, at 13 (2005) ("The ability of plaintiffs' lawyers to evade federal diversity jurisdiction has helped spur a dramatic increase in the number of class actions litigated in state courts," citing Madison County, Illinois, and St. Clair County, Illinois, as examples of venues with disproportionate class action filings); *see also* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000) ("[O]ver a recent two-year period, a state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal districts did in a year (thirty-eight cases).").

8. *See* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999). In the realm of tort awards, monetary damage awards against out-of-state corporate defendants were, on average, $240,000 higher in states that used partisan elections to select judges than in states that employed other judicial selection methods. *Id*.

9. Tabarrok & Helland, *supra* note 8, at 157.

CAFA attempted to guarantee fairer results for defendants involved in class actions by allowing removal to federal courts based on minimal diversity.[10] When there is diversity of citizenship, a defendant may remove a state-court action to federal court.[11] Complete diversity means that "all plaintiffs have different citizenship from all defendants."[12] Minimal diversity is a lower standard, thereby making it easier for parties to seek the greater protections of federal courts. Minimal diversity under CAFA is established when any member of a proposed plaintiffs'[13] class is a citizen of a different state than any defendant, or when any member of a proposed plaintiffs' class, or any defendant, is a foreign state or a subject or citizen of a foreign state.[14] In the class action context, complete diversity posed a problem because plaintiffs' attorneys could evade complete diversity in a national class action simply by naming a citizen from any defendant's state of residence as a plaintiff.[15] Minimal diversity was Congress's answer to this problem—Congress viewed federal judges as taking greater care in applying procedural requirements and reviewing proposed settlements, key components making federal court more fair for defendants.[16]

However, CAFA's guarantee of fairer results was challenged in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.* when a *parens patriae* action was unmasked as an attempt to evade federal diversity jurisdiction.[17] The reason that a

10. *See* S. REP. NO. 109-14, at 14 (2005) (citing greater care in applying procedural requirements and reviewing proposed settlements as key components making federal court fairer for defendants).

11. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005) (parties "may remove an action on the basis of diversity of citizenship"). CAFA amended the diversity requirements for removal to federal court from complete diversity of citizenship to minimal diversity. 28 U.S.C. § 1332(d) (2006).

12. BLACK'S LAW DICTIONARY 547 (9th ed. 2009).

13. As will be discussed in detail, "plaintiff" has a specific meaning in the context of CAFA, especially as contrasted to "person." *See infra* Part II.B.1. However, for ease of explanation in the introduction, the terms will be used interchangeably until the distinction between the terms is explored below.

14. 28 U.S.C. § 1332(d)(2)(A)–(C). These definitions cover both mass and class actions: "For purposes of this subsection . . . a mass action shall be deemed to be a class action . . . if it otherwise meets the provisions of those paragraphs." *Id.* § 1332(d)(11)(A).

15. NICHOLAS M. PACE ET AL., RAND CORP., INSURANCE CLASS ACTIONS IN THE UNITED STATES 57 (2007) (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)).

16. *See supra* note 10 and accompanying text.

17. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008).

parens patriae action could evade diversity jurisdiction is that, as a form of representative suit where state attorneys general bring an action on behalf of aggrieved citizens in their jurisdiction, it resembles a CAFA mass and class action.[18] Like a class action and a mass action under CAFA, a *parens patriae* suit involves a single party representing the interests of many.[19] A mass action is a form of aggregated litigation where all parties to the complaint are plaintiffs and all are involved in the proceedings.[20] Similar to a *parens patriae* suit, and unlike a class action, a mass action does not require formal certification.[21] And because *parens patriae* suits are "an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents,"[22] the similarity between a mass action (which is removable) and a *parens patriae* action (which is not) came to the forefront in *Caldwell*.

This similarity in *Caldwell* was problematic because the Fifth Circuit determined that Louisiana's *parens patriae* action was actually representing the monetary relief claims of more than 100 private Louisiana residents.[23] Such an action violates a foundational rule of civil procedure: "An action must be prosecuted in the name of the real party in interest."[24] The rule is designed "simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect

18. In modern usage, "*parens patriae*" is defined as: "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves," with an example being an attorney general acting as a *parens patriae* at an administrative hearing. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). As a general doctrine, this involves situations where "a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute the suit." *Id.* Black's Law Dictionary notes that "[t]he state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit." *Id.* This limitation will be discussed in detail, *infra* Part I.B.2.

19. *See infra* Part I.B.2.

20. *See infra* notes 99–100 and accompanying text. However, in the context of CAFA, mass actions are given a more specific definition. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (defining a CAFA mass action as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact").

21. *See infra* note 99 and accompanying text.

22. *See* Lemann, *supra* note 1, at 122.

23. *See* Louisiana *ex rel*. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 (5th Cir. 2008).

24. FED. R. CIV. P. 17 advisory committee's notes.

as res judicata."[25] In *Caldwell*, the state did not have an interest of its own in the suit and thus was not a real party to the controversy.[26] The court arrived at this conclusion after it "pierced the pleadings" in an effort to determine the real party in interest.[27] The court concluded that the citizens, whose alleged injuries formed the basis of the *parens patriae* suit, were the real parties in interest.[28] This meant that the suit was a mass action removable under CAFA,[29] and the Fifth Circuit therefore affirmed the district court's refusal to remand to state court.[30]

In *Caldwell*, the Fifth Circuit closed a loophole in CAFA that had been exploited by Louisiana's Attorney General when he mislabeled a mass action as a *parens patriae* suit. The loophole created a de facto "attorneys general" exception despite Congress's explicit rejection of such an exception.[31] This loophole allowed state attorneys general to waltz past CAFA's minimal diversity requirement by using their offices to disguise suits that should have been removable to federal court under CAFA, thus keeping the suits in plaintiff-friendly homecooking venues.[32] The Fifth Circuit closed this loophole by piercing the pleadings, identifying the real parties in interest, and applying CAFA's removal provision to the mislabeled suit.[33] However, absent similar rulings in other circuits, this loophole still exists

25. *Id.*

26. *Caldwell* will be discussed in greater detail below, but the Fifth Circuit made this determination based on a claim for treble damages that could only benefit the citizens. *See Caldwell*, 536 F.3d at 429.

27. *Id.* at 424–25. "Piercing the pleadings" in this context means looking past the named parties to the lawsuit and determining who the real parties in interest are. *See infra* notes 127–29. A "real party in interest" is a named party to a suit who "has a 'real interest' in the suit or, in other words, is a 'real party' to the controversy." Carden v. Arkoma Assocs., 494 U.S. 185, 200 (1990); *see also* CHARLES ALAN WRIGHT & MARY KAY LANE, LAW OF FEDERAL COURTS 492 (6th ed. 2002) ("The real party in interest is the party who, by the substantive law, possesses the right sought to be enforced."). For more on piercing the pleadings and real parties in interest, see *infra* notes 123–45 and accompanying text.

28. *Caldwell*, 536 F.3d at 430.

29. *Id.*

30. *Id.* The Fifth Circuit affirmed the district court's decision to pierce the pleadings. However, for purposes of readability, this Note will adopt the practice employed by courts in subsequent cases referring to the Fifth Circuit's decision not as an affirmation but as actually undertaking the process of "piercing the pleadings." *See, e.g.*, West Virginia *ex rel.* McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010).

31. *See infra* notes 182–88 and accompanying text.

32. *See infra* notes 74–76 and accompanying text.

33. *See infra* Part II.A.

for attorneys general outside the Fifth Circuit.[34] In these jurisdictions, attorneys general bringing suits against corporate defendants wield tremendous bargaining clout because *parens patriae* suits might easily represent monetary relief claims of millions of residents, worth potentially billions of dollars.[35] Waltzing past CAFA's minimal diversity requirement allows state attorneys general to create aggregate litigation where defendants might settle despite meritorious defenses simply to avoid the risk of a homecooked jury ruling against them at trial.[36]

The *Caldwell* decision has sparked an intense debate among courts faced with the issue of whether similar *parens patriae* suits are removable under CAFA.[37] However, the

34. *See infra* note 37 and accompanying text.

35. *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 916 (2008) ("Few manufacturers, however, are capable and willing to risk trial when the plaintiff is a state (or a consortium of state attorneys general operating in concert) that may collect billions of dollars as a result of harms allegedly suffered by millions of its residents.").

36. Judge Richard Posner has described the "intense pressure to settle" when corporate defendants face major litigation, even without considering the added pressure of homecooking. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

37. To date the Fifth Circuit is the only federal circuit court to address the issue of removability of mass actions. The Fourth Circuit recently decided a CAFA class action case. West Virginia *ex rel*. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 183 (4th Cir. 2011). Interestingly, the majority and dissenting judges in *CVS Pharmacy* waged a spirited battle over the principles enumerated by the *Caldwell* court. *See infra* notes 219–20, 222, 224, and 227. In addition to *CVS Pharmacy*, a number of district courts have addressed the issue of removability, and the treatment has been mixed. Some courts have declined to follow *Caldwell*. *See, e.g.*, Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009). Others have declined to extend *Caldwell*. *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. C 10-5711, 2011 WL 560593, at *3 (N.D. Cal. Feb. 15, 2011) (disagreeing with the manner of piercing the pleadings employed by the Fifth Circuit, but not the principle of piercing the pleadings). Other courts have simply distinguished *Caldwell* for a variety of reasons. *See, e.g.*, Connecticut v. Moody's Corp., No. 3:10CV546, 2011 WL 63905, at *3 (D. Conn. Jan. 5, 2011) (distinguishing on grounds of what constitutes a "quasi-sovereign interest" under Connecticut law); Sample v. Big Lots Stores, Inc., No. C 10-03276, 2010 WL 4939992, at *4–5 (N.D. Cal. Nov. 30, 2010) ("*Caldwell* simply recognizes that a *parens patriae* action brought by the state may be deemed to be a class action or mass action under CAFA where the state is seeking to recover damages suffered by private parties. That scenario is not presented here."); Anwar v. Fairfield Greenwich Ltd., 676 F. Supp. 2d 285, 298 (S.D.N.Y. 2009) (distinguishing *Caldwell* based on defendants acknowledging that individuals alleged to be part of mass action had no independent statutory right to sue). Still, some courts have either explicitly adopted *Caldwell's* holding, *see, e.g.*, West Virginia *ex rel*. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 445 (E.D. Pa. 2010), while others have deemed *Caldwell* "instructive" in reaching similar conclusions regarding removability,

holding in *Caldwell* need not be viewed as an invitation to remove all *parens patriae* litigation; it should be interpreted as removing those *parens patriae* suits that are intentionally mislabeled.[38] This Note argues that other courts should follow the Fifth Circuit and close the loophole created by intentionally mislabeled *parens patriae* suits.[39] Part I first describes the origins of the loophole and explains the procedural and practical reasons for exploiting it. Part I also outlines the three key elements of the loophole: the Class Action Fairness Act of 2005, *parens patriae* suits, and mass actions. Part II explores the Fifth Circuit's conclusion that *parens patriae* suits can be removed under CAFA and then considers two additional justifications for removal. Part III provides a guideline for when federal courts should pierce the pleadings of *parens patriae* suits. This Note concludes that, when appropriate, adopting the Fifth Circuit's approach closes a loophole that poses a small but extant risk to the foundational principles of CAFA.

I. CUING THE MUSIC: EXAMINING THE LOOPHOLE AND ITS THREE ELEMENTS

This Part examines the creation and elements of the *parens patriae* loophole. Part I.A explains the origins of the loophole and then examines the procedural and practical reasons that an attorney general would take advantage of it. Part I.B provides an overview of the elements: I.B.1 maps out a brief history of CAFA; I.B.2 explores the *parens patriae* doctrine; and I.B.3 examines the complicated definition of a CAFA mass action.

Kitazato v. Black Diamond Hospitality Invs., LLC, CV. No. 09-00271, 2009 WL 3824851, at *3 (D. Haw. Nov. 13, 2009).

38. Arguably, based on a textual analysis of interpretation, all *parens patriae* actions might mandate removal. *See infra* Part II.B.1. However, as discussed below, this oversteps the boundaries of CAFA and realizes *Caldwell*'s opponents' claims of Eleventh Amendment violations, as well as judicial activism.

39. This Note does not advocate special treatment for corporate defendants, support allowing corporate defendants to evade liability, or generally endorse judicial activism. It simply argues that *Caldwell* supported CAFA's intent by piercing the pleadings and determining that the Louisiana Attorney General's *parens patriae* action was an attempt to evade federal diversity jurisdiction. CAFA's framers intended to open up the federal courts to more representative lawsuits, and *parens patriae* actions offer a mechanism for avoiding CAFA's provisions.

A. Waltzing Through a Loophole

The loophole involves an attorney general using a *parens patriae* suit as a type of smokescreen to keep a mass action[40] within the plaintiff-friendly, homecooking confines of that attorney general's jurisdiction.[41] An attorney general brings a mass action mislabeled as a *parens patriae* suit and, if the court refuses to look past (or "pierce") the pleadings to see whose interests are actually being represented, the court will not apply CAFA.[42] This keeps a mislabeled mass action in state court instead of removing it to federal court because the attorney general, in a *parens patriae* suit, is able to claim that he or she is representing only one party's interest—the state's—and not the interests of the allegedly injured citizens. This removes the case from CAFA because, for CAFA's mass action provision to apply, a civil action must represent the monetary relief claims of 100 or more persons.[43] The interests represented in the suit are crucial because the Supreme Court has held that *parens patriae* suits must represent more than just the private interests of citizens; the state must have "a real interest of its own" to bring a *parens patriae* suit.[44]

If the state does not have a real interest of its own, mislabeling a mass action as a *parens patriae* suit is simply jurisdictional gamesmanship. Without a real interest, the attorney general should not be the only named plaintiff on the complaint. By not naming the injured citizens represented in the suit, an attorney general can claim that the suit neither has "class members"—the "persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action"[45]—nor that it represents the "monetary relief claims of 100 or more persons" in a mass action.[46] Instead of properly labeling the action as either a mass or class action, which would subject the suit to federal diversity jurisdiction,[47]

40. The same issue applies to mislabeled class actions. *See, e.g.*, West Virginia *ex rel.* McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010). However, this Note will be limited to discussion of the intersection of the mass action provision and *parens patriae* suits.

41. *See infra* text accompanying note 66.

42. *See infra* Part II.A.2.a.

43. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

44. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

45. 28 U.S.C. § 1332(d)(1)(D) (2006).

46. *Id.* § 1332(d)(11)(B)(i).

47. *See id.* § 1332(d)(1)–(2), (11).

the attorney general can keep the same claims in his or her home state's courts. If a court pierces the pleadings, as the Fifth Circuit did in *Caldwell*, this gamesmanship will be exposed and the suit properly removed to federal court.[48] If a court refuses to pierce the pleadings, there is no way to test the truthfulness of the attorney general's claimed *parens patriae* status, and the loophole remains wide open.

Importantly, the issue is not as simple as piercing the pleadings whenever an attorney general uses a private firm in support of litigation. Attorneys general employ private firms to pursue legitimate state actions.[49] In certain types of litigation, especially complex litigation and products liability suits, it is relatively common for attorneys general to hire plaintiffs' lawyers to assist them.[50] Private firms often have the necessary expertise that makes it cost effective for attorneys general offices with limited budgets to outsource particularly esoteric or complex work.[51] Therefore, using private firms and taking advantage of a loophole in CAFA are different. "Using" private firms entails employing specialists for difficult cases. "Taking advantage of a loophole in CAFA" involves applying an

48. *See supra* text accompanying notes 28–30. Note that a defendant's removal of the case from state court will alert the court of a possible need to pierce the pleadings. *See, e.g.*, Louisiana *ex rel*. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 423 (5th Cir. 2008) (noting that defendants removed the case from state to federal court, where they "urged the district court to look beyond the labels used in the complaint and determine the real nature of Louisiana's claims").

49. *See* Gifford, *supra* note 35, at 964 ("In most but not all instances of *parens patriae* litigation against product manufacturers, state attorneys general or municipal officials have hired private attorneys . . . to prosecute the litigation for them.").

50. *See id;* Danny Hakim, *Law Firm Is Big Donor to Attorney General Hopeful*, N.Y. TIMES (May 18, 2010), http://www.nytimes.com/2010/05/19/nyregion/19rice.html ("Law firms are also sometimes hired by attorneys general, particularly those with smaller budgets, to help on cases, although this is less common in New York."); *see also* Anthony J. Sebok, *Should State Attorneys General Use Private Law Firms to Pursue Civil Suits? An Appeal to the California Supreme Court Raises This Hot-Button Issue*, FINDLAW'S WRIT (Aug. 12, 2008), http://writ.news.findlaw.com/sebok/20080812.html. Some firms even advertise as having "extensive experience" in "state attorney general actions." *See* WINSTON & STRAWN LLP, http://www.winston.com/index.cfm?contentID=205&itemID=22 (last visited October 31, 2011). Given recent rulings that uphold the constitutionality of contingent fee arrangements between private firms and state attorneys general, this is a trend that is unlikely to end soon. *See, e.g.*, Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 33 (Cal. 2010), *cert. denied*, 131 S. Ct. 920 (2011) (holding that "the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case"); *see also* Gifford, *supra* note 35, at 964.

51. *See supra* note 50.

attorney general's name to a case in order to keep that case in state court. This was the concern voiced by Senator Chuck Grassley, CAFA's sponsor and one of its key advocates.[52] Senator Grassley described the dangers of the loophole: "We should not risk creating a situation where State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of this bill."[53] However, the risk is not simply that attorneys general will be "used as pawns"; the risk is also that attorneys general will knowingly participate in the jurisdictional gamesmanship.

There are procedural and practical reasons why taking advantage of the loophole is advantageous for both attorneys general and private law firms. The procedural reason is simply that if all *parens patriae* suits brought by attorneys general are subject to a de facto exception from CAFA, these suits will remain in state court. This is problematic because it allows attorneys general to continue to forum shop by keeping cases in homecooking venues despite CAFA's attempts at jurisdictional reforms.

From an attorney general's perspective, there are also several practical reasons for lending a state attorney general office's imprimatur to private firms. First, doing so provides free labor to the attorney general. At no direct cost to his or her office,[54] an attorney general has a private law firm try potentially lucrative class actions in his or her home state, where the effect of homecooking is presumably the strongest. Second, if a private firm wins a case resulting in a substantial amount of money flowing into state coffers, attorneys general stand to gain politically because they are elected officials.[55]

52. Class Action Fairness Act, S. 5, 109th Cong. (2005), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109s5is/pdf/BILLS-109s5is.pdf (listing Grassley as CAFA's sponsor). Although Grassley was discussing the "loophole" in the context of an actual (and rejected) Attorneys General exception to CAFA, he was outlining the procedural and practical reasons why an attorney general would take advantage of his or her position as the legal representative of a sovereign entity.

53. 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); *accord* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 (2008) ("CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers' inventing lawsuits and manipulating the system to enrich themselves at others' expense.").

54. *See* Sebok, *supra* note 50 (discussing the use of contingency-fee arrangements whereby firms were offered fee arrangements that guaranteed "a piece of the recovery if they won, and nothing at all if they lost").

55. *See* Jean O. Pasco, *Will Deal Boost Capizzi's Political Capital?*, L.A. TIMES (June 21 1997), http://articles.latimes.com/1997-06-21/news/mn-5589_1_orange-

Finally, the private law firms may reward attorneys general by contributing to their reelection campaigns.[56]

The arrangement benefits the private law firms too. The firms get ready-made classes of citizens that require neither the expense of formal certification and notice required for a class action nor the barratry required to find mass action parties. Perhaps most importantly, plaintiffs' lawyers get to try their class suits in state courts: This assures the firms access to favorable state venues with the corresponding presumption of larger settlements.

B. The Elements of the Loophole

1. A Brief History of CAFA[57]

CAFA has been described as "the most significant change in class action practice since the federal class action rule (Rule

county (noting the effect of a $30 million civil settlement on campaign for attorney general: "I think [Capizzi] looks pretty good in this one. . . . To voters in Orange County, $30 million is a ton of money.")

56. *See, e.g.*, 151 CONG. REC. S1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) (summarizing a Boston Globe exposé revealing that the Massachusetts attorney general, after contracting with private plaintiffs' lawyers to bring class actions and receiving a portion of the settlement money, then accepted campaign contributions made by the private law firms); *see also* Hakim, *supra* note 50 (detailing how Weitz & Luxenberg, "one of the nation's largest personal injury law firms," was "pouring money" into the campaign of a candidate for the New York state attorney general).

57. For purposes of this Note, congressional intent will be largely derived from the Report on the Act of the Senate Judiciary Committee, S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.A.A.N. 3. CAFA's legislative history is limited because the bill passed both the Senate and the House without amendment. As a result, there is neither a House nor a Conference Report. *See* West Virginia *ex rel.* McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 448 n.5 (E.D. Pa. 2010) ("Only the Senate Judiciary Committee's Report on CAFA remains as the primary non-textual indicator of congressional intent towards the legislation."). There was, however, a House Sponsors' statement, *see* 151 CONG. REC. H727–29 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner), and a great deal of discussion and debate about the bill on the House floor. Any discussion of legislative history must, of course, carry with it a caveat that floor debates are generally little more than political speeches and therefore should be accorded no weight as legislative history. *See* Garcia v. United States, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member . . . and casual statements from the floor debates."). Although the debate in the Senate contained a two-sided exchange about including an attorneys general exception, *see infra* Part II.A, the purpose of using the legislative history in this Note is still limited, more or less, to coloring the confusing parts of CAFA's text.

23) was amended in 1966."[58] CAFA grew out of perceived shortcomings in the existing class action framework.[59] Specifically, Congress concluded that plaintiffs' lawyers were too easily able to funnel class actions with nationwide issues or classes into state court.[60] This led to state courts "keeping cases of national importance out of Federal court," evincing "bias against out-of-State defendants," and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[61] Dissatisfaction with the class action system was not initially shared across party lines, with staunch Democrat opposition weighing against Republican support.[62] Accordingly, it took several years of "aggressive lobbying and partisan wrangling"[63] before CAFA became law on February 18, 2005.[64] In a sign of solidarity after the extended negotiations, the bill passed through both houses and across President George W. Bush's desk without amendments or alterations.[65]

Congress had three primary goals in enacting CAFA: (1) to reduce exorbitant payouts to plaintiffs' lawyers, (2) to reduce the prevalence of homecooking in state courts, and (3) to

58. Edward F. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504, 504 (2007).

59. The first sentence of the "Purposes" section of CAFA evinces the framers' opinion of the then-existing system: "By now, there should be little debate about the numerous problems with our current class action system." S. REP. NO. 109-14, at 4 (2005); *accord* Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1243 (10th Cir. 2009) ("CAFA was enacted to respond to perceived abusive practices by plaintiffs and their attorneys in litigating major class actions with interstate features in state courts.").

60. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5.

61. *Id.*

62. S. REP. NO. 109-14, at 3–4 (2005) (showing voting records showing split between Democrats and Republicans).

63. Guyon Knight, Note, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 FORDHAM L. REV. 1875, 1884 (2010).

64. S. REP. NO. 109-14 at 2–3 (2005); *see also* Seth Stern, *Republicans Win on Class Action,* CQ WKLY., Feb. 21, 2005, at 460 (calling CAFA's enactment "the capstone of a six-year slog through Congress").

65. *See* 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act, and Amended Federal Rule 23*, CAFA LAW BLOG (Feb. 9, 2005), http://www.cafalawblog.com/legal-publications-and-articles-rollo-and-crowson-publish-article-mapping-the-new-class-action-frontier-a-a-primer-on-the-class-action-fairness-act-and-amended-federal-rule-23.html.

protect corporate defendants from plaintiffs' lawyers.[66] By expanding federal diversity jurisdiction, Congress sought to reverse the homecooking trend,[67] where "governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations)," where the "lawyers who bring the lawsuits effectively control the litigation," and where "injured class members . . . are marginally relevant at best."[68] CAFA's framers derided a system where "consumers are the big losers: In too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."[69]

CAFA's framers attempted to solve these issues by expanding the original jurisdiction of federal courts, thus allowing more cases to be removed to federal court.[70] CAFA's minimal diversity is subject to a series of exceptions, some discretionary, others mandatory. For purposes of this Note, the most relevant is the "local controversy" exception, which grants discretion to district courts to remand ostensibly removable cases back to state court when the primary defendants and a percentage of the proposed plaintiff class that is greater than one-third but less than two-thirds of the plaintiffs are from the same state.[71] However, before remanding a "local controversy" that contains these demographics, CAFA requires that district courts consider the following series of factors:

66. S. REP. NO. 109-14, at 4–5 (2005). For discussion on whether CAFA's framers truly intended for the legislation to be pro-plaintiff, see Knight, *supra* note 63, at 1885 ("Despite CAFA's profession of concern for plaintiffs taken advantage of by lawyers gaming the procedural system, commentators have almost universally labeled the Act pro-defendant.") (citations omitted); *see also* Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 230 (2004) ("The intent of the Act is obviously more to shield defendants than to protect class members from abuses . . . ."). *But cf.* Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1789 (2008) ("[O]ne could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs.").

67. *See supra* notes 6–8 and accompanying text.

68. S. REP. NO. 109-14, at 4 (2005).

69. *Id.*; *accord* 151 CONG. REC. S1161 (daily ed. Feb. 9, 2005) (statement of Sen. Cornyn) ("We have seen that some of these egregious abuses of the class action procedure have been used to make certain entrepreneurial lawyers very wealthy when the consumers literally get a coupon worth pennies on the dollar.").

70. *See supra* notes 10–16 and accompanying text.

71. 28 U.S.C. § 1332(d)(3) (2006).

> (A) [W]hether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.[72]

These factors reveal the elements of a mass or class action that CAFA's framers thought were important when a district court was deciding whether a case should remain in federal district court. Several of these factors translate into the guidelines that this Note recommends district courts use when determining whether to pierce the pleadings.[73]

Finally, it is worth noting that CAFA's framers considered but rejected an exception to CAFA for suits brought by attorneys general. This would have been a blanket rule that suits brought by attorneys general could not be removed under CAFA.[74] CAFA's framers rejected this proposed exception, essentially because it was viewed either as unnecessary[75] or as creating the very loophole that the Fifth Circuit exposed in *Caldwell*.[76] The reasons for, and ramifications of, rejecting this exception will be discussed in Part II.A.

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72. *Id.* § 1332(d)(3)(A)–(F).

73. *See infra* Part III.

74. *See* 151 CONG. REC. S1158 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor). Senator Pryor introduced the amendment, saying, "[m]y amendment simply clarifies that State attorneys general should be exempt from [CAFA] and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government." *Id.*

75. *Id.* at S1163 (statement of Sen. Grassley).

76. *Id.* at S1163–64 (statement of Sen. Hatch).

2. *Parens Patriae* Suits: An Evolution from Beneficent Rulers to Real Parties in Interest

The *parens patriae* doctrine stems from a common law concept, rooted in the English constitutional system, called the "royal prerogative," whereby the King retained certain powers and duties.[77] "Historically, the term referenced the King's power as guardian over people who lacked the legal capacity to act for themselves."[78] This concept was recognized early on in American courts; however, it took the form of a common law legislative prerogative:

> This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.[79]

Parens patriae literally means "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen."[80] However, the common law approach "has relatively little to do with the concept of *parens patriae* standing that has developed in American law."[81] Unlike under the common law, a state may not bring nor enter a suit in order to represent a particular citizen's interest if that citizen can represent his or her own interest.[82] The state becomes a "nominal party," without a real interest of its own, if it represents a citizen who can represent his or her own interest.[83] States do not have standing to bring actions under the *parens patriae* doctrine as nominal parties.[84]

In order to have standing in a *parens patriae* action, the state must have either statutory standing or common law

77. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

78. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 425 (5th Cir. 2008).

79. *Snapp*, 458 U.S. at 600 (quoting Mormon Church v. United States, 136 U.S. 1, 57 (1890)).

80. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

81. *Snapp*, 458 U.S. at 600.

82. *See id.*; *see also* BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). Concretely, this means that if citizens are able to bring a suit on their own behalf, they must. The state in which they are residents may not represent their interests.

83. *See Snapp*, 458 U.S. at 600.

84. *Id.*

standing. Statutory standing is a legislatively-created right for the government to bring an action in certain situations.[85] The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSRA) contains an example of this.[86] The HSRA provides that:

> Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of . . . this title.[87]

Statutory grants of standing under the *parens patriae* doctrine vary widely. Some are national in scope and, importantly, address issues central to this Note. For instance, the HSRA provides a statutory right for state attorneys general to sue for violations of the Sherman Act.[88] The HSRA is notable for the protections against abusive practices by attorneys general that it contains. There are both notice and opt-out requirements, similar to class actions,[89] a corresponding *res judicata*-like bar against damage claims by represented citizens,[90] and a provision precluding damages for claims that have already resulted in damages (i.e., a provision specifically preventing double recovery).[91] Statutes of other states contain only limited *parens patriae* powers.[92] However, even when

85. *See, e.g.*, Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 428 (5th Cir. 2008) (noting that Louisiana's attorney general is vested with "statutory and constitutional authority to bring *parens patriae* antitrust actions" based on Louisiana Revised Statute § 51:138, which "empowers the Attorney General to enforce the Monopolies Act both criminally and civilly, and to seek redress against violators on behalf of both the state and private parties").

86. 15 U.S.C. § 15c (2006). A subsequent section, § 15h, provides that the Act "shall apply in any State, unless such State provides by law for its nonapplicability in such State." *Id.* § 15h. "In short, HSRA created a statutory *parens patriae* action for state attorneys general." *Caldwell*, 536 F.3d at 427 n.5.

87. 15 U.S.C. § 15c(a)(1) (2006).

88. *Id.*

89. *Id.* § 15c(b)(1)–(2).

90. *Id.* § 15c(b)(3).

91. *Id.* § 15c(a)(1)(A).

92. *Compare* W. VA. CODE ANN. § 47-18-17 (West 2011) (mimicking the HSRA's broad grants), *with* LA. REV. STAT. ANN. § 13:5036 (2011) (providing *parens patriae* standing with a single cursory sentence). At issue in *Caldwell* was whether the state could legitimately claim to have a real interest in the suit when the state's statute was unclear if this power was granted to attorneys general based on text that read, "any person who is injured in his business or property' under the Monopolies Act 'shall recover [treble] damages.' " Louisiana *ex rel.*

states have statutory provisions, a state must have a real interest in the action in order to bring a *parens patriae* suit .[93]

Alternatively, common law *parens patriae* standing requires that a state be vindicating a "quasi-sovereign interest."[94] What constitutes a quasi-sovereign interest is remarkably ambiguous. The Supreme Court has defined quasi-sovereign interests as the interests a state has "in the health and well-being—both physical and economic—of its residents in general."[95] A state must demonstrate a "direct interest" in the outcome of the litigation and cannot "merely seek recovery for the benefit of individuals who are the real parties in interest."[96] The effect of the alleged injury must be felt by a "sufficiently substantial segment" of a state's population—a term that the Court has declined to strictly define.[97] Absent a clearly defined rule, whether a state has a quasi-sovereign interest turns on a case-by-case analysis.[98]

3. A "Statutory Janus": Mass Actions Are Class Actions and Are Not Class Actions

Generally speaking, mass actions are a means for individuals—historically those who could not meet the

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Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 (5th Cir. 2008) (quoting LA. REV. STAT. ANN. § 15:137 (2007)).

93. Hood v. F. Hoffman-LaRoche, Ltd., 639 F. Supp. 2d 25, 32 n.9 (D.D.C. 2009) (explaining that "[t]he fact that an attorney general has the authority to proceed as *parens patriae* does not, *ipso facto*, mean that he or she necessarily is the only real party in interest."); *see also* Carden v. Arkoma Assocs., 494 U.S. 185, 200 (1990) (O'Connor, J., dissenting) (when testing a court's diversity jurisdiction, a determination must be made whether a named party "has a 'real interest' in the suit or, in other words, is a 'real party' to the controversy"). Given that at its core the issue addressed by this Note is whether to apply federal diversity jurisdiction, *Carden* is instructive.

94. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

95. *Id.* at 607.

96. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 396 (1938). The Supreme Court originally set this bar quite high; in Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945), the Court described how:

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

97. *See Snapp*, 458 U.S. at 607.

98. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 426 (5th Cir. 2008); *see generally Cook*, 304 U.S. 387 (1938).

strictures of Federal Rules of Civil Procedure Rule 23(b)—to aggregate their claims.[99] Unlike in class actions, all parties to the complaint are plaintiffs and all participate in the proceedings.[100] Mass actions are commonly used in personal injury cases.[101] As discussed in Part II.B.1, much of the confusion caused by CAFA's mass action provision can be traced to the use of "persons" instead of "plaintiffs" in the definition.[102] This creates an inference that all *parens patriae* actions seeking monetary relief—i.e., not merely seeking injunctive or declarative relief—brought on behalf of one hundred or more citizens must be a mass action. Part III discusses how courts can limit this overbroad inference.

Under CAFA, a mass action is considered a class action[103] but also is *not* a class action.[104] Courts have held that in the context of CAFA the terms are interchangeable insofar as "class action" "is used throughout CAFA to describe those actions over which the Act creates expanded diversity jurisdiction."[105] This "peculiar drafting" gives mass actions what the Eleventh Circuit called "the character of a kind of statutory Janus; under CAFA, a mass action simultaneously *is* a class action (for CAFA's purposes) and *is not* a class action (in the traditional sense of Rule 23 and analogous state law provisions)."[106]

CAFA defines a mass action as:

> [A]ny civil action (*except a civil action within the scope of section 1711(2)*) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those

99. *See* Nicole Ochi, Note, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 965–66 (2008).

100. *Id.* (citing ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 15 (3d ed. 2007)). Contrast mass actions with Rule 23(b) class actions, where represented parties do not have to actively bring or participate in claims.

101. *Id.* at 966.

102. *See infra* Part II.B.1.

103. 28 U.S.C. § 1332(d)(11)(A) (2006).

104. *Id.* § 1332(d)(11)(B)(i).

105. Lowery v. Ala. Power Co., 483 F.3d 1184, 1195 n.27 (11th Cir. 2007).

106. *Id.* (emphasis in original).

> plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).[107]

Section 1711(2) defines class actions.[108] Thus, by its plain language, CAFA defines "mass action" specifically to *exclude* formal class actions. However, CAFA also states that "a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs."[109] The referenced paragraphs in section 1332(d) detail when a class action is removable under CAFA. Predictably, these provisions "cover a variety of terrain."[110] Some of the incorporated paragraphs make sense in the context of a mass action.[111] Others do not.[112] Therefore, CAFA truly acts as a statutory Janus.

Section 1332(d)(2) does, however, contain two key provisions that apply to mass actions: Mass actions must have minimally diverse parties and must meet a $5 million amount in controversy requirement.[113] Thus, by "combining the requirements drawn from § 1332(d)(11)(B)(i)'s definition of a mass action and those drawn from § 1332(d)(11)(A)'s incorporation of CAFA's class action requirements into the

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107. 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (emphasis added).

108. 28 U.S.C. § 1711(2) (2006) defines "class action":

> The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

109. *Id.* § 1332(d)(11)(A).

110. *Lowery*, 483 F.3d at 1199–1200.

111. For instance, the "local controversy" exception makes sense; this exception limits CAFA's federal diversity jurisdiction for purely local cases. *See supra* notes 71–72 and accompanying text. Another exception that makes sense creates additional limitations to CAFA's expansion of diversity jurisdiction in suits against states and state officials. 28 U.S.C. § 1332(d)(5)(A) (2006).

112. Some, however, "despite being incorporated into the mass action context by § 1332(d)(11)(A), seem to have no application to mass actions." *Lowery*, 483 F.3d at 1200. For example, these provisions include one that addresses the timing of class certification, 28 U.S.C. § 1332(d)(8) (2006), and another that restricts the applicability of earlier provisions when "the number of members of all proposed plaintiff classes in the aggregate is less than 100," *id.* § 1332(d)(5)(B). The application of these is limited because, by definition, a mass action is not a certified class, so incorporating section 1332(d)(8) about the timing of class certification makes little sense; and given that a mass action *requires* the monetary relief claims of *100 or more persons*, the section 1332(d)(8) provision for proposed classes with fewer than 100 plaintiffs seems inapplicable.

113. *Id.* § 1332(d)(2).

mass action context," one arrives at the following requirements for a mass action: (1) an amount in controversy requirement of an aggregate of $5 million in claims; (2) minimal diversity; (3) at least 100 plaintiffs with monetary claims; and (4) common questions of law or fact shared among the plaintiffs.[114]

CAFA's legislative history suggests that the label given to a particular action is less important than the substance of the underlying claim and that prior to CAFA mass actions were subject to greater abuse than class actions. CAFA's framers referred to mass actions as "class actions in disguise"[115] and recognized that mass actions were "subject to many of the same abuses" as class actions.[116] CAFA's framers may even have thought that abuses of mass actions were *worse* than abuses of class actions: Mass actions, according to CAFA's framers, allow lawyers to join unrelated claims arising from different interactions with defendants and to "confuse a jury into awarding millions of dollars to individuals who have suffered no real injury."[117] Given that Congress wanted class action defined broadly to avoid "jurisdictional gamesmanship,"[118] it follows that the potentially more-abusive mass actions should be construed just as liberally. Support for this position comes from the Judiciary Committee, which noted,

> [T]he definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are *labeled* "class actions" by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purposes of applying these provisions.[119]

Not confining lawsuits to labels is where *parens patriae* suits and mass actions intersect in CAFA. Both are representative suits. Both avoid the formalities required of a Rule 23(b)(3) class action, in which damages claims require that "questions of law or fact common to class members

114. *See Lowery,* 483 F.3d at 1202–03.

115. S. REP. NO. 109-14, at 47 (2005).

116. *Id.* at 46; *see also* 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

117. S. REP. NO. 109-14, at 47; *see also* 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

118. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 424 (5th Cir. 2008).

119. S. REP. NO. 109-14, at 35 (2005) (emphasis added).

predominate over any questions affecting only individual members," and that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy."[120] Given the potential for abuse unmasked in *Caldwell*, it appears that the Fifth Circuit adhered to CAFA's framers' intent when it exposed Louisiana's *parens patriae* suit as a mass action in disguise.

II. STOPPING THE MUSIC: REMOVING *PARENS PATRIAE* SUITS IS JUSTIFIED UNDER CAFA

This Part considers the arguments made for and against removal of *parens patriae* suits and argues that the Fifth Circuit's decision in *Caldwell* was justified under CAFA. Part II.A.1 explores *Caldwell*'s conclusion that *parens patriae* suits are removable under CAFA. Part II.A.2 then examines the principal arguments advanced by critics of *Caldwell*. Part II.B provides two additional justifications for why courts should pierce pleadings to determine the real parties in interest: (1) CAFA's text and (2) CAFA's structure.

A. Exploring the Caldwell *Decision*

1. Why the Fifth Circuit's Decision Was Justified Under CAFA

On November 7, 2007, Louisiana's then-Attorney General Charles C. Foti, Jr., along with counsel from four private law firms, filed a *parens patriae* action in Louisiana state court seeking enforcement of the state's Monopolies Act.[121] Foti alleged that several out-of-state corporate defendants in insurance and related fields colluded "to form a 'combination' that illegally suppressed competition" in the wake of

120. FED. R. CIV. P. 23(b)(3).

121. *Caldwell*, 536 F.3d at 421–22 & n.2. Under the well-established rules of the federal courts, the subsequent Louisiana attorney general, James D. "Buddy" Caldwell, was automatically substituted for former Attorney General Foti when he lost his bid for reelection. Bill Barrow, *Foti Out as Attorney General*, THE TIMES-PICAYUNE (Oct. 21, 2007), http://www.nola.com/elections/index.ssf/2007/10/attorney_general_agriculture_r.html. *See Caldwell*, 536 F.3d at 421 n.1; *see also* FED. R. APP. P. 43(c)(2) ("When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party.").

Hurricanes Katrina and Rita.[122] The essence of the claim was that a group of insurance companies allegedly used a strategy devised by a corporate consultancy and furthered by actuarial service providers to undervalue and underpay insurance claims resulting from Hurricanes Katrina and Rita.[123] Louisiana brought an action against all of the companies allegedly involved in the scheme, seeking forfeiture of illegally-obtained profits, treble damages, and injunctive relief. [124]

What followed changed this seemingly routine claim into a landmark decision on CAFA. The defendants removed the claim to federal court, contending that it was mislabeled as a *parens patriae* action and that the substance of the claim required classification as a mass action under the provisions of CAFA.[125] Louisiana's attorney general filed a responsive motion, seeking to remand the claim as a *parens patriae* suit back to state court.[126] At a hearing on the removal issue, the federal district court judge focused on identifying the real parties in interest.[127] Echoing Federal Rule of Civil Procedure 17,[128] the judge explained his rationale for this: "[I]t's the Court's responsibility to not just merely rely on who a plaintiff chose to sue, or, in this case, how the plaintiff chose to plead [but to] look at the specific substance of . . . the complaint

122. *Caldwell*, 536 F.3d at 422. The defendants were: Allstate Insurance Company; Lafayette Insurance Company; Xactware Solutions, Inc.; Marshall & Swift/Boeckh, LLC; Insurance Services Office, Inc.; State Farm Fire and Casualty Company; USAA Casualty Insurance Company; Farmers Insurance Exchange; the Standard Fire Insurance Company; and McKinsey & Company, Inc. *Id.*

123. *Id.* The alleged collusion between the defendants started in the 1980s. The specific claims were that the defendants "manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums held" and by "conspir[ing] . . . to horizontally fix the prices of repair services utilized in calculating the amount(s) to be paid under the terms of Louisiana insureds' insurance contracts with insurers for covered damage to immovable property." *Id.* at 422–23.

124. *Id.* at 423.

125. *Id.*

126. *Id.*

127. *Id.*

128. FED. R. CIV. P. 17. This rule requires that "[a]n action must be prosecuted in the name of the real party in interest." *Id.* The Advisory Committee's Notes to the 1966 Amendment note that, "[i]n its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." FED. R. CIV. P. 17 advisory committee's notes. The Notes continued: "That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Id.*

. . . ."[129] The judge concluded that Louisiana was only a nominal party to the suit and that the citizen policyholders were the real parties in interest.[130] After Louisiana filed an interlocutory appeal,[131] the Fifth Circuit affirmed the district court's order.[132] The Fifth Circuit determined that the action was a CAFA mass action, which meant that the individual insurance policyholders were thereafter to be added to the suit, presumably as plaintiffs (the Fifth Circuit left the logistics of the decision in the hands of the district court).[133]

The Fifth Circuit advanced two primary justifications for its decision to uphold removal under CAFA. First, the court noted that CAFA was designed to "prevent 'jurisdictional gamesmanship.' "[134] The court cited Senator Orrin Hatch's prophetic warning that "enterprising plaintiffs' lawyers will surely manipulate [the loophole] in order to keep their lucrative class action lawsuits in State court . . . by [an attorney general] simply lend[ing] the name of his or her office to a private class action . . . ."[135] As evidence that there might have been jurisdictional gamesmanship afoot, the *Caldwell* court noted that the Louisiana attorney general brought the suit alongside private counsel.[136] The Fifth Circuit also noted that the same group of lawyers had brought several other similar aggregate actions that were pending before the same federal district court in Louisiana, all with nearly identical claims as those alleged in the attorney general's suit.[137]

The second justification the *Caldwell* court advanced was that Louisiana did not have a quasi-sovereign interest in the treble damages sought in the suit. The court applied the quasi-sovereign interest analysis promulgated by the Supreme Court

129. *Caldwell*, 536 F.3d at 423.

130. *Id.*

131. Generally, federal courts of appeals may not review district court remand orders. *See* 28 U.S.C. § 1447(d) (2006). However, CAFA contains an exception that allows courts of appeals to accept an appeal from a district court order granting or denying a motion to remand a mass/class action to state court. *See* 28 U.S.C. § 1453(c)(1) (2006); *see also* BP Am., Inc. v. Oklahoma *ex rel.* Edmondson, 613 F.3d 1029, 1032 (10th Cir. 2010); Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38–39 (1st Cir. 2009).

132. *Caldwell*, 536 F.3d at 432.

133. *Id.* at 430.

134. *Id.* at 424.

135. *Id.* (quoting 151 CONG. REC. S1157, at 1163–64 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch)).

136. For analysis of this fact in the context of *parens patriae* suits, see *infra* Part II.A.2.

137. *Caldwell*, 536 F.3d at 423.

in *Snapp*.[138] The Fifth Circuit concluded that Louisiana had a quasi-sovereign interest in seeking injunctive relief,[139] but that "as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest."[140] The court reasoned that the state would benefit from the cessation of the predatory practices allegedly committed by the defendants.[141] Thus, the claim for injunctive relief was the type of quasi-sovereign interest that supports a *parens patriae* action; no citizen is going to bring a mass or class action suit for injunctive relief on behalf of all Louisiana insurance policyholders. However, the Fifth Circuit rightly held that the claim for treble damages did not represent a quasi-sovereign interest, because the Louisiana statute did not provide for it[142] and because the interests represented by this claim belonged exclusively to the individual policyholders.[143] The court based this reasoning on the repeated references in the complaint to the individual policyholders, as well as the general purpose of treble damages, which the court summarized as designed to "encourage private lawsuits by aggrieved individuals for injuries to their businesses or property."[144] Because the relief sought in the complaint operated only in favor of the policyholders who were affected by the defendants' allegedly unlawful conduct, the policyholders were the real parties in interest.[145]

The *Caldwell* court's analysis is consistent both with black letter law[146] and with the encouragement of CAFA's framers to look past the labels of suits.[147] First the district court and then the Fifth Circuit found a lawsuit that resembled a class action requiring removal under CAFA's provisions by undertaking an

138. *Id.* at 425–28; *see also supra* notes 94–98 and accompanying text.

139. *Caldwell*, 536 F.3d at 430.

140. *Id.* at 429.

141. *Id.* at 430.

142. LA. REV. STAT. ANN. § 51:137 (2011) ("Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him."). Note that persons who are injured may sue; the statute does not provide for suits by the attorney general.

143. *Caldwell*, 536 F.3d at 429–30.

144. *Id.* (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972)).

145. *Id.* at 429.

146. *See* WRIGHT & LANE, *supra* note 27 ("The real party in interest is the party who, by the substantive law, possesses the right sought to be enforced.") Here, the right sought to be enforced was the collection of treble damages which, as noted above, *supra* note 142–43, belonged to the Louisiana citizens.

147. *See supra* note 119 and accompanying text.

analysis of the substance of the pleadings.[148] Analyzing the pleadings to determine whether jurisdiction is proper complies with well-established Supreme Court precedent requiring courts to "look to the substance of the action and not only at the labels that the parties may attach."[149] Looking past the labels is called "piercing the pleadings"[150] and requires courts to determine the real parties in interest.[151] Determining the real parties in interest matters because of the foundational rule that parties without an interest in a case cannot prompt a court to remand the case from the federal system.[152] In determining jurisdiction, federal courts must examine the substance of the action brought, not just the labels affixed to the case.[153] This rule exists because "a federal court must disregard nominal . . . parties and rest jurisdiction only upon the citizenship of real parties to the controversy."[154]

However, it is unclear when and how courts should pierce the pleadings. The dispute centers on the level of specificity with which courts should conduct this analysis: viewing the complaint as a whole or examining individual claims.[155] For instance, in *Illinois v. SDS West Corp.*, after surveying the post-*Hickman*[156] history, the court noted that most courts have "viewed the complaint as a whole" but also noted that some, including the *Caldwell* court, have taken a more granular look at the pleadings.[157] Viewing the complaint as a whole causes fewer courts to pierce the pleadings because *any* state interest evident on the face of the complaint will insulate the complaint from greater scrutiny. As a concrete example, in *Caldwell*,

148. *Caldwell*, 536 F.3d at 423, 428.

149. *Id.* at 424 (citing Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 185–86 (1907)).

150. *Id.* at 424–25 ("This court has recognized that 'defendants may pierce the pleadings to show that the . . . claim has been fraudulently pleaded to prevent removal.' ") (citations omitted).

151. *See* United States v. Johnson, 319 U.S. 302, 303–04 (1943).

152. *See* Wood v. Davis, 59 U.S. 467, 469 (1855); *see also* Smallwood v. Illinois Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004) ("[T]here are cases, hopefully few in number, in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.")

153. *See Wecker*, 204 U.S. at 185–86.

154. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461 (1980).

155. *See* Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009).

156. Mo., Kan. & Tex. Ry. Co. v. Hickman, 183 U.S. 53, 59–61 (1901) (establishing that courts must look past the labels of case when state does not have real interest in controversy).

157. *SDS W. Corp.*, 640 F. Supp. 2d at 1052.

Louisiana asserted a claim for injunctive relief. The Fifth Circuit concluded that Louisiana had a quasi-sovereign interest in seeking injunctive relief.[158] Therefore, if the Fifth Circuit had viewed the complaint as a whole, the claim for injunctive relief would have insulated the impropriety of bringing the treble damages claim and the court would not have taken a closer look at the complaint. This would let a claim for injunctive relief obscure the fact that four private law firms were using the Louisiana attorney general's title to keep a CAFA mass action in Louisiana state court.

An approach where courts are able to look at the individual claims is therefore preferable. A determination about whether a named party "has a 'real interest' in the suit or, in other words, is a 'real party' to the controversy,"[159] was necessary in the *Caldwell* decision; the treble damages claim was the crux of the suit.[160] Under CAFA's definition, the *Caldwell* case was a mass action rather than a *parens patriae* action: The monetary relief claims (for treble damages) of one hundred or more persons (thousands of Louisiana policyholders) were proposed to be tried jointly (in a single complaint) on the ground that the plaintiffs' (the Louisiana policyholders') claims involved common questions of law or fact (the alleged conspiracy by the corporate defendants).[161] And the determination that the policyholders were the real parties in interest[162] is consistent with the rule that to determine who "the real party in interest is," courts should look to the "essential nature and effect of the proceeding."[163] The *Caldwell* court correctly followed well-established rules and applied them properly to the facts.

158. *See supra* note 139 and accompanying text.

159. Carden v. Arkoma Assocs., 494 U.S. 185, 200 (1990) (O'Connor, J., dissenting).

160. It is possible to view *Caldwell* narrowly, reading the holding as applicable only to instances where the grant of *parens patriae* authority derives from common law and not statutory authority. However, the court anticipated this argument and stated that it would have ruled the same way even if *Caldwell* had been based on statutory authority. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 (5th Cir. 2008) (stating that the court would arrive at the same outcome "[e]ven assuming *arguendo* that the Attorney General has standing to bring such a representative action").

161. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (2006). The additional jurisdictional amount requirements specified under section 1332(d)(11)(A), e.g., an amount in controversy requirement of an aggregate of $5 million in claims and minimal diversity, also were satisfied.

162. *Caldwell*, 536 F.3d at 429–30.

163. Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 250 (7th Cir. 1981) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)).

2. The Critics' Perspective

The controversy surrounding *Caldwell* is broader than how the Fifth Circuit elected to analyze the *Caldwell* case. Critics claim that *Caldwell* improperly applied CAFA to a *parens patriae* suit.[164] This argument has three parts: (a) CAFA does not specifically reference either *parens patriae* suits or real parties in interest, (b) federalism concerns stemming from the Eleventh Amendment preempt removal, and (c) the legislative history provides some evidence that Congress did not intend *parens patriae* suits to be subject to CAFA.

a. No Specific Reference to Parens Patriae *Suits or Real Parties in Interest in CAFA*

Critics of *Caldwell* argue that, because there is no reference to *parens patriae* suits in CAFA, removal of even mislabeled suits is improper. Academic works support the dissenting judge's opinion in *Caldwell*, claiming that while "a 'parens patriae' action may resemble a class action in that an attorney general is representing a state's citizens" because the action "is not filed as a class action, CAFA does not apply even if for all intents and purposes it resembles one."[165] But this argument ignores both the framers' intent to look beyond labels[166] and the jurisprudence on piercing the pleadings.[167] Holding that the *parens patriae* label immunizes suits from removal under CAFA allows Senator Hatch's "enterprising plaintiffs' lawyers" to manipulate a loophole and to do so with

164. *See, e.g.*, Lemann, *supra* note 1, at 138–42 (compiling criticisms of *Caldwell*). The principal case cited for the idea that CAFA does not include *parens patriae* suits, Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749 (D.N.J. 2005), predates *Caldwell*. The *Harvey* court surveyed CAFA's legislative history and concluded that it was not Congress's intent to encroach upon states' authority to bring *parens patriae* actions. *Id.* at 752–54. As discussed *infra* in Part II.B.3, there is a battle over the legislative history and what should be concluded from it. *See* Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. CHI. L. REV. 345, 353–57, 360 (2011).

165. Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 122 (2006) (citing Tedder v. Beverly Enters., No 3:05CV00264SWW, 2005 U.S. Dist. LEXIS 38694, at *5 (E.D. Ark. Dec. 12, 2005)); *accord* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 434 (5th Cir. 2008) (Southwick, J., dissenting) (stating the "definitive aspect" of removability is "a statute or rule of procedure that authorizes a representative action").

166. *See supra* notes 115–19 and accompanying text.

167. *See supra* note 150 and accompanying text.

judicial blessing. For similar reasons, the critics' arguments that neither the statute nor legislative history mentioned "real parties in interest" are unpersuasive.[168] The absence of discussion of "real parties in interest" in CAFA's legislative history does not change the fact that federal courts must apply the Supreme Court's jurisprudential guidance on piercing the pleadings.[169] Congress need not explicitly require federal courts to examine the real parties in interest. This is something that courts are required to do in every case by Federal Rules of Civil Procedure Rule 17(a).

b. Eleventh Amendment Concerns

Critics of *Caldwell* also claim that removing states' *parens patriae* actions abrogates states' rights under the Eleventh Amendment because Congress did not directly authorize removal. The Eleventh Amendment grants states sovereign immunity from suit in federal court: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[170] Further, the Supreme Court has held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[171] The grant of sovereign immunity is

168. *See* Knight, *supra* note 63, at 1913 ("[T]he Senate Report does not discuss, or even mention, real parties in interest. Nor did this concept arise during debate in the House or Senate. Interestingly, 'real party in interest' was mentioned in the legislative history of previous versions of CAFA, but only with respect to class actions. In sum, the connection between 'real party in interest' and the mass action is not immediately plain.").

169. *See supra* notes 149–54 and accompanying text.

170. U.S. CONST. amend. XI. There are perils associated with placing too much emphasis on the plain language of the Eleventh Amendment. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.") (internal quotation marks omitted). Despite the staggering amount of literature on the Eleventh Amendment, a detailed examination of the Eleventh Amendment is beyond the scope of this Note. *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 1025 (6th ed. 2008) ("The literature on the Eleventh Amendment is voluminous, and much of it is of rare quality.").

171. *Seminole Tribe*, 517 U.S. at 56 (quoting Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989)). *Seminole Tribe* also stands for the proposition that Congress

so broad that the Supreme Court has read into the Constitution a definition that extends beyond the language of the text.[172] While CAFA admittedly is "devoid of a statement of congressional intent to force a state to litigation [sic] in the courts of another sovereign,"[173] Eleventh Amendment protection generally extends only where the state is a defendant, not a plaintiff.[174] Even if the Eleventh Amendment protects states as plaintiffs and defendants, *Caldwell*'s holding need not be viewed as an invitation to remove all *parens patriae* litigation; rather, it should be interpreted as removing those *parens patriae* suits that are mislabeled.[175] This serves two purposes. First, it upholds the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them" [176] by CAFA.[177] Second, this avoids gamesmanship by "prevent[ing] a state from wearing two hats in an attempt to disguise itself as the real party in interest for claims for which the true real parties in interest are individual consumers."[178]

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cannot abrogate state sovereign immunity through legislation enacted under the Commerce Clause. Congress can abrogate state sovereign immunity only through the exercise of section 5 of the Fourteenth Amendment, and Congress did not enact CAFA under section 5.

172. *See* Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 J. MARSHALL L. REV. 513, 515 (2004).

173. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 431 (5th Cir. 2008) (quoting Louisiana's brief); *accord* Lemann, *supra* note 1, at 143.

174. *See Caldwell*, 536 F.3d at 431 n.12 (collecting cases).

175. *See* Sample v. Big Lots Stores, Inc., No. C 10-03276 SBA, 2010 WL 4939992, at *5 (N.D. Cal. Nov. 30, 2010) ("*Caldwell* does not stand for the proposition that all representative actions necessarily are 'class actions' subject to removal under CAFA. Rather, *Caldwell* simply recognizes that a *parens patriae* action brought by the state may be deemed to be a class action or mass action under CAFA where the state is seeking to recover damages suffered by private parties."). For indications of when a *parens patriae* suit might be mislabeled, see *infra* Part III.

176. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

177. West Virginia *ex rel.* McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)) ("[A] federal court must rigorously examine a matter removed under CAFA to ensure that it does not prematurely preclude a class action (in all but name) from the court's jurisdiction.").

178. *Id.*

c. The Much-Debated Legislative History of CAFA

Academics and courts hotly contest the value of CAFA's legislative history and yet each side of the *Caldwell* debate claims that the legislative history supports its respective position.[179] *Caldwell*'s critics cite CAFA's legislative history to support the claim that removal is improper because an exception to CAFA for *parens patriae* suits was deemed "unnecessary" because these suits are neither mass actions nor class actions.[180] *Caldwell*'s supporters counter by pointing out that CAFA was designed to stem the tide of abusive litigation practices. And a *parens patriae* exception was excluded not simply because it was thought to be unnecessary; it was excluded because of concerns about creating a loophole.[181] Given the intent of the law and the attempted exploitation of the loophole, *Caldwell*'s proponents have the more compelling argument.

When drafting CAFA, Congress specifically addressed *parens patriae* suits.[182] The Senate considered an amendment

179. For scholarly treatment, compare Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1444 n.12 (2008) (arguing that CAFA's framers "sought to answer many of those questions [caused by ambiguous phrases and undefined terms] in legislative history," and noting that "much of the 2005 Senate Report was contained in a 2003 Senate Report. *See* S. REP. No. 108-123 (2003)"), with H. Hunter Twiford, III, Anthony Rollo, & John T. Rouse, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 17 n.28 (2005) (citing 151 CONG. REC. S978 (daily ed. Feb. 3, 2005) for the proposition that the Senate Committee Report "was submitted to Congress before CAFA became law"). For a judicial perspective, compare Lowery v. Ala. Power Co., 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (endorsing consideration of CAFA's legislative history: "While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, [2005] — while that body was considering the bill."), with Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) ("[T]he Senate Report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal."), and Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (citing Pierce v. Underwood, 487 U.S. 552, 566–68 (1988)) (rejecting the use of the Senate Report because "naked legislative history has no legal effect"). Whatever weight one chooses to give to it, the legislative history still provides a record of, at the very least, what motivated the victorious party to pass the legislation.

180. *See infra* note 187 and accompanying text.

181. *See infra* notes 190–92 and accompanying text.

182. *See generally* 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005).

to CAFA that would have made representative actions[183] filed by state attorneys general *exempt* from removal to federal courts under CAFA.[184] The rationale for this proposed amendment was essentially a federalism argument: The "Pryor Amendment,"[185] named after its sponsor, Senator Mark Pryor, called for the change so that states could "pursue their individual . . . interests as determined by themselves and not by the Federal Government."[186] However, Congress rejected the amendment as unnecessary. For instance, Senator Grassley concluded, "because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition [of a mass or class action]. That means that cases brought by State attorneys general will not be affected by this bill."[187] Courts have pointed to these colloquies as a justification for remanding *parens patriae* actions.[188]

Basing a view of the legislative history on this point ignores the larger reasons behind CAFA's enactment. CAFA

183. Although the principal actions relevant to this Note brought by attorneys general are *parens patriae* actions, state attorneys general may also head up class actions as well as direct enforcement actions. *See, e.g.*, *id.* at S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); *see also* West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 183 (4th Cir. 2011) (Gilman, J., dissenting) (noting that West Virginia's consumer protection act "clearly contemplates that the Attorney General can fairly and adequately protect the interests of West Virginia's [citizens] by bringing this type of lawsuit on behalf of the class").

184. 151 CONG. REC. S1804 (daily ed. Feb. 9, 2005). Congress recently considered and again rejected codifying this exemption. *See* Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong. (2010), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05503:@@@R. Thanks in large part to protests of House Republicans, the House of Representatives removed a provision that would have added an exception to CAFA's mass and class action provisions specifically excluding "an action brought by a State or subdivision of a State on behalf of its citizens." H.R. REP. NO. 111-521, at 2 (2010).

185. 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005) (statement of Sen. Specter).

186. *Id.* at S1805 (statement of Sen. Pryor). Senator Pryor introduced the amendment, saying, "[m]y amendment simply clarifies that State attorneys general should be exempt from S. 5 and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government." *Id.* Senator Pryor, a former attorney general, added: "In the simplest terms, this amendment allows [attorneys general] to seek State remedies to State problems. I hope we can all agree infringement on State rights should not be a result of this bill." *Id.* Senator Pryor noted that forty-six attorneys general had formed a bipartisan group who shared his concern that this could potentially hamstring protection of the "poor, elderly, and disabled." *Id.*

187. *Id.* at S1163–64 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley).

188. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 424 (5th Cir. 2008).

was intended to address abusive litigation practices.[189] Senator Grassley's concession that CAFA would not affect *parens patriae* actions meant *properly labeled parens patriae* actions. Senator Grassley opposed the exclusion because of the risk it posed for exploitation: "That [proposed exclusion] creates a very serious loophole in this bill."[190] Senator Specter warned of this exclusion creating "latitude for the attorney general to deputize private attorneys to bring their class actions," thus creating a "pretty broad loophole."[191] Senator Hatch foresaw the situation that the Fifth Circuit faced in *Caldwell* even more clearly:

> At best, [a *parens patriae* amendment] is unnecessary. At worst, it will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court . . . . If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action.[192]

The amendment ultimately was rejected and the concerns of both Senators Grassley and Hatch were borne out. Actions brought by attorneys general where the states are real parties in interest are properly characterized as *parens patriae* actions and do not fall within the ambit of CAFA's mass action provision.[193] However, when the states are not the real parties in interest but still bring suits as *parens patriae* actions, whether "manipulated" by "enterprising plaintiffs' lawyers" or not, the states are exploiting Senator Hatch's loophole.[194]

189. *See supra* note 59.

190. 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley).

191. *Id.* at S1161 (statement of Sen. Specter).

192. *Id.* at S1163–64 (statement of Sen. Hatch). Senator Hatch then directed attention to an article from the Boston Globe that detailed how the Massachusetts attorney general had contracted with private plaintiffs' lawyers to bring class actions, with the attorney general collecting a portion of the settlement money. *Id.* Senator Hatch cited the article's uncovering of alleged campaign contributions made by the private law firms to the attorney general's campaign fund as particularly troubling. *Id.* at S1164.

193. *See In re* Edmond, 934 F.2d 1304, 1310 (4th Cir. 1991); *see also* West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 178 (4th Cir. 2011).

194. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 423–24 (5th Cir. 2008).

Caldwell offers the paradigm for what these instances of exploitation can look like: Private law firms, employing the imprimatur of a state's attorney general, veil the true nature of a mass action in the guise of a *parens patriae* suit, and are thus able to waltz through a loophole that allows the law firms to keep lucrative lawsuits in state court. Accordingly, the legislative history and the decision to reject an amendment that exempted state attorneys general from CAFA's provisions support *Caldwell*'s holding that mass action suits should not be exempted from removal under CAFA simply because they are incorrectly labeled as *parens patriae* suits.

B. Two Additional Justifications

Because of the suspicious facts in *Caldwell*,[195] the Fifth Circuit did not address all of the justifications for removing mislabeled *parens patriae* suits. The additional justifications include (1) CAFA's text and (2) CAFA's structure.

1. Statutory Text—Claims of Persons Not Claims by Plaintiffs

Whether a lawsuit is a mass action under CAFA depends on whether the lawsuit involves the monetary relief claims of 100 or more persons. Some critics of *Caldwell* interpret this requirement to mean that there must be 100 or more named plaintiffs. However, this reading violates fundamental principles of statutory interpretation.[196] Giving CAFA's text its ordinary meaning shows that mass actions must be based on "people" and not "plaintiffs." This may require that a court pierce the pleadings if a state brings persons' claims but lacks a real interest in the underlying matter; although there is only one named plaintiff—the attorney general—courts nonetheless should consider the citizens whose claims underlie the action.

Statutory interpretation begins with the plain text of a statute.[197] It is a fundamental rule of statutory interpretation that, when a word is not defined by statute, courts normally

195. *See supra* Part II.A.1.

196. *See infra* notes 206–09 and accompanying text.

197. United States v. Gonzales, 520 U.S. 1, 4 (1997) ("Our analysis begins, as always, with the statutory text.").

construe it in accord with its ordinary or natural meaning.[198] When Congress uses different terms in the same statute, courts normally presume that Congress "intended its different words to make a legal difference," and "act[ed] intentionally and purposely in the disparate inclusion or exclusion."[199]

Applying these rules of interpretation reveals that Congress based the CAFA mass action provision on claims of persons, not claims by plaintiffs. A mass action is based on a numerosity requirement: "any civil action . . . in which monetary relief claims *of* 100 or more *persons* are proposed to be tried jointly . . . ."[200] Neither "of" nor "person" is defined in section 1332(d). "Of," employed here as a preposition, is "used as a function word indicating a possessive relationship."[201] "Person" is defined as "a human being."[202] According ordinary meanings to these terms, a mass action simply must comprise the monetary relief claims possessed by or belonging to 100 or more human beings.[203]

Courts that have effectively translated "persons" to mean "plaintiffs" have not afforded "claims of . . . persons" its ordinary meaning.[204] "Plaintiff" is also used in the CAFA

198. Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 38 (1996) (courts must apply the plain language, or "ordinary English," of statutes); Smith v. United States, 508 U.S. 223, 228 (1993).

199. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 62–63 (2006).

200. 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (emphasis added).

201. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1565 (Philip B. Gove ed. 2002).

202. BLACK'S LAW DICTIONARY 1257 (9th ed. 2009).

203. Chief Judge Frank Easterbrook made a telling distinction in *Bullard v. Burlington N. Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir. 2008), dismissing an argument advanced by plaintiffs seeking remand to state court after removal based on CAFA. The argument was addressing what Chief Judge Easterbrook confusingly called "class actions" when citing the "mass action" provision but nonetheless evinces how "claims of 100 or more persons" means just that:

> A proposal to hold multiple trials in a single suit (say, 72 plaintiffs at a time, or just one trial with 10 plaintiffs and the use of preclusion to cover everyone else) does not take the suit outside § 1332(d)(11). Recall the language of § 1332(d)(11)(B)(i): any "civil action . . . in which monetary relief *claims* of 100 or more persons are proposed to be tried jointly" is treated as a "class [sic] action" (emphasis added). The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the "claims" advanced by 100 or more persons are proposed to be tried jointly.

Id.

204. *See* Missouri *ex rel.* Koster v. Portfolio Recovery Assocs., Inc., 686 F. Supp. 2d 942, 947 (E.D. Mo. 2010) ("[T]he Court finds this suit is not a 'mass action' because the Missouri Attorney General has not joined 99 additional *plaintiffs*, as would be required by 28 U.S.C. § 1332(d)(11)(B)(i).") (emphasis added). Note how

section that defines a CAFA class action.[205] Like "persons," "plaintiffs" is also undefined in section 1332(d). According to Black's Law Dictionary, "plaintiff" means "[t]he party who brings a civil suit in a court of law."[206] Note the disparity between the class action section and the mass action section: CAFA's mass action text does not require that the monetary relief claims belong to "plaintiffs" or "named plaintiffs," nor that the monetary relief claims be brought by "plaintiffs" or "named plaintiffs." Instead, CAFA's text refers to the "monetary relief claims of 100 or more persons."[207] Interpreting the text to hold that "persons" means "plaintiffs" would contravene the holding of *Burlington Northern*: "Congress intended its different words to make a legal difference," and "[w]here words differ[,] . . . Congress act[ed] intentionally and purposefully in the disparate inclusion or exclusion."[208]

In the *parens patriae* cases where courts have refused to pierce the pleadings, courts have effectively held that only the claims of attorneys general mattered: The court counts the claims of one person, not the underlying claims of the affected citizens.[209] This is not giving "monetary relief claims of . . . persons" its ordinary meaning. Persons are not plaintiffs, and only the monetary relief claims of persons matter in the context of CAFA. Only counting the attorney general's claim avoids a logical textual argument suggesting that most, if not all, *parens patriae* suits are removable. The syllogism is simply this: *parens patriae* suits are brought on behalf of both the state itself and its affected citizens. CAFA requires removal when it is proposed that monetary relief claims of one hundred or more persons are tried jointly. So when an attorney general aggregates monetary relief claims of one hundred or more citizens into a *parens patriae* action and any recovery will be returned to the citizens, the action should be removed. This

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the court uses the terms interchangeably, obliquely referring to the attorney general as a "plaintiff" and assuming, incorrectly, that 99 additional "plaintiffs" need to be joined to constitute a mass action.

205. 28 U.S.C. §§ 1332(d)(2)(A)–(C) (2006).

206. BLACK'S LAW DICTIONARY 1267 (9th ed. 2009).

207. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

208. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 62–63 (2006).

209. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429–30 (5th Cir. 2008) (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972)).

logic appears in both *Caldwell*[210] and the dissent's argument in a recent Fourth Circuit decision on a closely related matter.[211]

In *Caldwell*, the court based its decision, in large part, on the fact that the attorney general was seeking treble damages. According to the *Caldwell* court, this showed that the real parties in interest behind the action were the citizens: "We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest."[212] The court based its analysis on the text of the Louisiana Monopolies Act, which "plainly states that 'any person who is injured in his business or property' under the Monopolies Act 'shall recovery [sic] [treble] damages.' "[213] This is the critical question in these cases: Whom do these claims belong to under the relevant substantive law, the state or the citizens? Because only individual citizens were entitled to enforce this provision in *Caldwell*, only the citizens, not the state, stood to gain.[214] To put this in the language of CAFA, the Louisiana attorney general was proposing to try jointly the monetary relief claims of more than one hundred Louisiana residents. Therefore, what was presented to the court as a *parens patriae* action was actually a CAFA mass action.

The dissenting judge in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.* reached a similar conclusion based on the West Virginia attorney general including a claim that, if substantiated, would result in damages necessarily being paid directly to the citizens.[215] Citing *Caldwell*, Judge Gilman noted that "the West Virginia Attorney General here does not have a quasi-sovereign interest in the refunds that the [defendants] will be required to pay directly to the affected consumers if they are found to have violated the WVCCPA."[216] Just as the *Caldwell* court dismissed the fact that the Louisiana attorney general was bringing some claims properly classified as *parens patriae* actions,[217] Judge Gilman admitted that the West Virginia attorney general was "seeking civil penalties and injunctive relief, these being the type of claims clearly within

210. *See infra* note 212 and accompanying text.
211. *See infra* note 215 and accompanying text.
212. *Caldwell*, 536 F.3d at 429.
213. *Id.* (alteration in original).
214. *Id.*
215. West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 181 (4th Cir. 2011) (Gilman, J., dissenting).
216. *Id.* at 182.
217. *Caldwell*, 536 F.3d at 430.

the state's *parens patriae* authority."[218] But again, like the *Caldwell* court,[219] Judge Gilman viewed the claims for monetary relief to be "the primary focus of this case," and the claims for civil penalties and injunctive relief to be "subsidiary claims that will be considered by the trial court only if the primary claim of reimbursement to the allegedly overcharged consumers is successful."[220]

As explained above, textual analysis of CAFA's mass action provision can logically support that any time an attorney general brings a *parens patriae* action seeking monetary relief for affected citizens, a court could invoke CAFA. However, as a blanket rule, this seems to close the loophole even more tightly than CAFA's framers intended. For instance, one of the chief opponents to the Pryor Amendment, Senator Grassley, stated that legitimate *parens patriae* suits should be litigated in state court; he did not say that *parens patriae* actions should exclude claims for monetary relief.[221] A blanket rule comes uncomfortably close to realizing the fears of Senator Pryor[222] and *Caldwell*'s critics[223] of encroachment on the states' abilities to bring *parens patriae* actions. Therefore, a blanket rule is probably unworkable: it would go too far to require every *parens patriae* action to be removed to federal court. But the opposite rule, one modeled on the Pryor Amendment that exempts *any* actions brought by a state, leaves open a massive loophole that has been, and assuredly would continue to be, taken advantage of by state attorneys general. Therefore, courts need to have a methodology for ferreting out which cases are true *parens patriae* actions and which cases are mass actions disguised as *parens patriae* actions. This Note suggests a series of elements that courts should examine, detailed below in Part III.

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218. *CVS Pharmacy, Inc.*, 646 F.3d at 182 (Gilman, J., dissenting).

219. *Caldwell*, 536 F.3d at 430 (calling the treble damages "the central issue in this appeal" and noting "that the purpose of antitrust treble damages provisions are to encourage private lawsuits by aggrieved individuals for injuries to their businesses or property").

220. *CVS Pharmacy, Inc.*, 646 F.3d at 182 (Gilman, J., dissenting).

221. *See supra* note 187 and accompanying text.

222. *See supra* note 186 and accompanying text.

223. *See supra* Part II.A.2.b and accompanying text; *see also CVS Pharmacy, Inc.*, 646 F.3d at 178 ("Were we now to mandate that the State was not entitled to pursue its action in its own courts, we would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a West Virginia matter into a federal case.").

Caldwell's critics, however, do not see this argument as cut-and-dry. For instance, one critic notes that the Senate Report refers to "mass actions" as "suits that are brought on behalf of numerous named plaintiffs . . . ."[224] Moreover, the Senate Report further states that CAFA addresses situations in which "100 or more named parties seek to try their claims."[225] The House Record reflects the same terminology: Representative James Sensenbrenner referred to mass actions as being initiated by "a complaint in which 100 or more plaintiffs are named . . . ."[226]

However, this ignores two important counterpoints. The first, and the more persuasive, is simply that the final statutory language contains no reference to "named plaintiffs."[227] As noted above, statutory interpretation begins with the plain text of a statute,[228] and when a word is not defined by statute, courts normally construe it in accordance with its ordinary or natural meaning.[229] This obviates analysis of the legislative history of the use of the term "person" instead of "plaintiff." However, assuming arguendo that a court decides to consider the legislative history, there is counterbalancing evidence in the legislative history that supports a purely textual analysis. For instance, the House Report also recommended that there be separate definitions for "class action" and "plaintiff class action."[230] The Report defined the latter as a "class action in which class members are plaintiffs," whereas it defined regular class members as "the *persons* (*named or unnamed*) who fall within the definition of the proposed or certified class in a class action."[231] Perhaps then, the legislative history on "persons" versus "plaintiffs" is inconclusive. However, proponents of *Caldwell* do have the weight of the statutory text to support their argument.

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224. Amy Spencer, Note, *Once More Into the Breach Dear Friends: The Case for Congressional Revision of the Mass Action Provision in the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1067, 1081 (2006) (citing S. REP. NO. 109-14, at 46 (2005)) (concluding that "if courts interpret 'mass actions' according to the plain language of the statute," then "a complaint naming one hundred or more plaintiffs" is required).

225. S. REP. NO. 109-14, at 46 (2005).

226. 151 CONG. REC. 2639 (2005) (statement of Rep. Sensenbrenner).

227. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

228. *See supra* note 197.

229. *See supra* note 198.

230. H.R. REP. NO. 109-7, at 4 (2005).

231. *Id.* (emphasis added).

2. CAFA's Structure—Unnamed Persons are Included

The structure of CAFA confirms that "claims of persons" in the mass action provision is intended to include the claims of unnamed parties and that courts should pierce the pleadings to find these parties. There is, as noted in Part I.B.3, substantial interplay between the class action and mass action sections of CAFA. For instance, a mass action is considered a class action "removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs."[232] Embedded in this cross-referencing provision are clues to Congress's intent to encourage a court to pierce the pleadings. Paragraphs (2) through (10) refer to "members of a class."[233] CAFA defines "class members" in paragraph (1) as "the *persons* (*named or unnamed*) who fall within the definition of the *proposed* or certified class in a class action."[234]

Paragraph (1) is not included in the definition of a mass action. However, it would seem anomalous to limit mass actions strictly to "named plaintiffs" without explicitly including this in CAFA, especially when Congress broadly defined "class member" to include unnamed persons in the class action section upon which the mass action provision largely depends. Inclusion of unnamed persons in uncertified representative actions therefore lends support to the proposition that Congress intended for courts to look for unnamed parties in the pleadings when determining whether the action should be remanded to state court. This in turn supports removal under CAFA when the pleadings in a *parens patriae* suit are pierced and the suit is shown to be mislabeled.

III. THE COURT AS CONDUCTOR: EXAMINING WHEN COURTS SHOULD PIERCE THE PLEADINGS

While the Fifth Circuit explained why it is necessary to pierce the pleadings,[235] it did not clarify when courts should do so. This Part offers a five-element checklist designed to expose suspicious facts present in a *parens patriae* suit.

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232. 28 U.S.C. § 1332(d)(11)(A).
233. *See id.* § 1332(d)(2)(A)–(C).
234. *Id.* § 1332(d)(1)(D) (emphasis added).
235. Louisiana *ex rel*. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 423 (5th Cir. 2008).

Courts need guidelines in order to avoid having to pierce the pleadings in each *parens patriae* suit. Each *parens patriae* suit poses a small but extant risk that jurisdictional gamesmanship is afoot. To faithfully enforce CAFA, courts arguably should pierce the pleadings in each *parens patriae* suit. However, even putting aside Eleventh Amendment concerns, piercing the pleadings in each *parens patriae* suit would result in judicial inefficiencies by unnecessarily consuming time and resources. Therefore, courts need guidelines for when to pierce the pleadings.

CAFA provided guidelines for other discretionary actions by district courts, most notably the "local controversy" exception. This exception allows district courts to remand cases to state courts based on consideration of several factors.[236] The "local controversy" exception and the relevant factors are summarized as follows:

> CAFA . . . contains a complicated "local controversy" exception that gives courts the right, but not the duty, to decline jurisdiction based on the citizenship of the parties and the nature of the action. Among the factors that a court should consider are, whether the claims are of "national or interstate interest"; choice of law issues; ["*whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction*";] whether a "nexus" exists among the plaintiffs, harm suffered, and the defendants; [how many citizens of the state where the injury occurred are in the suit and how "dispersed" the plaintiffs are generally;] and whether similar class actions have been filed within the past three years asserting similar claims on behalf of "the same or other persons." [237]

Several of these factors translate into workable guidelines for district courts to use when determining whether to pierce the pleadings in a *parens patriae* suit.

There are five indicators that, when present, should raise red flags for a court reviewing a *parens patriae* suit: private plaintiffs' attorneys, parallel civil suits, valuable individual claims, a limited number of underlying claims, and suspect

236. 28 U.S.C. § 1332(d)(3)(A). The exclusion applies to "a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed . . . ." *Id.* § 1332(d)(3).

237. Knight, *supra* note 63, at 1886 (emphasis added) (citing 28 U.S.C. § 1332(d)(3) (2006)).

language in the pleadings. Although no single factor is necessary, any one of these factors should be sufficient to cause a court to pierce the pleading.

The first factor is obvious post-*Caldwell*: the presence of private plaintiffs' attorneys in the suit. This sends a clear, if rebuttable, signal that the state might be attempting to keep a mass action out of federal court.[238] This might indicate that jurisdictional gamesmanship is afoot or it might simply evince an attorney general in need of specialized assistance. The content and context of the complaint should provide clues that can rebut this signal. The second factor is the existence of parallel civil suits. This draws both from *Caldwell*[239] and from the local controversy exception.[240] Evidence that individual parties are simultaneously litigating the same underlying action calls into question why a *parens patriae* suit is necessary. This element is surprisingly common.[241] But this too could be rebutted; an attorney general could be seeking only equitable relief or could demonstrate that his or her suit sought damages for a broader subset of citizens than was represented in the private actions.

The third factor is if an attorney general brings valuable individual damages claims. The archetypal *parens patriae* suit is a "negative value" suit,[242] where the injury to individual citizens is so minor that citizens are unlikely to bring suits individually because the cost of litigating the matter is greater than the potential return.[243] Bringing a *parens patriae* action

238. *See supra* notes 40–43 and accompanying text.

239. *See Caldwell*, 536 F.3d at 423.

240. *See* 28 U.S.C. § 1332(d)(3)(F).

241. *See* West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 182 (4th Cir. 2011) (Gilman, J., dissenting) (noting that "some of the same private attorneys representing the Attorney General here are simultaneously representing individuals who have filed essentially identical claims against the same defendants in Michigan and Minnesota"). Parallel suits appear in other recent CAFA decisions, though not all involve private attorneys litigating private citizens' claims. *See, e.g.*, Illinois v. AU Optronics Corp., 10-CV-5720, 2011 WL 2214034, at *10 (N.D. Ill. June 6, 2011) (citing "congruent" suits being brought by other states against the defendant).

242. *See* Smith v. Georgia Energy USA, LLC, 259 F.R.D. 684, 697 (S.D. Ga. 2009) ("A 'negative value' suit is one in which putative class members would expend more money by litigating their suits individually than they would stand to gain in damages on an individual basis.").

243. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 739 (1981). The *Maryland* Court, in upholding a *parens patriae* action in a suit alleging a conspiracy by Louisiana to keep natural gas prices high, explained that the situation was ripe for a *parens patriae* action because

> [A] great many citizens in each of the plaintiff States are . . . consumers

when the potential individual recoveries are substantial is a strong indication of jurisdictional gamesmanship. The fourth factor is a corollary to the third factor: Courts should pierce the pleadings when *parens patriae* actions represent a limited number of underlying claims. Like the third factor, this is unusual in a *parens patriae* suit;[244] a negative value suit is generally employed to aggregate a larger volume of small value claims. Therefore, having a small volume of high value claims is inherently suspicious because, logically, the aggrieved citizens should be motivated to pursue the claims on their own. The fifth factor risks stating the obvious. If, after reviewing the record, a court finds either evidence of jurisdictional gamesmanship[245] or a complaint that is "rife with statements" that make it clear that the citizens whose interests are represented by the attorney general are the real parties in interest, as in *Caldwell*, the court should pierce the pleadings.[246] Although this seems self-evident, simply being aware that this loophole exists, and that a complaint might evidence exploitation of this loophole, merits including this factor.

Weighing the minimal time required to check for these factors against the risk of double recovery against the defendants should make apparent the usefulness of this exercise. If one or more of these factors are present, then a court should adopt the *Caldwell* approach and pierce the pleadings to determine if removal is appropriate.

CONCLUSION

When appropriate, courts should adopt the Fifth Circuit's approach of applying CAFA to close the loophole created by

> . . . and are faced with increased costs aggregating millions of dollars per year. . . . [I]ndividual consumers cannot be expected to litigate . . . given that the amounts paid by each consumer are likely to be relatively small.

Id. This theme of many citizens with small individual dollar claims can be found in other Supreme Court and federal appellate decisions. *See, e.g.*, Texas v. New Mexico, 482 U.S. 124 (1987); Kansas v. Colorado, 206 U.S. 46 (1907); *In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 30 (2d Cir. 1981) ("Congress enacted the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c–15h (1976), to provide a meaningful remedy for small consumers injured by antitrust violations.").

244. *See supra* note 243 and accompanying text.

245. *See* 28 U.S.C. § 1332(d)(3)(C).

246. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 n.9 (5th Cir. 2008).

mislabeled *parens patriae* actions. Courts should apply a five-factor checklist and, if any of the factors are present, should look past the labels of *parens patriae* suits and determine who are the real parties in interest. This way courts can close the loophole foreseen by CAFA's framers and laid bare in *Caldwell*. Failure to do so risks cuing the music for "some enterprising plaintiffs' lawyers" and a willing attorney general to waltz through the loophole. This prevents removal of cases over which federal courts have original jurisdiction. Consider again Judge Neely's description of the effect of homecooking in his decisions:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[247]

Congress intended CAFA to provide protection for the defendants who face the greatest risk from homecooking. By piercing the pleadings and applying CAFA when necessary, courts can stop the waltz and close the loophole.

247. *See* Tabarrok & Helland, *supra* note 8, at 157.

NAGPRA IN COLORADO: A SUCCESS STORY

CECILY HARMS*

A primary goal of the Native American Graves Protection and Repatriation Act (NAGPRA) is to correct the human rights violations committed against Native Americans from centuries of grave looting, stealing, and improper sales of cultural items. In the twenty-two years since NAGPRA's passage, the human rights foundation of the Act has been overshadowed by struggles regarding interpretation and implementation. The museums and Native American tribes of Colorado have not lost sight of NAGPRA's human rights foundation, however. Their commitment to the spirit of NAGPRA is evident in the museums' and tribes' approach to basic implementation and taking the initiative to develop state law to fill gaps in NAGPRA several years before federal regulations addressed the same issue. The collaboration between Colorado museums and tribes is, therefore, a model for NAGPRA implementation today and for the future.

* Juris Doctor candidate, University of Colorado Law School, 2012. Thank you to Professor Kristen Carpenter for her guidance on this Note when it began as a paper in her seminar on cultural property, the editors of the *University of Colorado Law Review* for their astute comments, and my mother and father for their unwavering support.

INTRODUCTION

The Native American Graves Protection and Repatriation Act[1] (NAGPRA) is, first and foremost, a human rights law.[2] Passed in 1990, NAGPRA is a federal statute enacted to correct the human rights violations caused by centuries of looting Native American graves, stealing from tribes, and displaying stolen human remains[3] and objects in museums. NAGPRA addresses these past wrongs by protecting undisturbed Native American graves;[4] imposing criminal penalties for trafficking in Native American remains and objects;[5] and requiring museums and federal government agencies to inventory all of their Native American human remains, sacred and funerary objects, and objects of cultural patrimony in consultation with tribes and to repatriate items and remains whose tribe or owner can be identified.[6] NAGPRA also gives museums and

1. 25 U.S.C. §§ 3001–3013 (2006). Hereinafter, "NAGPRA" or "the Act."

2. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye) ("[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.").

3. The use of "individual" rather than "human remains" is a widespread practice of respect. *See, e.g.*, NAT'L PARK SERV., DEPT. OF INTERIOR, NATIONAL NAGPRA PROGRAM FY2011 MIDYEAR REPORT (2011), http://www.nps.gov/nagpra/DOCUMENTS/Reports/NationalNAGPRAMidYear2011final.pdf. While wishing to respect this preference and honoring it where possible, "human remains" is the language used in NAGPRA itself, *e.g.*, 25 U.S.C. §§ 3002–3003, so, for the sake of clarity, "human remains" must sometimes be used in this Note.

4. 25 U.S.C. §§ 3001–3003.

5. 18 U.S.C. § 1170 (2006).

6. 25 U.S.C. §§ 3003–3005.

federal agencies restrictive time limits within which to complete these tasks.[7] Not only does NAGPRA mandate immediate and oftentimes expensive action on a sensitive issue, but NAGPRA is also full of ambiguous terminology, requiring differentiation between "associated" and "unassociated" funerary objects[8] and challenging how to define "Native American."[9] Because the passage of NAGPRA required such innovative and extensive action so quickly, museums and federal agencies under NAGPRA's mandates understandably focused on the Act's implementation requirements. In this rush to understand and comply with NAGPRA's requirements, a disconnect occurred. Although human rights were the driving force in the Act's passage, they have become lost in NAGPRA's implementation. Great strides have been made in the past twenty-two years to correct the human rights violations. However, GAO (Government Accountability Office) reports, regulative additions to NAGPRA, and legal battles over NAGPRA's requirements all demonstrate that the Act has yet to be fully implemented as it was envisioned. Tribes and museums striving to use and comply with NAGPRA still struggle to do so years later because the human rights foundation of the Act has been overshadowed by disputes over definitions.

This Note posits that despite the general disconnect between the goals and the implementation of NAGPRA, Colorado has managed to implement NAGPRA in a way that has not lost sight of the Act's human rights foundation. By taking a proactive approach, Colorado recognized and implemented the heart of NAGPRA's intention—correcting centuries-old human rights violations—while other states and government agencies have only grudgingly complied with NAGPRA's basic requirements. Specifically, Colorado developed a process that filled in the gaps of NAGPRA with

7. Summaries of sacred objects, objects of cultural patrimony, and unassociated funerary objects were given a three-year time limit, *id.* § 3004(b)(1)(C), and inventories of human remains and associated funerary objects were given a five-year time limit, *id.* § 3003(b)(1)(B). See *infra* Part I.C.3, for a discussion on the difference between these two requirements.

8. 25 U.S.C. § 3001(3)(A)–(B) (differentiating that "associated objects" must still be with the remains they were buried with while "unassociated objects" are not held at the same museums as the remains).

9. *Id.* § 3001(9); see also *infra* Part I.D (discussing Bonnichsen v. United States, 367 F.3d 864, 875–82 (9th Cir. 2004)), for a discussion of NAGPRA's definition of "Native American."

supplemental state law in order to return and rebury individuals' remains that may otherwise not be eligible for repatriation. Colorado's process anticipated federal NAGPRA regulations requiring other states and federal agencies to follow essentially the same process.[10] As NAGPRA at a national level still struggles to achieve its goals two decades after implementation, Colorado is a model for how NAGPRA should be implemented.

This Note details Colorado's model implementation of NAGPRA in three parts. Part I provides background on the bleak legal and social context leading to the enactment of NAGPRA, the passage of NAGPRA, and the content of NAGPRA. Part II lays out the potential challenges Colorado faced with NAGPRA, the early indicators of meritable implementation, and compares Colorado's implementation to that of other states and federal agencies. Finally, Part III explores the collaborative approach that has made NAGPRA so effective in Colorado and the extra work, beyond rudimentary compliance, that made possible the development of Colorado's process to return culturally unidentifiable remains.

I. BACKGROUND: FROM CENTURIES OF LOOTING TO NAGPRA

Understanding the laws and practices surrounding the looting of Native American graves prior to the passage of NAGPRA is vital to fully appreciate the impact and complications of the Act. Part A addresses the national lack of respect shown to Native graves for centuries. Part B discusses the human rights foundations of NAGPRA, NAGPRA's predecessor—the National Museum of the American Indian Act (NMAIA)—and the passage of NAGPRA. Part C lays out the actual content of NAGPRA, and Part D addresses the difficulties with the Act—from its ambiguous language to the financial and emotional strain it has put on museums and tribes.

A. Native Graves Prior to NAGPRA

White Americans, even figureheads such as Thomas Jefferson, have been desecrating Native American graves since

10. *See infra* Part III.C–D.

the colonial era.[11] By the twentieth century, there was even federal legislation enacted to define the right to dig up Native American graves. With the stated goal of protecting artifacts on federal land from looters, the Antiquities Act of 1906 "defined dead Indians interred on federal land as 'archeological resources' and . . . converted these dead persons into 'federal property.' "[12] Such an act was contrary to long-standing common-law principles that human remains are not property.[13] Not only was this policy an ethnocentric break from the common law's respect for human remains, but putting Native ancestors' remains in museums also disregarded the Native cultural belief that ancestors' spirits cannot be at rest while their remains are above ground.[14] Disinterment "stops the spiritual journey of the dead," leaving the Native ancestors' spirits to "wander aimlessly in limbo."[15]

Respect for the dead and their graves (even unmarked ones) is deeply ingrained in American culture,[16] and rules on disinterment are usually lengthy and require extensive judicial supervision and involvement.[17] However, these "legal

11. James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archeology and American Indians*, 24 ARIZ. ST. L.J. 11, 14–17 (1992) (Jefferson excavated a Native burial mound in Virginia without asking permission from the local Native Americans. He did so "in the name of science.").

12. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, *in* THE FUTURE OF THE PAST 9, 12 (Tamara L. Bray ed., 2001); Antiquities Act of 1906, 34 Stat. 225 (1906) (current version at 16 U.S.C. §§ 431–433 (2006)) (the original Antiquities Act is no longer in effect, but has been integrated into 16 U.S.C. §§ 431–433). Mesa Verde, in southwestern Colorado, was one of the first two sites "protected" under the Antiquities Act. Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After* Lucas, 13 ST. THOMAS L. REV. 65, 72 (2000). The other site was "George Washington's home at Mount Vernon." *Id.*

13. Trope & Echo-Hawk, *supra* note 12, at 12; *see also* Williams v. Williams, (1882) XX Ch.D. 659 at 665.

14. *See* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES 31–32 (2000).

15. Riding In, *supra* note 11, at 13.

16. *See, e.g.*, Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938) (A jury awarded a man $5,000 in emotional distress damages when the unmarked grave of his child was plowed over. The case was remanded on other grounds.).

17. *See, e.g.*, WOODLAND PARK, CO., CODE tit. 2, ch. 2.28, § 2.28.230 (2002), *available at* http://library.municode.com/HTML/13858/level2/TIT2ADPE_CH2.28CERE.html#TIT2ADPE_CH2.28CERE_2.28.230DI (stipulating that (1) disinterment requires a court order or a signed affidavit from the deceased's next of kin on a form provided by the city; (2) it is not allowed without permission of the deceased's family members; and (3) it cannot be done on a weekend or a holiday).

protections, which most citizens take for granted, have failed to protect the graves and the dead of Native people" despite the importance of burial grounds in Native cultures.[18] State case law, such as the 1982 California case of *Wana the Bear v. Community Construction Inc.*[19] and the 1965 Florida case of *Newman v. State*,[20] has established that Indian burial sites are often not protected as cemeteries. In *Wana the Bear*, the California Court of Appeals ruled that a Miwok burial ground did not qualify for the protections afforded to cemeteries under California law (and therefore refused to enjoin the construction of a residential subdivision on the burial grounds) because the burial grounds had been "abandoned" in the late nineteenth century when the Miwok were driven out of the area.[21] In *Newman*, the removal of a Seminole man's skull from a burial ground was held not to be a wanton and malicious disturbance of the contents of a tomb, in large part because the burial ground was unmarked.[22] Because of the long-time practice of grave looting by white Americans and case law reinforcing the lack of legal protection of Native American grave sites, it is estimated that "between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions."[23]

B. Human Rights Foundations, NMAIA, and the Passage of NAGPRA

In the 1970s, the United States' Native American community began addressing this human rights violation through an Indian burial rights movement.[24] This movement opposed the use of Native ancestors' remains for scientific research and the storage of Native ancestors' remains in museums.[25] The foundations of the burial rights movement were in the international fight for human rights and self-

18. Trope & Echo-Hawk, *supra* note 12, at 11.
19. 180 Cal. Rptr. 423, 425–26 (Cal. Ct. App. 1982).
20. 174 So. 2d 479, 483–84 (Fla. Dist. Ct. App. 1965).
21. *Wana the Bear*, 180 Cal. Rptr. at 424, 426–27.
22. *See Newman*, 174 So. 2d at 480, 483.
23. Trope & Echo-Hawk, *supra* note 12, at 11.
24. James A. R. Nafziger & Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT'L J. CULTURAL PROP. 77, 80 (1999).
25. *Id.*

determination,[26] with the backdrop of "the dramatic social movements of the 1960s and early 1970s associated with civil rights demonstrations, anti-Vietnam War protests, counter-cultural nonconformity, and demands for environmental protection" in the United States.[27] The burial rights movement had a straightforward purpose: addressing the "legacy of grave robbing, postmortem head hunting, and unethical research" done to deceased Native ancestors in the United States.[28] Native American activists argued that the lack of legal protection for Native American graves was a human rights violation and a failure to provide Equal Protection. Stealing human remains of any ethnicity from their graves and displaying these remains in museums is a violation of human rights, and, because "the law and policy that protects the sanctity of the dead and the sensibilities of the living has failed to protect Native Americans," there has also been an Equal Protection violation.[29] As Senator Inouye told the Senate,

> [w]hen human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.[30]

The need for stronger burial rights became clear to the broader public when it discovered just how many Native ancestors' remains were at issue. In a 1987 Select Committee on Indian Affairs hearing, the Smithsonian admitted that of the 34,000 individuals in its collection, 14,523 were North American Native ancestors and 4,061 were "Eskimo, Aleut, and Koniag" Native ancestors, which caused an "intense and immediate Native American reaction."[31] Awareness of the issue among the non-Native American population became more

26. *Id.*

27. James A. R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 175, 184–85 (2006).

28. Riding In, *supra* note 11, at 25; *cf.* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 848–49 (2d ed. 2008).

29. *See* Trope & Echo-Hawk, *supra* note 12, at 10–11, 15–16.

30. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990).

31. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 266 (2005).

widespread after a 1988 *National Geographic* article about the government's "inadequate response" to the destruction of over 800 Native American burial sites in Kentucky.[32] The burial rights movement and the public exposure helped put pressure on the federal government to correct this human rights violation.

Members of Congress attempted, unsuccessfully, to pass legislation protecting Native graves several times in the late 1980s.[33] Then, in 1989, Congress passed the National Museum of the American Indian Act (NMAIA).[34] This Act required the Smithsonian, of which the National Museum of the American Indian was to be a part, to do inventories and summaries of their Native American human remains and funerary objects with the help of Native American tribes.[35] If remains or objects could be identified as belonging to a particular culture, they were to be returned to the tribe or lineal descendants.[36] This Act was an important precursor to NAGPRA not only because it established a federal repatriation procedure, but also because it required the United States' national museum to comply.[37] The Smithsonian had a substantial Native American collection and had vigorously opposed the Congressional bills of the 1980s trying to address Native American repatriation issues.[38] With the precedent of inventories and repatriation procedures imposed on the Smithsonian, Congress was poised to pass legislation requiring repatriation from the nation's other federally funded museums.

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32. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 369 (1999); Harvey Arden, *Who Owns Our Past?*, NAT'L GEOGRAPHIC, Mar. 1989, at 376.

33. Trope & Echo-Hawk, *supra* note 12, at 20.

34. 20 U.S.C. §§ 80Q–80Q-15 (2006).

35. *Id.*; Trope & Echo-Hawk, *supra* note 12, at 20–21.

36. 20 U.S.C. § 80Q-9 to -11.

37. Another interesting point concerning the National Museum of the American Indian Act as a precursor to NAGPRA is that the two acts were passed under different titles of the U.S. Code. The National Museum of the American Indian Act is in title 20, the "Education" title, while NAGPRA is in title 25, the "Indians" title. 20 U.S.C. § 80Q; 25 U.S.C. §§ 3001–3013 (2006). This difference could be used to make an argument that while the NMAIA did strive to strike a balance between the interests of museums wanting to retain collections for further research and Native Americans wanting to rebury their ancestors, NAGPRA's placement in title 25 shows a preference for Native American human rights.

38. Trope & Echo-Hawk, *supra* note 12, at 20.

C. The Content of NAGPRA

NAGPRA was signed into law by President George H. W. Bush on November 23, 1990.[39] It is a comprehensive piece of legislation with three main goals: the protection of undisturbed Native graves; criminal penalties for trafficking in Native American remains and objects; and the return of human remains and stolen objects by museums and federal agencies.[40]

1. Protection of Undisturbed Native Graves

NAGPRA addresses how to handle the contents of a newly discovered Native grave and protection of unexcavated graves on federal land.[41] It grants ownership of found objects and remains to the lineal descendant of the buried Native American or the tribe on whose land the grave was discovered.[42] It also strives to protect Native American graves that have not yet been disturbed.[43] In addition, NAGPRA establishes procedures to follow in the case of an inadvertent discovery to protect the grave and requires notification of the appropriate tribe before construction, mining, and agriculture can continue in the area.[44]

2. Criminal Penalties for Trafficking

NAGPRA makes it illegal to traffic Native American remains and cultural objects and establishes criminal punishments for violations.[45]

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39. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

40. 25 U.S.C. §§ 3001–3013; GERSTENBLITH, *supra* note 28, at 848–93.

41. 25 U.S.C. § 3002(d).

42. *Id.* § 3002(a). NAGPRA defines "tribal land" as "all lands within the exterior boundaries of any Indian reservation; . . . all dependant Indian communities; . . . [and] any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of the Public Law 86–3." *Id.* § 3001(15)(A)–(C) (internal quotation marks omitted).

43. 25 U.S.C. § 3002(d)(1) (stating that unmarked graves of Native peoples on federal land are protected from intentional excavation).

44. *Id.*

45. 18 U.S.C. § 1170 (2006) (including fines and/or imprisonment of up to five years).

3. Consultation and Repatriation from Museums and Federal Agencies

Finally, once implemented, NAGPRA required all federally funded collections to conduct an inventory of their "human remains and associated funerary objects" within five years of the passage of NAGPRA[46] and create a summary of unassociated funerary objects, objects of cultural patrimony, and sacred objects within three years.[47] These inventories and summaries had to be done in consultation with tribal government and religious leaders.[48] Summaries were intended to provide more general information about entire collections "in lieu of an object by object inventory."[49] The summary process also did not require consultation with tribes as early as the inventory process did.[50] The less stringent nature of the summary process was presumably why it had a shorter deadline than the inventories, although the two processes are otherwise alike.[51] The museum or federal agency then had to attempt to establish a "cultural affiliation" for the human remains and objects to a particular tribe.[52] If remains or objects could be culturally identified, the museum had to repatriate them.[53]

D. Issues of Interpretation and Application

Because of the ground-breaking nature of NAGPRA in both American Indian and museum law, NAGPRA's scope and

46. 25 U.S.C. § 3003.

47. *Id.* § 3004; see also *infra* Part D, for a discussion on the meaning of these terms.

48. 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B).

49. Nat'l Park Serv., U.S. Dep't of Interior, *Summary and Inventory Overview*, NAT'L NAGPRA, http://www.nps.gov/nagpra/TRAINING/Summaries_and_Inventories.pdf (last visited Sept. 2, 2011).

50. *Id.*

51. Most importantly, both require museum-initiated consultations with the goal of making cultural affiliation determinations. *Id.*

52. 25 U.S.C. §§ 3003(a), 3004(a). "[C]ultural affiliation means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." *Id.* § 3001(2) (internal quotation marks omitted).

53. *See* Nat'l Park Serv., *supra* note 49. For unassociated funerary objects, sacred objects, and objects of cultural patrimony, the museum or agency holding the object must be unable to prove that it has a right of possession to the object before it can be repatriated. 43 C.F.R. § 10.10(a)(B) (2010).

definitions are not completely clear, even after twenty-two years. As one museum scholar put it, "NAGPRA does not give wholesale answers to disputes. Instead, it sets forth rules, definitions, and procedures . . . ."[54] Definitions of the terms used in NAGPRA have caused many problems. For example, the definition of "Native American" became a famous and hotly contested issue.[55] In *Bonnichsen v. United States*,[56] a federal judge decided that a nearly ten thousand-year-old skeleton known as "Kennewick Man" or "the Ancient One" was essentially too old to qualify as a Native American under the NAGPRA definition. Finding a significant difference between a tribe that *is* indigenous rather than a tribe that *has been* indigenous, the judge concluded that "because Kennewick Man's remains are *so* old and the information about his era is *so* limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures."[57]

The subcategories of "cultural items" have also caused interpretation issues. The definition of "human remains" is obvious enough, but the four subcategories of objects—"associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony"—have not been as easy to define.[58] The terms can easily overlap and often impose definitions and categorization in a way that does not easily align with Native cultural beliefs concerning the objects. For example, "associated" and "unassociated" funerary objects both refer to objects originally buried with an individual,[59] but a statutory difference has been imposed that hinges on whether the institution that currently holds the burial object also holds the individual with which the object was placed.[60] Thus, an associated funerary object is an object that is now in the possession of the entity who is also in possession of the human

54. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 114 (2d ed. 1998).

55. NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that *is* indigenous to the United States." 25 U.S.C. § 3001(9) (emphasis added) (internal quotation marks omitted).

56. 367 F.3d 864, 882 (9th Cir. 2004).

57. *Id.*

58. 25 U.S.C. § 3001(3) (internal quotation marks omitted).

59. *Id.* § 3001(3)(A)–(B).

60. *See id.*

remains that the object was originally buried with.[61] An unassociated funerary object is an object that is in the possession of an entity who does not also have possession of the human remains that the object was originally buried with.[62] This difference between associated and unassociated funerary objects, while seemingly straightforward, has encountered complications. Even if a funerary object enters a museum's collection with the individual it was placed with, a funerary object can change from being associated to unassociated if the individual's remains are separated from the funerary object.[63] Furthermore, because funerary objects must be "with" an individual to be defined as associated, objects that have been "abandoned at locations distant from the grave as part of funerary practices" may not be considered associated funerary objects despite the intentional nature of their placement.[64] It is questionable whether NAGPRA would even apply to such an object; even though the object is deliberately placed as part of a funerary ceremony it has never been "associated" with the remains. But it has also never been separated from the remains and therefore "unassociated."[65]

Museums and tribes have also struggled with the distinction between "sacred" and "religious" objects.[66] NAGPRA only applies to "sacred" objects because while "all NAGPRA sacred objects have a religious character," not all religious objects are sacred.[67] It may seem logical that any object of a religious nature should be protected by NAGPRA under such a broad term as "sacred," but, in fact, NAGPRA only protects items as "sacred objects" if they are "needed for present-day use in religious ceremonies."[68] The category "cultural patrimony" is also notably difficult to apply because it does not cover items

61. *Id.* § 3001(3)(A).
62. *Id.* § 3001(3)(B).
63. *See id.*
64. *See id.* § 3001(3)(A); C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 165 (2002) ("Certain Indian tribes, particularly those from the northern plains, have ceremonies in which objects are placed near, but not with, the human remains at the time of death or later."); Daniel N. Matthews, NAGPRA in Southern Idaho: An Ethnographic Approach 102 (Apr. 21, 1997) (unpublished Ph.D. dissertation, University of Colorado) (on file with Norlin Library, University of Colorado).
65. Matthews, *supra* note 64.
66. ROGER ECHO-HAWK, KEEPERS OF CULTURE 104 (2002).
67. *Id.*
68. *Id.*

that are valued by a whole tribe but are individually owned such as "personal property of famous chiefs or privately owned cultural artifacts of great significance."[69]

Beyond the difficulty of understanding the terminology of NAGPRA, tribes and museums alike have found frustrations with implementing NAGPRA. For museums, it has been an ongoing challenge to comply with NAGPRA's three-year limit for creating a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony,[70] as well as the five-year limit for completing an inventory of associated funerary objects and human remains.[71] Museums' Native American collections are often so large that five years was not enough time to inventory and summarize the entire collection, especially if the museum needed to consult with many different tribes.[72] Also, under the original NAGPRA, human remains could not be repatriated if the cultural affiliation of the remains was indeterminable, or if several tribes had claimed ownership and the museum was unable to determine who the "most appropriate claimant" was.[73]

Beyond the difficulty implementing the specific provisions of NAGPRA, the goals of the legislation can also be unsettling for museums. "[Museums] faced the prospect of returning their priceless collections to tribes that often lacked resources to preserve them."[74] Moreover, one of the goals of NAGPRA—to put sacred objects back in use—meant that previous museum pieces would be used "until worn out and discarded, a disheartening prospect for curators who dedicate their working lives to such objects' conservation."[75]

Native tribes have also found many things lacking in NAGPRA. First, a common problem in American Indian law arose: NAGPRA was written in the terms and concepts of Anglo-American law, but the Native American cultures that NAGPRA impacts do not share these same legal conceptions.

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69. *Id.* at 110.

70. 25 U.S.C. § 3004(b)(1)(C) (2006).

71. *Id.* § 3003(b)(1)(B).

72. In 1996 alone, fifty-eight museums were granted extensions for completing their inventories of human remains and associated funerary objects. Extension of Time for Inventory, 61 Fed. Reg. 36,756, 36,757 (July 12, 1996).

73. 25 U.S.C. § 3005(e). New regulations have since been passed regarding the disposition of culturally unidentifiable human remains. *See* 43 C.F.R. § 10.11(c) (2010).

74. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 17 (2003).

75. *Id.*

This created "a conflict in cultural and legal traditions."[76] Tribal methods of dispute resolution and systems of property ownership emphasize conciliation and community rather than individual rights, and they often depart markedly from the Anglo-American tradition in which NAGPRA was written.[77] For instance, Navajo jurisprudence stresses problem solving rather than the win-lose fault finding of Anglo law.[78] While Anglo law "uses coercion and power" to find the " 'truth,' and limits standing to parties who claim direct injury" in its focus on guilt, the Navajo system focuses on "moral suasion" and "on healing rather than on guilt."[79] NAGPRA expresses "rights of possession" in terms of Fifth Amendment Takings and retribution for trafficking human remains and objects in terms of fines and imprisonment.[80] NAGPRA is clearly an Anglo-American law.

Clashing cultural and legal systems have created other obstacles to implementing NAGPRA. Putting individuals' remains that have been sitting in a museum's collection back in the ground is an important goal of NAGPRA, but the Act's requirements stop at repatriation.[81] NAGPRA has no language mandating the reburial of remains, let alone reburial at the original gravesite, despite the importance this original site holds for Native cultures. This means NAGPRA does not call for Native human remains that were found on public lands to be reinterred on public land. Also, remains found on private land cannot be reinterred on the private land if there is not a special arrangement with the landowner. Therefore, under NAGPRA, the original resting sites for the exhumed Native Americans are usually not an option for reinterment.[82]

NAGPRA has also caused internal issues for Native American tribes. "Deep divisions have developed within tribes over who has the authority to speak [for the tribe] on repatriation issues" and "who should answer the inquiries."[83] Also, the handling of human remains in consultation and

76. MALARO, *supra* note 54, at 114.

77. *Id.*

78. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 33 (1999).

79. *Id.*

80. 25 U.S.C. § 3001(13) (2006); 18 U.S.C. § 1170 (2006).

81. *See* 25 U.S.C. § 3005.

82. KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 129 (2002).

83. GULLIFORD, *supra* note 14, at 29.

repatriation can be an isolating experience for the Native Americans who must touch them;[84] many Native tribes believe there are negative repercussions when a deceased ancestor is exhumed and separated from the objects he or she was buried with. Consequently, forcing a tribal member to handle ancestors' remains puts the handler in close proximity to these negative repercussions, which can lead other tribal members to avoid or ignore the handler.[85]

Moreover, tribal infrastructures can be ill-equipped to deal with the level of Native participation that NAGPRA demands.[86] Turnover rates in the Historical Preservation Officer positions, which some tribes created in response to NAGPRA, are still high, making handling issues, such as the categorization of objects under the four highly technical NAGPRA definitions and the effective participation in and use of NAGPRA, very challenging for these tribes.[87] Beyond structural and procedural difficulties, NAGPRA addresses sacred items and the remains of Native ancestors and the disrespect they have suffered, which is a very sensitive issue for Native Americans. As former Executive Secretary of the Colorado Commission on Indian Affairs, Ernest House, Jr. said, "[i]f we were talking about public safety and health care, tribal leaders are used to that . . . but [NAGPRA] is talking about sacred items."[88]

Finally, tribes have raised complaints about implementation. Tribes have objected to the cursory approach that some museums and federal agencies have taken in completing their inventories.[89] Although providing tribes with collection-level summaries rather than object-by-object inventories is acceptable under NAGPRA for sacred objects, objects of cultural patrimony, and unassociated funerary

84. *Id.*

85. *See id.* (" 'Those medicine men are being separated by tribal members and being treated as if they are spirits . . . . They are shunned by their own people.' ") (quoting Robert Frost, Native American consultant).

86. Since the passage of NAGPRA, many tribes have established cultural heritage officers and NAGPRA Coordinators to specifically handle NAGPRA issues, and there is now a database on the National Park Service webpage of tribal contacts for NAGPRA issues. *See* Nat'l Park Serv., U.S. Dep't of Interior, *Native American Consultation Database*, NAT'L NAGPRA, http://grants.cr.nps.gov/nacd/index.cfm (last updated May 2011).

87. Telephone Interview with Ernest House, Jr., former Exec. Sec'y, Colo. Comm'n on Indian Affairs (Nov. 18, 2010).

88. *Id.*

89. *See, e.g.*, FINE-DARE, *supra* note 82, at 153.

objects, this approach makes it very challenging for tribal NAGPRA officers to identify specific items on which to make repatriation claims.[90] Also, the museum practice of consulting with tribes in groups instead of individually can hinder the intent of the required consultations: to form respectful, working relationships with tribal representatives at an individual level in order to learn as much as possible about the objects in the museum's collection.[91] Neither museum action is specifically disallowed by NAGPRA, but neither helps NAGPRA's goal of constructive consultation leading to cultural affiliation determinations.[92] These problems have led to the common complaint that "[b]ecause of the money it is costing, the resources it is draining, and the frustration it is engendering, NAGPRA has driven itself into the position of arousing the suspicions of Native Americans."[93] In 2008 the National Association of Tribal Historic Preservation Officers issued a report criticizing NAGPRA's implementation at the federal level.[94] The report rebuked Congress for not providing adequate funding to properly implement NAGPRA and pointed out the lack of proper training provided to federal agencies and museums on their obligations under NAGPRA.[95] The report also highlighted tribes' lack of access to information identifying which museums and agencies may have possession of objects and human remains subject to NAGPRA but have not completed inventories and summaries.[96]

Lawsuits under NAGPRA are also problematic. A plaintiff must show damage to her own property to have standing in such a case, which means she must first establish ownership of the item.[97] Unfortunately, as previously discussed, Native beliefs of property ownership do not easily align with the Anglo-American legal system,[98] so a Native American's rightful "ownership" of an item in a museum is difficult to prove. As a result, most claims under NAGPRA are dismissed on

90. *See id.*
91. *See id.*
92. *See* 25 U.S.C. §§ 3003–3004 (2006).
93. FINE-DARE, *supra* note 82, at 165.
94. MAKAH INDIAN TRIBE & NAT'L ASS'N OF TRIBAL HISTORIC PRES. OFFICERS, FEDERAL AGENCY IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (2008), *available at* www.nathpo.org/PDF/NAGPRA%20Report/NAGPRA-Report.zip.
95. *Id.* at 42–46.
96. *Id.* at 42–43, 46.
97. Yasaitis, *supra* note 31, at 284.
98. *See supra* Part I.D (discussing Native American property law).

procedural issues before they can even begin.[99] This means that if an item or human remains are not repatriated through the initial NAGPRA consultation and claims procedure, there is little hope of restitution in court. Clearly, there are many issues with NAGPRA from both the museum and tribal perspective. However, Colorado has shown—through its successful implementation of NAGPRA—that these challenges are not insurmountable. The state's museums and tribes have managed to maintain perspective and focus in regards to NAGPRA's human rights goals and have not been substantially impaired by interpretational and procedural difficulties.

II. COLORADO COMPLIES WITH NAGPRA BASICS

Despite the many difficulties inherent in NAGPRA, Colorado has taken on the challenge of proper implementation. Part A addresses the special challenges Colorado has faced in implementing NAGPRA due to its state laws preceding the Act. Part B addresses how initial implementation in Colorado was challenging, due to the immediate and extensive amount of work it required of both museums and tribes. Part C discusses Colorado's robust NAGPRA activity and the amount of National Parks Service grant funding that has flowed into the state. Finally, Part D highlights Colorado's successes in implementing NAGPRA by comparing Colorado to states that have struggled with implementing NAGPRA.

A. Laws and Native Graves in Colorado

Colorado began passing laws to protect Native American graves decades before NAGPRA was passed.[100] A state Antiquities Act was passed in 1967 aimed at preventing the looting of Native graves on state land by reserving title to

99. *See, e.g.*, Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912 (D.C. Cir. 2003) (finding that tribal fears of NAGPRA violations when the Army Corp of Engineers transferred land to the state of South Dakota were merely speculative and therefore lacked standing); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995) (denying the claim that the remains themselves had rights not to have scientific research performed on them).

100. This fact in itself shows that Colorado was poised to be a model example of NAGPRA implementation. Some states did not have laws to protect Native graves more than eight years after the passage of NAGPRA. *See, e.g.*, Alston V. Thoms, *Beyond Texas' Legacy: Searching for Cooperation Without Submission*, 4 TEX. F. ON C.L. & C.R. 41, 48 (1998).

"historical, prehistorical, and archaeological resources found on state-owned lands to the state."[101] In 1973, the Office of the State Archeologist was created, and, as one of its main duties, took charge of receiving and storing remains inadvertently found or criminally exhumed from state land.[102] The new office strove "to coordinate, encourage, and preserve by the use of appropriate means the full understanding of this state's archaeological resources as the same pertain to man's cultural heritage."[103] However, the legislation did not dictate special procedures for Native graves. Furthermore, repatriation of remains was beyond the scope of the State Archeologist's original duties. As a result, found remains often ended up in storage at the Office of Archaeology and Historic Preservation.[104] The state Historic Preservation Act was revised in 1990 and began protecting unmarked graves on state land and stipulated procedures "in the case of inadvertent discovery" with time limits that prevent remains from going into permanent housing in the custody of the State Archeologist.[105]

By NAGPRA's passage in 1990, Colorado state law already protected the contents of inadvertently discovered graves by providing a thorough set of rules for how to proceed when Native remains were found. The Colorado Revised Statutes called for an on-site examination by the State Archeologist within forty-eight hours of the discovery of any human remains on public (state) or private land, disinterment of Native remains (unless the landowner, State Archeologist, and the Commission of Indian Affairs agreed to leave the remains), and allowed the State Archeologist "to make determinations regarding the disposition of Native American human

101. FINE-DARE, *supra* note 82, at 99; *see also* COLO. REV. STAT. § 24-80-401 (2010).

102. Bridget Ambler & Sheila Goff, NAGPRA at 20: NAGPRA as a Change Agent in Colorado 7 (Nov. 11, 2010) (unpublished manuscript) (on file with the Department of Material Culture, Colorado Historical Society); *see also* COLO. REV. STAT. § 24-80-404.

103. COLO. REV. STAT. § 24-80-403.

104. *See* Ambler & Goff, *supra* note 102, at 7–8.

105. FINE-DARE, *supra* note 82, at 99; COLO. REV. STAT. § 24-80-1302 (requiring an on-site inquiry by a county medical examiner or coroner, contact with the Colorado Commission on Indian Affairs, and time limits for how long remains may be held by the state archeologist). Without these time restrictions and the duty to contact the Colorado Commission on Indian Affiars, disinterred Native American human remains could be held by the state indefinitely. *See* COLO. REV. STAT. § 24-80-1302.

remains."[106] This right to repatriate relied heavily on the State Archeologist's judgment because the statute did not halt repatriations, as NAGPRA does, when the remains' cultural heritage was unclear or several tribes claimed the remains.[107] The statute minimized the procedural requirements and amount of time the Native remains could be disinterred and investigated before the Commission of Indian Affairs was contacted and plans were made to reinter the remains.[108] Unfortunately, Colorado's efficient law for repatriating Native remains conflicted with NAGPRA. While Colorado law allowed the State Archeologist to make dispositions of Native remains, NAGPRA requires the State Archeologist to follow its standards, which do not permit repatriating remains that are culturally unidentified or claimed by multiple tribes.[109]

At the time of NAGPRA's passage in 1990, Colorado law protected Native graves and allowed for repatriation of the disinterred; but Colorado law lacked and still lacks protection for items buried with the remains, items previously exhumed, or items already in museums.[110] This means that items intentionally buried with an individual disinterred from private land in Colorado have never been subject to protection.[111] In addition, there was a lack of protection for objects taken from Native graves and already placed in Colorado museums. The only way to make a claim on an item in a museum at the time was under a property law passed in 1988 addressing "Loans to Museums." This law stated that owners who loaned objects to museums had only seven years to make a claim on the object or it became part of the museum's collection.[112] Considering that most of the artifacts in Colorado museums that came from Native graves were dug up before

106. COLO. REV. STAT. §§ 24-80-1301 to -1304; Ambler & Goff, *supra* note 102, at 15.

107. *See* 25 U.S.C. § 3005(a) (2006). The text of NAGPRA at this time only allowed for repatriation of human remains when cultural affiliation could be established. By inference, when remains' cultural affiliation cannot be determined, they cannot be repatriated.

108. COLO. REV. STAT. § 24-80-1302(2); Ambler & Goff, *supra* note 102, at 15.

109. *See* 25 U.S.C. § 3005.

110. *See* COLO. REV. STAT. § 24-80-1302.

111. The "[h]uman remains" protected under this law are narrowly defined as "any part of the body of a deceased human being in any stage of decomposition." COLO. REV. STAT. § 24-80-1301(3) (internal quotation marks omitted).

112. COLO. REV. STAT. § 38-14-101 to -103.

1981[113] and were not intentionally given to museums as loans, this statute was of little help.

Although NAGPRA added more protection for Native remains and objects than what Colorado law provided at the time,[114] NAGPRA also created new complications because Colorado's laws on the State Archeologist's right to repatriate remains did not wholly align with NAGPRA's procedures. Because of NAGPRA's revolutionary nature and broad scope, NAGPRA brought many new rules and rights to Native remains and cultural objects in Colorado.

B. A Potential Disaster

As it was in the rest of the country, implementing NAGPRA was a monumental undertaking in Colorado. Bridget Ambler, Curator of Material Culture at History Colorado,[115] explained that "[w]hen the Native American Graves Protection and Repatriation Act . . . arrived knocking on the doorsteps of American museums on November 16, 1990, most answered in their nightclothes, unsure of the strange visitor and certainly unsure of how to accommodate it (and without the financial means to fund compliance)."[116] Complying with NAGPRA took a "Herculean" effort from History Colorado, especially because its collection of Native American human remains and objects had suffered "over a hundred years of neglect."[117] Not only had the collection been neglected, it had been dismantled; in 1981, a research strategy to aid in cataloging the collection called for dis-articulating many of the partial skeletons to store like bones together as opposed to keeping the skeletons as intact as possible.[118]

Other Colorado institutions also faced immediate obstacles to implementation. Fort Lewis College did not even learn it needed to comply with NAGPRA until September of 1994, one

113. For example, many of the human remains and objects in the Denver Museum of Nature and Science's Native American collection came from donations made by Francis and Mary Crane in 1968. *See* Notice of Inventory Completion: Denver Museum of Nature & Science, Denver, CO, 76 Fed. Reg. 14,061 (Mar. 15, 2011).

114. See *infra* Part I.C, for a discussion of the protections NAGPRA provides.

115. History Colorado is the new name for what was formerly the Colorado Historical Society.

116. Ambler & Goff, *supra* note 102, at 9.

117. *Id.*

118. *Id.* at 8.

year after the summary due date, and only little more than a year before the inventory of human remains and associated funerary objects was due.[119] Because the Fort Lewis Anthropology Department had never received any federal funds for fieldwork, they did not think their collection was subject to NAGPRA.[120] It was not until 1994 that they received a letter from the National Parks Service and realized that other departments at Fort Lewis College that received National Science Foundation funding made the Anthropology Department subject to NAGPRA.[121]

Native Americans also faced challenges with NAGPRA in Colorado. In order to comply with NAGPRA, the tribes with a possible cultural affiliation to the human remains and objects in a museum collection must go to the museum to view the collection during consultations.[122] This consultation requirement facilitates communication between museums and tribes, allows museums to better understand their collections, and lets tribal representatives see exactly what remains and objects in a museum may belong to their tribes. However, consultations also require tribal representatives to do extensive, and therefore expensive, traveling. Colorado has only two federally recognized tribes, the Southern Ute Tribe and the Ute Mountain Ute Tribe,[123] but Colorado museums have Native American remains and objects from all over the country.[124] NAGPRA does not address how tribes are supposed to fund the travel to complete these consultations.[125] Therefore, NAGPRA consultation requirements place a large financial obligation on tribes. Implementing NAGPRA in Colorado was not convenient or easy for any of the involved parties. Yet, despite these setbacks, Colorado museums and tribes managed to work towards implementing NAGPRA effectively.

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119. FINE-DARE, *supra* note 82, at 123.

120. *Id.*

121. *Id.*

122. *See* 25 U.S.C. § 3003(b)(1)(A) (2006); 25 U.S.C. § 3004(b)(1)(B).

123. A list of federally recognized tribes is printed annually. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

124. *See, e.g.*, *American Indian Art*, DENVER ART MUSEUM, http://www.denverartmuseum.org/explore_art/collections/collectionTypeId--20 (last visited Sept. 4, 2011).

125. *See* 25 U.S.C. § 3003(b)(1)(A); 25 U.S.C. § 3004(b)(1)(B).

C. Signs of NAGPRA Success

One sign of how extensive and successful NAGPRA implementation has been in Colorado is the impressive number of National NAGPRA program grants awarded to Colorado museums and Native American tribes.[126] Realizing that the actions mandated by NAGPRA were a heavy financial burden, the Department of the Interior began awarding grants through the National Park Service's National NAGPRA Program in 1994 to help accomplish these required tasks.[127] "In recognition of the repatriation process, Section 10 of [NAGPRA] authorizes the Secretary of the Interior to make grants to museums, Indian tribes, and Native Hawaiian organizations for the purposes of assisting in consultation, documentation, and the repatriation of museum collections."[128] By 2009, the Department of the Interior had given $31 million in 592 NAGPRA grants.[129] Museums and tribes in Colorado have been awarded over $2 million in grants since 1994.[130] Only California, Alaska, and Oklahoma have received more grant funds.[131] Such a large amount of grant money is at the very least a sign of extensive NAGPRA activity in Colorado.[132]

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126. National NAGPRA is the program within the National Park Service that administers NAGPRA. From 1994–2010, Colorado museums and tribes received approximately forty-six NAGPRA grants. Nat'l Park Serv., U.S. Dep't of Interior, *National Park Service NAGPRA Grant Awards*, NAT'L NAGPRA, http://www.nps.gov/nagpra/grants/allawards.htm (last visited Mar. 11, 2011).

127. Thomas L. Strickland, U.S. Dep't of Interior, *Foreword to* NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, JOURNEYS TO REPATRIATION: 15 YEARS OF NAGPRA GRANTS 1994–2008, at 2 (2008), http://www.nps.gov/nagpra/NAGPRA-GrantsRetroFinal.pdf.

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 11. This $2 million has gone to the following parties: History Colorado, the Colorado Springs Fine Arts Center; the Denver Art Museum; the Denver Museum of Nature and Science; the Fort Collins Museum; Fort Lewis College; the Southern Ute Indian Tribe of the Southern Ute Reservation; the University of Colorado Museum in Boulder; and the University of Denver Department of Anthropology and Museum of Anthropology. *Id*. at 15.

131. *Id*. at 10–11. California and Alaska have each received almost $5 million in NAGPRA grants, and Oklahoma has received almost $4.5 million. *Id.* Oklahoma and Alaska both have a significantly higher Native American percentage of their populations than Colorado, and California's population is seven times bigger than Colorado's and has significantly more universities and cultural institutions for NAGPRA grants to go to. *State and County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/index.html (last visited Sept. 4, 2011).

132. Grants for consultation and documentation range from $5,000 to $90,000 and repatriation grants can go up to $15,000. NAT'L PARK SERV., U.S. DEP'T OF

The number of completed inventories and repatriations in Colorado is also impressive. History Colorado alone has repatriated "over 700 human remains and over 2,000 associated funerary objects."[133] Putting these numbers in perspective, the National Forest Service's entire collection for the Southwestern Region before repatriation was about 5,000 human remains and 15,000 associated funerary objects.[134] This level of activity indicates that Colorado museums and tribes are successfully fulfilling their consultation obligations so that they can complete their inventories and summaries.

D. NAGPRA in Colorado Versus Elsewhere

Even in terms of basic NAGPRA compliance, Colorado has been more successful than other states. The National NAGPRA Program grants play an instrumental role in tribes' and museums' efforts to implement NAGPRA, and about half of the applications for these grants are successful.[135] Receipt of these grants is clearly competitive, and several states have not been awarded any grant money.[136] Colorado museums and tribes have effectively tapped this funding resource by repeatedly submitting successful applications for grants and by proposing projects that the National NAGPRA Program wants to fund.[137]

Another sign of Colorado's successful implementation of NAGPRA has been the lack of lawsuits and non-legal conflicts on NAGPRA issues.[138] Lawsuits regarding NAGPRA

INTERIOR, JOURNEYS TO REPATRIATION: 15 YEARS OF NAGPRA GRANTS 1994–2008, at 4 (2008), http://www.nps.gov/nagpra/NAGPRA-GrantsRetroFinal.pdf.

133. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to Kristen Carpenter, Professor of Law, Univ. of Colo. Law Sch. (Oct. 5, 2010, 2:35 PM) (on file with author).

134. Minutes from the Sixteenth NAGPRA Review Comm. Meeting 23 (Dec. 10–12, 1998) (on file with author).

135. *See* NAT'L PARK SERV., *supra* note 132, at 8, 8 fig. (2008) (showing that there have been approximately 1265 applications for grants; 590 successful applications and 675 unsuccessful applications, for a success rate of 46.6 percent).

136. *Id.* at 10–11 (No tribes or museums from Delaware, New Jersey, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming have been awarded NAGPRA grants.).

137. For instance, the University of Colorado and its natural history museum have been awarded grant money for each of the past eight years. *See National Park Service NAGPRA Grant Awards*, NAT'L NAGPRA, http://www.nps.gov/nagpra/GRANTS/ALLAWARDS.htm#2010 (last visited Oct. 22, 2011).

138. Arizona, California, Hawaii, Oklahoma, Oregon, Nevada, New Jersey, New Mexico, New York, South Dakota, Texas, Vermont, and Washington D.C. have all experienced NAGPRA litigation. *See* San Carlos Apache Tribe v. United

implementation have been filed in twelve states and the District of Columbia, but NAGPRA-centered suits are almost nonexistent in Colorado case law.[139]

Colorado museums have also managed to avoid non-legal conflict over NAGPRA as well.[140] One of the most public examples of a non-legal conflict over NAGPRA comes from California. In 2009, the Hearst Museum eliminated its autonomous NAGPRA unit.[141] In an attempt to persuade the Hearst Museum to repatriate the 11,000 human remains it still possessed, Native American groups drummed and a Buddhist nun went on a hunger strike.[142] Wesleyan University, in Connecticut, also gained attention for its noncompliance.[143] The University only sent summaries of their collection to eight tribes from Connecticut and Tennessee, but a NAGPRA consultant found that the university had items "from almost every state."[144] This noncompliance for nearly a decade and a

States, 272 F. Supp. 2d 860 (D. Ariz. 2003); Geronimo v. Obama, 725 F. Supp. 2d 182 (D.D.C. 2010); Quechan Indian Tribe v. United States, 535 F. Supp. 2d 1072 (S.D. Cal. 2008); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995); Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008); Bonnichsen v. United States, 969 F. Supp. 614 (D. Or. 1997); Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207 (D. Nev. 2006); N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, No. 09-683, 2010 WL 2674565 (D.N.J. June 30, 2010); United States v. Corrow, 941 F. Supp. 1553 (D.N.M. 1996); W. Mohegan Tribe & Nation of N.Y. v. New York, 100 F. Supp. 2d 122 (N.D.N.Y. 2000); Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047 (D.S.D. 2000); Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644 (W.D. Tex. 1999); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992).

139. A single Colorado case mentions NAGPRA, but it is in a footnoted list of a "variety of statutory and regulatory regimes" that a mining company must comply with, and the court specifically says the case did not warrant a "meaningful judicial review" of the list of regimes. Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1259 (D. Colo. 2010).

140. There have been examples of tribes being frustrated with the long period of time the repatriation process has taken, though. *See, e.g.*, Katy Human, *Bones of Contention Go Home*, DENVER POST, Feb. 9, 2007, at A1, *available at* ProQuest, File no. 1213554471 (The Miccosukee Tribe of Florida made repatriation claims on hundreds of items in the Denver Museum of Nature and Science collection that did not begin to be repatriated until 2007.).

141. *See* NAGPRA & UCB BLOG, http://nagpra-ucb.blogspot.com/ (last visited Nov. 19, 2011).

142. Doug Oakley, *December Protest: Drumbeat Sounds Outside UC Museum for Return of Human Remains,* NAGPRA & UCB BLOG (Dec. 6, 2009, 6:11 AM), http://nagpra-ucb.blogspot.com/search/label/News%20coverage.

143. Daniel Greenberg, *University Takes Steps to Begin Complying with NAGPRA*, THE WESLEYAN ARGUS (Feb. 1, 2011), http://wesleyanargus.com/2011/02/01/university-takes-steps-to-begin-complying-with-nagpra/.

144. *Id.*

half prompted the formation of a new student group: Students for NAGPRA Compliance.[145]

In contrast, Colorado institutions have received praise for their NAGPRA implementation. A cultural resource specialist for the Tlingit and Haida Tribes of Alaska has stated that the Denver Museum of Nature and Science (DMNS) has been one of the "most cooperative" museums he has worked with on NAGPRA.[146] Conversely, the University Museum in Philadelphia, the Portland Art Museum, and the Seattle Art Museum were named the worst museums to work with on NAGPRA issues.[147] In Colorado, the lack of conflict on NAGPRA issues despite the large amount of NAGPRA activity seems to indicate that while Colorado is a hotbed of NAGPRA activity, it is cooperative, and therefore successful, activity.

Colorado has also been more successful in implementing NAGPRA than the federal agencies covered by the Act. In 2010, the Government Accountability Office issued a report that eight key federal agencies were not in compliance with NAGPRA.[148] Despite being due fifteen years ago, these agencies' summaries and inventories were not in compliance with the Act.[149] In addition, the quality of the materials that had been completed varied greatly, and many of the summaries and inventories were not published in the Federal Register, as NAGPRA requires.[150]

Basic implementation of NAGPRA is going well in Colorado. But the large number of NAGPRA grants and well-documented activities of Colorado museums and tribes complying with NAGPRA do not tell the complete story. NAGPRA implementation in Colorado seems to be thriving, but how and why? If Colorado museums and tribes are only doing what was required by NAGPRA, why are they getting so much funding two decades after the Act was passed? The story goes deeper than mere compliance.

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145. *Id.*

146. Harold Jacobs, Letter to the Editor, *Re: 'Museums Concede Dark Role in Looting of Indian Relics,' Sept. 2 News Story; and 'Indians Have Right to Relics,' Sept. 7 Editorial*, DENVER POST, Sept. 18, 2003, at B6, *available at* ProQuest, File No. 406842591.

147. *Id.*

148. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST TWENTY YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010).

149. *See id.* at 16–29.

150. *Id.* at 17, 26.

III. NAGPRA SUCCESS IN COLORADO: GOING BEYOND BASIC COMPLIANCE

The statistics above beg the question, "why is Colorado different?" DMNS's in-house attorney, Lynda Knowles, believes it is a combination of geography, collection size, and most importantly, institutional philosophy.[151] Colorado is a western state with Native American input and issues more prevalent than in some eastern states, and Colorado museums' collections are also smaller than many eastern museums'.[152] While these factors are certainly at play, Knowles has observed that DMNS's institutional philosophy of treating NAGPRA first and foremost as human rights legislation has been the most vital aspect of the museum's NAGPRA success.[153] Bridget Ambler, of History Colorado, believes Colorado's approach to NAGPRA is special because of "the commitment of the individuals as well as the institution."[154] History Colorado put an emphasis on human rights law in its nationally unique decision to share its NAGPRA liaison with the Colorado Commission on Indian Affairs.[155] This shared position created a direct link between History Colorado and the state agency charged with being the liaison between Colorado and its tribes.[156] In Ambler's opinion, this shared position "infused [History Colorado's] NAGPRA implementation efforts with a[n] enhanced cultural sensitivity and awareness."[157] While the position is no longer shared, History Colorado still works closely with the Colorado

151. Interview with Lynda Knowles, Legal Counsel, Denver Museum of Nature and Sci., in Denver, Colo. (Feb. 8, 2011).

152. *Id.* The National Museum of the American Indian estimates that about 25,000 items in its collection are subject to NAGPRA. *Repatriation*, NAT'L MUSEUM OF THE AM. INDIAN, http://www.nmai.si.edu/subpage.cfm?subpage=collections&second=collections&third=repatriation (last visited Aug. 16, 2011).

153. Interview with Lynda Knowles, *supra* note 151.

154. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to author (July 11, 2011, 9:41 AM) (on file with author). At History Colorado, formerly Colorado Historical Society, its previous curator, Carolyn McArthur, worked collaboratively with Roger Echo-Hawk, a history scholar, to lay the foundation for effective NAGPRA implementation, which has carried on into today. *Id.* At the Denver Museum of Nature and Science, the addition of Dr. Chip Colwell-Chanthaphonh to the Anthropology Department is credited with establishing the museum's current philosophy and success with NAGPRA. *See id.*

155. *Id.*

156. *See id.*; *Colorado Commission of Indian Affairs*, LIEUTENANT GOVERNOR GARCIA, http://www.colorado.gov/cs/Satellite/LtGovGarcia/CBON/1251598936425 (last visited Nov. 11, 2011).

157. E-mail from Bridget Ambler, *supra* note 154.

Commission on Indian Affairs, and "the partnership by its nature has made [History Colorado's] NAGPRA implementation efforts more transparent, and has helped [History Colorado] to better understand some of the cultural background that our tribal partners bring to the table during consultations."[158] This approach to NAGPRA, which stresses communication with tribes, is an element that other museums and federal agencies can emulate regardless of location or collection size.

The DMNS and History Colorado's institutional philosophies are prime examples of how Colorado tribes and museums have managed to avoid much of the frustration that other institutions and tribes have encountered in implementing NAGPRA. The key to this success is that Colorado museums and tribes have not taken advantage of or gotten bogged down in the unclear wording, unlike those who have taken an antagonistic approach to NAGPRA. Vague definitions are a common problem in implementing NAGPRA, as previously discussed in *Bonnichsen v. United States*.[159] A loophole museums use to avoid repatriations is demonstrating a lack of the requisite connection between the Native remains and the claimant, as in *Bonnichsen*.[160] In contrast, Colorado tribes became active with NAGPRA in large part because Colorado museums were implementing the spirit and, more specifically, the human rights aspects of NAGPRA. Focusing on the purpose of the Act led Colorado to go beyond the plain language of NAGPRA to create a new state rule, Colorado's "process" for repatriating culturally unidentifiable remains, that specifically addresses Native grave and repatriation issues that NAGPRA does not address.[161] Parts A and B discuss the role of Colorado's Native tribes and museums in NAGPRA implementation. Part C discusses the formation and

158. *Id.*

159. *See* 357 F.3d 962 (9th Cir. 2004); *supra* Part I.D.

160. *See* 357 F.3d at 976–79; Julia A. Cryne, Comment, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts*, 34 AM. INDIAN L. REV. 99, 111–12 (2010); Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1211–12, 1219 (D. Nev. 2006) (disputing both affiliation and the requirements of consultation under NAGPRA when the Bureau of Land Management decided that an individual was unaffiliated with any current Native American group despite the evidence presented by experts hired by the Fallon Paiute-Shoshone Tribe that the individual should be deemed affiliated). The court also added its own commentary that 2000-year-old remains of an individual "are not likely to be classified as Native American" due to their age. *Id.* at 1216.

161. *See infra* Part III.C.

accomplishments of the tribal-museum alliance, and Part D addresses the future of NAGPRA in Colorado.

A. The Role of Colorado Tribes

In many ways, NAGPRA did not reach the Native American tribes of Colorado until a decade after it was implemented. A decade of observation and cooperative implementation was necessary to prove NAGPRA's worth to the Native community.[162] As with most federal American Indian law legislation, Colorado tribes were concerned about how this new Act would be implemented.[163] Tribes usually hold such new legislation at arm's length because, despite the good intentions of these programs, they are usually inadequately funded and poorly implemented.[164] NAGPRA was originally no different. Tribes were aware of the Act and that the mandated consultations with museums meant they had to participate in NAGPRA's requirements. From the tribal perspective, however, the first decade of NAGPRA was dormant as Native Americans waited to see how this new legislation would "play out."[165] Colorado's two Ute tribes became actively involved in NAGPRA implementation in the 2000s only after the tribes saw that Colorado museums were trying to implement NAGPRA not only because they had a legal obligation to do so, but because the museums wanted to build a better relationship with the Native American community.

162. Telephone Interview with Ernest House, Jr., *supra* note 87.

163. *Id.*

164. *Id.* For example, neither the Joint Venture Construction Program nor the Small Ambulatory Grants Program to build and improve tribal health care facilities had received any federal funding as of 2009 despite being federal government initiatives. *See* Letter from Gary J. Hertz, Dir., Office of Envtl. Health and Eng'g, to Tribal Leaders (May 28, 2009), http://www.dfpc.ihs.gov/JVCP/DearTribalLeader5-28-09.pdf. Even programs that Native Americans generally do support are typically without the resources to become as effective as intended. See, for example, the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4016, (NAHASDA), which was implemented to address the issue of inadequate housing for Native Americans. Despite the ongoing crisis of inadequate housing, the budget for NAHASDA "has remained static, and in some cases has declined." U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 65 (2003), http://www.usccr.gov/pubs/na0703/na0731.pdf.

165. Telephone Interview with Ernest House, Jr., *supra* note 87.

B. The Role of Colorado Museums: Cultural Sensitivity Lays the Groundwork for Success

From the very beginning, tribal and museum partnerships have enabled Colorado to implement NAGPRA in a way that honors the Act's human rights foundation. Collaboration and sharing, not just between tribes and museums but also among museums themselves, has helped the human rights spirit of the Act spread through the Colorado museum community. For example, in order to accurately and timely complete their inventories, History Colorado and the Denver Art Museum (DAM) formed "a grant partnership to create a shared NAGPRA Coordinator."[166] Sharing the NAGPRA Coordinator made the position an affordable investment. And, through this partnership, two of the largest museums in Colorado managed to get both of their inventories submitted on time for both the 1993 and the 1995 deadlines.[167]

Several Colorado museum curators have also helped implement the spirit of NAGPRA by returning items under the Act when they could have fought the repatriations by using the ambiguous wording of NAGPRA's object definitions. Curator David Bailey of the Museum of Western Colorado repatriated "an elegant beaded vest and a buckskin dress decorated with elk teeth to Northern Ute families," and, in return, gained the respect of the Northern Ute.[168] Bailey honored this repatriation request instead of utilizing the loopholes that the "cultural patrimony" designation has created because "[e]verybody benefits when we return items and receive valuable information back."[169] Rather than fight to retain museum collection pieces, he "would rather have a dialogue and exchange with living Indians to gain their respect and insight into our collections."[170] Not only did the Museum of Western Colorado receive stories and information from the Northern Ute in exchange for the vest and dress, but the Northern Ute also donated some new beaded items.[171] Roger Echo-Hawk of DAM had this to say about repatriating a sash:

166. Ambler & Goff, *supra* note 102, at 11.
167. *Id.*
168. GULLIFORD, *supra* note 14, at 53.
169. *Id.*
170. *Id.*
171. *Id.*

> DAM lost a valued object from its collections. The meaning to the Blood people, however, was that a living, long-lost sash returned into the care of the community. In dreams of goodwill, the outcome of justice offers a special blessing to us all. In human terms, this is the significance of NAGPRA.[172]

The definitions of NAGPRA may be unclear, but there are many examples like those just mentioned of Colorado museums not letting the ambiguous definitions get in the way of completing the deeper goals of NAGPRA.

The first rounds of the mandated NAGPRA consultations were also crucial in establishing good relationships between Colorado museums and tribes. These first consultations were unsurprisingly tense because the tribes were keeping the museums and NAGPRA at arm's length, but former Executive Secretary of Colorado Commission on Indian Affairs Ernest House, Jr. feels this tension was an important step.[173] Tribes needed to see that the museums could "take the heat for what they were trying to implement."[174]

Ambler agrees that the consultations were, and still can be, tense, but have been "overwhelmingly positive."[175] History Colorado has taken a very conscientious approach to the mandated consultations and has tried to be aware of the fact that "there is a history of appropriation, subjugation, assimilation, theft, and mistrust on behalf of Euro-Americans towards indigenous peoples, and to think that has all gone away would be naive. American Indians live with that legacy every day; it is part of their family's story, and part of their identity."[176] Awareness and understanding of the inherent tension between the parties are fundamental steps towards each party understanding and helping each other. History Colorado took purposeful steps to address this tension. In consultations, History Colorado

> treat[s] tribal delegates with the respect they rightfully deserve as emissaries of sovereign nations. We have developed policies and procedures that we share to be

172. ECHO-HAWK, *supra* note 66, at 2.
173. Telephone Interview with Ernest House, Jr., *supra* note 87.
174. *Id.*
175. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to author (Nov. 12, 2010, 09:53 MST) (on file with author).
176. *Id.*

> transparent about how we implement our program. We also begin each consultation by inviting a tribal representative (usually the most senior person) to provide an invocation. We listen carefully.[177]

Other Colorado institutions have also made sincere efforts to address the tension inherent in consultation between museums and tribes. For example, Fort Lewis College's initial consultations were marked by tension, but also by a concerted effort of those involved to build a good relationship that emphasized figuring out what was in Fort Lewis's collection, addressing the concerns of the Native representatives over implementation, and overcoming the flaws in NAGPRA.[178]

Colorado museums have also laid the foundation for working with tribes, instead of working against them, to determine how claims for repatriation are handled and funded. The National Park Service NAGPRA grants play a large role in furthering this work.[179] Because responding to NAGPRA inventories and making claims for items is such a costly and complicated process for tribes, Colorado museums have gone beyond fulfilling their own statutory obligations by bearing some of the burden that would otherwise fall on the tribes. History Colorado has

> agreed to administer the grants and do the "leg work" on the tribes' behalf, and have done so in collaboration with the Ute Mountain Ute Tribe, the Southern Ute Tribe, the Ute Indian Tribe of Utah, the Pawnee Nation of Oklahoma, 21 Pueblos, Plains tribes and others in different reburial events.[180]

DAM responds to "a notice of intent to prepare or submit a repatriation claim" by having the staff collect "the available documentation and provide[] copies free of charge to the claimant."[181]

The museums have also worked out agreements with tribes over items that a tribe is not prepared to have repatriated or items that the tribe is willing to have housed primarily in the museum. For example, History Colorado has

177. *Id.*
178. *See* FINE-DARE, *supra* note 82, at 125–33.
179. *See supra* Part II.C.
180. Email from Bridget Ambler, *supra* note 175.
181. ECHO-HAWK, *supra* note 66, at 27.

continued to care for repatriated remains at the tribes' request until the tribes are prepared to transfer custody.[182] History Colorado also has artifacts that are housed in the museum's exhibits but that the tribe can take out on loan whenever it needs them for a ceremony.[183]

An understanding and accommodation of the involved parties' interests rather than mere compliance with the minimum requirements of NAGPRA has built a solid foundation for Colorado tribal-museum interactions. Using this foundation, Colorado has transcended NAGPRA's rules of implementation and has filled gaps in the legislation in the decades following NAGPRA's passage. These efforts have created a true partnership between Colorado's tribes and museums.

C. Partnerships Form to Build a Better NAGPRA

Colorado museums and tribes have created a process for reburying the culturally unidentifiable human remains that, under NAGPRA, would otherwise not be eligible for repatriation and reburial.[184] This collaborative process is an example of the proper way to implement NAGPRA. Respect for human rights and for deceased Native ancestors motivated Colorado museums and tribes to write their own laws that honor the spirit of NAGPRA, even though federal legislation had not caught up to the Act's intent.

Prior to NAGPRA, Colorado law had set forth procedures for the State Archeologist in the event that Native remains were found.[185] By requiring the State Archeologist to follow NAGPRA procedure rather than established state rules, the Act actually made it harder to repatriate Native remains in Colorado.[186] Because these unidentified human remains were a point of major concern for Colorado's Native Americans, History Colorado went to the Colorado Commission on Indian Affairs (CCIA) and asked it to be a liaison between the

182. Email from Bridget Ambler, *supra* note 175.

183. Bridget Ambler, Curator of Material Culture, History Colo., Presentation to University of Colorado Law School Cultural Property Seminar (Sept. 28, 2010).

184. *See* Ambler & Goff, *supra* note 102, at 22–26.

185. *See supra* Part II.A.

186. Culturally unidentifiable remains could be reinterred under Colorado law, but NAGPRA requires a "cultural affiliation" to be established before remains can be repatriated. *Compare* 25 U.S.C. § 3005(a) (2006), *with* COLO. REV. STAT. § 24-80-1302 (2006).

museum and Colorado's two Ute tribes in an effort to address this gap in NAGPRA.[187] The Commission formed a "Reinterment Committee" that focused on "NAGPRA consultations with [History Colorado] and tribes, re-writing the state's burial law, and developing a state-wide reburial plan."[188]

This Committee led to a 1999 Memorandum of Understanding between History Colorado, the CCIA, and the two Ute tribes. The Memorandum stated that the groups were going to work together to address the issue of respectful treatment, housing, and disposition of Native human remains through NAGPRA.[189] The Memorandum also described the groups' two ambitious goals: (1) taking a closer look at NAGPRA's cultural identity standards in an effort to get more human remains repatriated; and (2) petitioning the NAGPRA Review Committee to approve a yet-to-be-developed process to rebury Native remains that would otherwise remain unrepatriated under NAGPRA.[190] The Memorandum did not have a legislative impact,[191] but it marked an important milestone in NAGPRA's implementation history in Colorado. The Southern Ute Tribe and the Ute Mountain Ute Tribe were no longer holding NAGPRA nor History Colorado at arm's length; the tribes were now fully invested participants.

Building on the momentum of the Memorandum of Understanding, History Colorado and the CCIA obtained a NAGPRA grant in 2000 to host a symposium that brought together tribal experts and academics "to discuss the lines of evidence recognized under NAGPRA and the extant legal scholarship regarding determinations of cultural affiliation."[192] Discussion from the symposium revealed that many of the human remains History Colorado had classified as culturally unidentifiable actually fulfilled NAGPRA's evidence requirements for identification, and the remains were thus identified and repatriated.[193] The symposium resulted in the repatriation of more Native remains, but many remains still

187. Ambler & Goff, *supra* note 102, at 15.
188. *Id.*
189. Telephone Interview with Ernest House, Jr., *supra* note 87.
190. Ambler & Goff, *supra* note 102, at 16.
191. *Id.*
192. *Id.*
193. *Id.* at 17–18.

could not be culturally identified and, therefore, could not be repatriated.[194]

The first goal from 1999 had been fulfilled as much as possible, so it was time to move on to the second goal: develop and propose a reburial process. With the support of then Colorado Attorney General Ken Salazar, History Colorado and CCIA again teamed up for a NAGPRA grant.[195] This time they hosted a 2005 regional consultation with tribes who live or have lived in Colorado.[196] The goal of the regional consultation was to develop a process for reinterring contested and unidentifiable remains that would comply with NAGPRA and replace Colorado's current (and conflicting) state law.[197] Forty-seven tribes were involved in the drafting process.[198] Because multiple tribes have claims on remains in Colorado, the two Colorado Ute tribes "offered to act as mediators or facilitators in the case of contested or culturally unidentifiable human remains,"[199] and were largely responsible for taking up the long-term goal of developing a process to repatriate remains that would otherwise be unrepatriatable under NAGPRA.

Several of the out-of-state tribes invited to the regional consultation—who had poor relationships with the museums in their states—took notice that Colorado was "trying to do a good thing" with its implementation of NAGPRA.[200] Consequently, most of the affected non-Colorado tribes decided to lend their support for the process, and by the time the process was presented to the NAGPRA Review Committee for the second time, thirty-nine of the forty-seven involved tribes sent along letters of support, with only one tribe objecting to the process.[201] The Review Committee and the Department of the Interior approved the process in 2008.[202]

The process stipulates that any Native remains found on state or private land, and remains and objects classified as culturally unidentifiable by the State Archeologist, be placed in

194. *See id.*
195. *Id.* at 19.
196. *Id.*
197. *Id.*; *see also supra* Part III.C.
198. Telephone Interview with Ernest House, Jr., *supra* note 87.
199. FINE-DARE, *supra* note 82, at 160.
200. *Id.*
201. Ambler & Goff, *supra* note 102, at 22.
202. *Id.*

the care of the two Colorado Ute Tribes.[203] The tribes will take responsibility for the culturally unidentifiable remains and associated funerary objects and "rebury them in as little as 100 days."[204] The process establishes a preference for how to deal with inadvertently discovered remains (leave them there where possible).[205] The process also establishes a strict timeline and provides rules governing the removal of remains that ensure that the remains are not destroyed, are treated with respect, and do not languish in storage indefinitely because of procedural uncertainties.[206]

D. New Regulations for Culturally Unidentifiable Remains

On May 14, 2010, a new national NAGPRA regulation addressing the "[d]isposition of culturally unidentifiable human remains" went into effect.[207] NAGPRA was finally catching up to the way Colorado was already implementing the Act. The NAGPRA Review Committee had been working on regulations regarding the disposition of culturally unidentifiable human remains since 1994.[208] It took NAGPRA sixteen years to develop and implement rules similar to the ones Colorado tribes and museums implemented in a mere three years.[209]

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203. *Id.* at 22–24; HISTORY COLO., PROCESS FOR CONSULATION, TRANSFER, AND REBURIAL OF CULTURALLY UNIDENTIFIABLE NATIVE AMERICAN HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS ORIGINATING FROM INADVERTENT DISCOVERIES ON COLORADO STATE AND PRIVATE LANDS, http://www.historycolorado.org/sites/default/files/files/OAHP/Programs/OSA_NAGPRA_Grant_Protocol_FINAL.pdf [hereinafter PROCESS].

204. Press Release, Barbara O'Brien, Colo. Lt. Gov., Colorado's Native American Remains Reburial Process Receives Approval (June 2, 2008) (on file with author).

205. PROCESS, *supra* note 203.

206. PROCESS, *supra* note 203; Ambler & Goff, *supra* note 102, at 22–25.

207. 43 C.F.R. § 10.11 (2010). This legislation calls for "disposition" as opposed to "repatriation," which the original NAGPRA uses in reference to Native ancestors' remains. The National Park Service defines "disposition" in NAGPRA to mean the "[a]ct of disposing[;] [t]ransferring to the care or possession of another[; or] [t]he parting with, alienation of, or giving up property." Nat'l Park Serv., U.S. Dep't of Interior, *NAGPRA Glossary*, NAT'L NAGPRA, http://www.nps.gov/nagpra/TRAINING/GLOSSARY.HTM (last visited Mar. 13, 2011). "[R]epatriation means the transfer of physical custody of and legal interest in Native American cultural items . . . ." *Id.*

208. Native American Graves Protection and Repatriation Act Regulations–Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58,582 (Oct. 16, 2007) (to be codified at 43 C.F.R. pt. 10).

209. *See supra* notes 195–97, 202 and accompanying text.

Rather than allow culturally unidentified remains to stay in museum collections, there is now a national procedure to ensure that, wherever possible, unidentified remains can be returned to Native Americans.[210] This new part of NAGPRA addresses one of the biggest gaps in the original legislation. The new regulations require museums to initiate consultations with all tribes that have had culturally unidentified remains removed from their present-day lands and any tribe "from whose aboriginal land" remains were removed.[211] If the consultation does not lead to a cultural identification and consequent repatriation, the museum "must offer to transfer control of the human remains" to tribes in a priority order favoring the tribe(s) from whose land the remains were taken, then the tribe(s) with aboriginal land where the remains were exhumed.[212] If no tribe from either of the above categories agrees to a transfer of control, then the remains may be transferred to another Native tribe, a non-federally recognized Indian group (with the permission of the Secretary of the Interior), or the remains can be reinterred.[213] However, the ambitious repatriation goals regarding culturally unidentifiable human remains do not carry over to any objects that were buried with the remains. While these new regulations require that museums and federal agencies "must offer to transfer control of the human remains," for the funerary objects associated with the remains, the regulations only stipulate that museums and agencies "may" transfer them.[214]

The new regulations for the disposition of culturally unidentified remains are quite similar to the process for

210. *See* 43 C.F.R. § 10.11.
211. *Id.* § 10.11(b)(2).
212. *Id.* § 10.11(c)(1).
213. *Id.* § 10.11(c)(2).
214. *Id.* § 10.11(c)(1), (4). The fact that associated funerary objects can be separated from their remains has been heavily contested. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Remains, 75 Fed. Reg. 12,378, 12,397–98 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10). Comments on the new rule said that to separate the remains from their funerary objects is "contrary to American common law and Indian funeral traditions." *Id.* at 12,398. Also, this rule separates remains from objects that might help to make a cultural affiliation determination on the remains at a later date. *Id.* The Secretary of the Interior's Office responded to these concerns by stating that making disposition of the associated funerary objects as well as the culturally unidentifiable human remains would raise "possession and takings issues that are not clearly resolved in the statute or the legislative history." *Id.*

repatriation that Colorado already had in effect. Both emphasize the goal of returning remains to Native Americans even if a specific cultural identification cannot be made, and both favor returns to the federally recognized tribe from whose land the remains were removed.[215] The Colorado provision that provides that the state's two Ute tribes will take responsibility for the remains and rebury them in a way acceptable to all forty-seven tribes with aboriginal land in Colorado fits seamlessly into the new regulation. This process is exactly the situation that the new regulations give preference to, just with all of the details already worked out. As the two Ute tribes are the state's only federally recognized tribes, no determination of whose tribal lands the remains came from has to be made.[216] Also, because Colorado has already developed a procedure for reinterring the remains, developing a plan for disposition and reinterment "that is mutually agreeable" (in the words of the new regulation) to all of the involved tribes does not have to be done for each individual case.[217] Colorado's process is an efficient, streamlined version of the new federal regulation. Integrating these new federal rules into the state's NAGPRA procedures should, therefore, be relatively straightforward. Not only did Colorado's process anticipate the new federal regulations accurately, but it also created a procedure that is even more effective than the new federal rule.

The new NAGPRA regulations take steps towards filling the gaps in the original NAGPRA statute and further correct the human rights violations NAGPRA was intended to fix. However, there are already signs that the same kinds of implementation difficulties surrounding the definitions section will plague this new part of NAGPRA. Tribal groups are upset about how the new regulations define which groups must be consulted and which groups may have remains repatriated to them, and that associated funerary objects are not required to be repatriated with the remains.[218] At the same time, museums are upset that they have to try to consult with even larger numbers of Native tribes without any additional funding to do

215. *See* 43 C.F.R. § 10.11; Ambler & Goff, *supra* note 102, at 22–26.

216. *See* 43 C.F.R. § 10.11(b)(2)(i).

217. *See id.* § 10.11(b)(5); Ambler & Goff, *supra* note 102, at 22–26.

218. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,378–405 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

so.[219] National NAGPRA is trying to push itself in the same direction taken by Colorado; however, it is moving forward without the same understanding and consideration of the human rights foundation found in Colorado's implementation.

E. The Future of NAGPRA in Colorado

Colorado's process is unique and vastly important to American Indian law and NAGPRA. Iowa has also been proactive in developing a process to reinter Native remains more efficiently, but Iowa's process does not have the strict timeline for examination of the remains, which, in Colorado, has ensured that remains can be reinterred as quickly as possible.[220] Furthermore, the Iowa process lacks the involvement with the Native American tribes that has proved critical in Colorado.[221] Colorado's process is "the most extensive of its kind in the country" and is a model for other states dealing with the new part of NAGPRA.[222] Indeed, other states' tribes have asked the Coloradan architects of this process to come talk to their state archeologists, governments, and tribal leaders because they are not getting the same positive outcomes as Colorado.[223]

Colorado's process is a huge accomplishment, but History Colorado, CCIA, Ute Mountain Ute Tribe, and Southern Ute Tribe are not done working on implementing the human rights foundation of NAGPRA. The History Colorado-CCIA-Ute alliance plans to address ways to return to tribes any inadvertently discovered human remains currently housed in museum collections as well as any future discoveries in an even more timely fashion.[224]

CONCLUSION

Colorado has implemented NAGPRA with an understanding of the fundamental human rights issues that are the foundation of the Act. This has led to a successful implementation of NAGPRA's basic requirements in Colorado,

219. *Id.*
220. Ambler & Goff, *supra* note 102, at 30–34.
221. *Id.*
222. Press Release, *supra* note 204.
223. Telephone Interview with Ernest House, Jr., *supra* note 87.
224. *Id.*

as well as to the development of state law furthering NAGPRA's goals two years before national legislation accomplished the same goal. Colorado's effectiveness in implementing NAGPRA and its foresight in enacting state law to remedy the gaps in the national regulations should be an example for future NAGPRA legislation. In particular, federal regulations are currently being developed for another section of NAGPRA that was originally reserved (just as the regulations on the disposition of culturally unidentifiable human remains were). 43 C.F.R. § 10.7 addresses the "[d]isposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony" and applies to remains and objects found on federal or tribal land after the November 16, 1990 passage of NAGPRA.[225] Implementation of this reserved section appears to be on the same lengthy schedule as the culturally unidentifiable remains regulations; National NAGPRA has been working on this reserved section for six years, and no regulations have been drafted yet.[226] Colorado's approach to NAGPRA and its development of the culturally unidentifiable remains disposition process should be a model for how National NAGPRA works on developing new regulations. Focusing on the human rights foundations of NAGPRA helps clarify the goals and necessities of future NAGPRA regulations and better enables the involved parties to work towards those goals. Human rights violations are more effectively rectified through good faith and cooperative, efficient legislation, not decades of fighting over definitions.

Despite the many uncertainties and shortcomings of the Native American Graves Protection and Repatriation Act, NAGPRA in Colorado is an example of successful implementation. As Ute Mountain Ute tribal member and former Executive Secretary of the Colorado Commission on Indian Affairs, Ernest House Jr., said, the future of respecting Native graves and burial objects in Colorado is bright because of the "foundation laid in the 1980s, the hard, tense consultations in the 1990s, and the implementation of the Process in 2000."[227] Colorado museums' proactive, respectful approach to the required consultations and lack of loophole

225. Nat'l Park Serv., U.S. Dep't of Interior, *Reserved Sections of the NAGPRA Regulations*, NAT'L NAGPRA, http://www.nps.gov/nagpra/MANDATES/Reserved_Sections.htm (last visited Aug. 17, 2011).

226. *See id.*

227. Telephone Interview with Ernest House, Jr., *supra* note 87.

abuse in repatriations helped gain the trust and respect of Native American tribes. This positive foundation in turn led to Colorado's two Native tribes becoming active partners in a process to reinter culturally unidentifiable remains that NAGPRA did not protect.

Colorado's process is unique not only because it anticipated and seamlessly fit into the 2010 legislation regarding culturally unidentifiable human remains, but also because both museums and Native Americans were—and still are—an integral part of the project. The formation of such a dynamic, effective partnership between traditionally opposed groups around such a sensitive topic is more than just a model for other states and agencies trying to complete their basic NAGPRA obligations—it is an example of how implementing the spirit of NAGPRA is vitally important for achieving the Act's goal of correcting human rights violations. In the process of honoring the spirit of the Act, Colorado tribes and museums built good will, which also helps further the Act's human rights goals. The human rights violations that NAGPRA strives to address have historically pushed the Native and museum/scientific communities apart; however, Colorado tribes and museums have found a way to come together to work for a common purpose of fixing these violations. Colorado is a model state for NAGPRA implementation, and therefore a success story.

USING POOR FORM AS A PROXY FOR POOR SUBSTANCE: A LOOK AT *WEND V. PEOPLE* AND ITS CATEGORICAL RULE PROHIBITING PROSECUTORS FROM USING THE WORD "LIE"

DANNY PAULSON*

In Wend v. People*, the Colorado Supreme Court reversed a second-degree murder conviction because the prosecutor repeatedly used various forms of the word "lie" to describe some of the defendant's statements made during two taped interviews with the police. In its opinion, the court first held that in Colorado it is categorically improper for a prosecutor to use the word "lie." In doing so, it committed itself to a unique legal standard for one word that runs contrary to the traditional legal test used nationwide for all forms of prosecutorial misconduct. Then, the court reversed the conviction on plain error review—a standard that requires a contextual, "totality of the circumstances" analysis of the trial's fundamental fairness—but only after it completely avoided critical facts bearing on that inquiry. This Note demonstrates that Colorado's categorical rule against a prosecutor's use of the word "lie" is unnecessary and imprudent. It also shows that* Wend*'s plain error review was incomplete because it failed to address the case's most critical facts bearing on whether the defendant was denied a fair trial.*

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INTRODUCTION

> *Beware lest you lose the substance by grasping at the shadow.*
>
> —Aesop[1]

Jennifer Lee-Renee Wend shot and killed her roommate, Michael Adamson, in the early hours of Christmas morning 2002.[2] She did not contact the police but rather let Adamson's body lie dead in his room until December 31, when her friend,

1. Aesop, *The Dog and the Shadow*, *in* FOLK-LORE AND FABLE 10 (Charles W. Eliot ed., P.F. Collier & Son 1909).
2. Wend v. People, 235 P.3d 1089, 1091 (Colo. 2010).

Randy Anderson, removed the body from Wend's house.[3] A few days later, the police received a tip that Adamson was missing, which resulted in a video-recorded police interview of Wend on January 3, 2003.[4] Wend told the police that she did not know where Adamson was but was confident that he was alive.[5] A few days later, however, Anderson confessed to his role in Adamson's disappearance and told the police that Wend killed Adamson.[6] Thus, on January 17, a second video-recorded interview between the police and Wend occurred.[7] Initially, she again denied any knowledge of a shooting.[8] Then, she told the police that Anderson shot Adamson.[9] Finally, by the end of the second interview, Wend confessed to her role in Adamson's death.[10] She told the police, "I have not been telling you the truth,"[11] and she admitted that she killed Adamson.[12]

Wend went to trial claiming self-defense.[13] Both police interviews were placed into evidence.[14] Accordingly, Wend's lies and her admission to lying were before the jury as evidence.[15] At trial, the prosecutor highlighted the fact that Wend had lied to the police and that she admitted to it.[16] Her own counsel also repeatedly acknowledged that she had lied to the police.[17]

The jury convicted Wend of second-degree murder.[18] But the conviction did not withstand appellate scrutiny. After the Colorado Court of Appeals affirmed the decision,[19] the Colorado Supreme Court found prosecutorial misconduct and reversed on plain error.[20] The court first held that in Colorado it is

3. *See* Respondent's Answer Brief at 6–7, *Wend*, 235 P.3d 1089 (No. 09SC478).
4. *Wend*, 235 P.3d at 1092; Respondent's Answer Brief, *supra* note 3, at 9.
5. Respondent's Answer Brief, *supra* note 3, at 9.
6. *Wend*, 235 P.3d at 1092.
7. *Id.*; Respondent's Answer Brief, *supra* note 3, at 39.
8. *Wend*, 235 P.3d at 1092.
9. *Id.*
10. *Id.*
11. Respondent's Answer Brief, *supra* note 3, at 42.
12. *See Wend*, 235 P.3d at 1092.
13. *Id.*
14. *See id.* at 1092 n.1.
15. *See id.*
16. *See id.* at 1092.
17. *Id.*
18. *Id.* at 1093.
19. People v. Wend, No. 07CA1283, 2008 WL 5009627, at *1 (Colo. App. Nov. 26, 2008), *rev'd*, 235 P.3d 1089 (Colo. 2010).
20. *Wend*, 235 P.3d at 1091.

categorically improper for a prosecutor to use the word "lie."[21] In doing so, it committed itself to a unique legal standard for one word that runs contrary to the traditional legal test used nationwide for all forms of prosecutorial misconduct.[22] Then, the court reversed the conviction on plain error review—a standard that requires a contextual, "totality of the circumstances" analysis of the trial's fundamental fairness—but only after the court completely avoided mentioning critical facts bearing on that inquiry.[23] Specifically, the court never addressed that the only reasonable conclusion from Wend's statements is that Wend did lie multiple times to police, that Wend admitted to having lied to the police, that defense counsel conceded that Wend lied, and that Wend's lies and her admission to lying were captured on video and placed into evidence for the jury to consider.[24]

This Note first demonstrates that Colorado's categorical rule against a prosecutor's use of the word "lie" is unnecessary and imprudent. Appellate courts review for prosecutorial misconduct because defendants have a constitutional right to a fair trial.[25] At its root, trial fairness is a matter of substance, not form.[26] Not surprisingly, the traditional two-step test for prosecutorial misconduct is anchored to substance, primarily through its use of a contextual, totality of the circumstances standard of review.[27] The test recognizes that a statement's context frequently influences its substantive effect at least as much as its content does.[28] Therefore, Colorado's prohibition against the use of one word—"lie"[29]—regardless of the context

21. *Id.*

22. *See, e.g.*, United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003); People v. Martinez, 224 P.3d 877 (Cal. 2010); State v. Reynolds, 836 A.2d 224 (Conn. 2003); Mills v. State, No. 56,2007, 2007 WL 4245464 (Del. Dec. 3, 2007); McKenney v. State, 967 So. 2d 951 (Fla. Dist. Ct. App. 2007); State v. Marsh, 728 P.2d 1301 (Haw. 1986); State v. Sheahan, 77 P.3d 956 (Idaho 2003); People v. Nowicki, 894 N.E.2d 896 (Ill. App. Ct. 2008); Ellison v. State, 717 N.E.2d 211 (Ind. Ct. App. 1999); State v. Musser, 721 N.W.2d 734 (Iowa 2006).

23. *Wend*, 235 P.3d at 1096–99.

24. *See* discussion *infra* Part VI.B.2.

25. United States v. Young, 470 U.S. 1, 11–12 (1985).

26. *Id.*

27. *See, e.g.*, *Kravchuk*, 335 F.3d at 1153.

28. *See, e.g.*, United States v. Gartmon, 146 F.3d 1015, 1025–27 (D.C. Cir. 1998) (finding that the prosecutor's use of a number of terms, including the word "lie," was not improper because of various contextual factors).

29. Other forms of the word are also prohibited. Saying "lies," "liar," "lying," "lied," or any other variation of "lie" is prohibited. Curiously, however, Colorado actually encourages prosecutors to use euphemisms of the word "lie," such as

under which it is uttered, is a misguided rule that elevates form over substance.

This Note also demonstrates that the Colorado Supreme Court conducted an incomplete plain error review in *Wend*. Plain error review reverses convictions where, under the totality of the circumstances, errors affecting substantial rights call into question the fundamental fairness or integrity of a trial.[30] In *Wend* the Colorado Supreme Court did not review the totality of the circumstances. Unfortunately, the court's plain error review failed to address many of the case's most critical facts bearing on whether Wend was denied a fair trial.[31]

Part I of this Note begins with a review of the traditional two-step test used to adjudicate prosecutorial misconduct allegations. Part II then examines the various forms of prosecutorial conduct that have and have not been deemed improper under the traditional framework's first step. Next, Part III describes the practical and theoretical reasons that a prosecutor's use of the word "lie" can be improper. After that, Part IV explores how the traditional framework's second step is applied under plain error review. Part V reviews *Wend*'s facts, trial, and opinion. Finally, Part VI first argues that *Wend*'s new categorical rule is both imprudent and unnecessary and then criticizes the court's unwillingness under plain error review to look at the case's unique facts bearing on whether the defendant's trial was fundamentally unfair.

I. ADJUDICATING PROSECUTORIAL MISCONDUCT: THE LEGAL FRAMEWORK

Appellate courts, regardless of jurisdiction, review prosecutorial misconduct allegations similarly.[32] This Part reviews the traditional test used to examine allegations of prosecutorial misconduct. It begins with a review of the test at the federal level. Then it reviews Colorado's version of the test.

"untruthful." *Wend*, 235 P.3d at 1091, 1096, 1098. This distinction is discussed *infra* Part VI.B.1.

30. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 631 (2002); *Young*, 470 U.S. at 11–12; *Wend*, 235 P.3d at 1097–98.

31. *See* discussion *infra* Part VI.B.2.

32. *See* cases cited *supra* note 22. These cases all look at both the content and context of the proceeding to determine whether the prosecutor's conduct was improper, followed, if necessary, by a determination of whether any impropriety warrants reversal under the relevant standard of review.

In both jurisdictions, the test's linchpin feature is that it accounts for both content and context.

Prosecutorial misconduct refers to conduct or methods used by prosecutors calculated or tending to produce wrongful convictions.[33] Federal courts apply a two-step test to review claims of prosecutorial misconduct.[34] In the first step, courts determine whether the prosecutor's conduct was improper.[35] Whether conduct was improper rests in part on the context surrounding the conduct.[36] Appellate courts review conduct de novo, meaning the appellate court gives no deference to the trial court's decision about whether something was improper.[37] If an appellate court determines that a prosecutor's conduct was improper—which is a finding of prosecutorial misconduct—then it proceeds to the second step.[38]

The second step is to determine whether the prosecutorial misconduct warrants that the conviction be reversed.[39] The mere occurrence of prosecutorial misconduct is not determinative of reversal.[40] Whether reversal is warranted is not reviewed de novo.[41] Rather, deference to the trial court is given at the degree appropriate to the case's reviewing posture.[42] The reviewing posture will usually be either plain or harmless error review.[43] In general, appellate courts will not review error if it was not first objected to at trial.[44] However,

33. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

34. *See, e.g.*, United States v. Kravchuk, 335 F.3d 1147, 1153 (10th Cir. 2003).

35. *See, e.g.*, United States v. Gordon, 173 F.3d 761, 769 (10th Cir. 1999).

36. *See, e.g.*, United States v. Jaswal, 47 F.3d 539, 544 (2d Cir. 1995) (finding that the prosecutor's use of "I think" was not improper because context did not show reference to personal beliefs).

37. *See* Buford v. United States, 532 U.S. 59, 64 (2001) (noting that when an appellate court reviews de novo, it gives no deference to the lower court's findings); *see also* United States v. Rigas, 583 F.3d 108, 116 (2d Cir. 2009) (explaining that de novo means "anew").

38. *Kravchuk*, 335 F.3d at 1153.

39. *Id.*

40. United States v. Cotton, 535 U.S. 625, 632 (2002).

41. *See* United States v. Thompson, 449 F.3d 267, 271 (1st Cir. 2006) (finding that the trial court was in a better position to determine whether the harm caused by improper comments warranted reversal).

42. *Compare* United States v. Hasting, 461 U.S. 499, 508–09 (1983) (applying harmless error review), *with* United States v. Van Anh, 523 F.3d 43, 55–57 (1st Cir. 2008) (applying plain error review).

43. *See, e.g.*, *Hasting*, 461 U.S. at 508–09; *Van Anh*, 523 F.3d at 55–57.

44. *See, e.g.*, United States v. Mebane, 839 F.2d 230, 232 (4th Cir. 1988).

plain error review provides an exception to this rule and allows a court to review error if it is alleged that the error affected a substantial right of the defendant.[45] A conviction will be reversed on plain error review if the error did in fact affect a substantial right of the defendant such that it undermined the fundamental fairness of the trial and called into question the correctness of the trial's outcome.[46] Alternatively, courts will apply harmless error review for errors that were objected to at trial.[47] Under harmless error review, courts will affirm a judgment if either there was no error or if the error was "harmless" to the conviction.[48] But if it "can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself," a reviewing court will reverse a conviction under harmless error review.[49]

Accordingly, due to their different degrees of deference, the standard of review applied on appeal can influence whether or not improper conduct warrants reversal.[50] Additionally, when reviewing for prosecutorial misconduct, federal courts will reverse a conviction where the prosecutor's conduct violated the defendant's due process right to a fair trial.[51] The defendant must prove that her rights were violated when viewing the misconduct in the context of the whole trial.[52]

Colorado courts review prosecutorial misconduct much like federal courts.[53] First, they decide whether the conduct in question was improper based on the totality of the

45. *Cotton*, 535 U.S. at 632.

46. *See Van Anh*, 523 F.3d at 55.

47. *See* Martinez v. People, 244 P.3d 135, 142–43 (Colo. 2010).

48. *See Hasting*, 461 U.S. at 509–12. A court may find constitutional errors harmless if it is beyond a reasonable doubt that they had no effect on the judgment. Mitchell v. Esparza, 540 U.S. 12, 17–18 (2003).

49. People v. Rivera, 56 P.3d 1155, 1169 (Colo. App. 2002).

50. United States v. Weatherspoon, 410 F.3d 1142, 1150–51 (9th Cir. 2005) (quoting United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994)) ("Where defense counsel objects . . . we review for harmless error on defendant's appeal; absent such an objection, we review under the more deferential plain error standard.").

51. United States v. Carr, 424 F.3d 213, 227 (2d Cir. 2005); *see also* United States v. Young, 470 U.S. 1, 11–12 (1985).

52. *Young*, 470 U.S. at 11 ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."); United States v. Kravchuk, 335 F.3d 1147, 1153 (10th Cir. 2003).

53. *See, e.g.*, Domingo-Gomez v. People, 125 P.3d 1043, 1048 (Colo. 2005).

circumstances,[54] thus ensuring that context is taken into account.[55] Second, upon finding improper conduct, the reviewing court determines if the misconduct warrants reversal.[56] As with the federal courts, Colorado's appellate courts give deference to trial courts in this analysis, because trial courts are "best positioned to evaluate whether any statements made by counsel affected the jury's verdict."[57] So too, the standard of review varies depending on whether the defendant objected at trial.[58] Deference to trial courts differs depending on whether misconduct is reviewed for harmless or plain error, with plain error being the tougher standard to overcome for a defendant appealing her conviction.[59] Where there is plain error review, courts again inquire into the case's content and context, "because only through an examination of the totality of the circumstances can the appellate court deduce whether error affected the fundamental fairness of the trial."[60] Hence, Colorado courts review prosecutorial misconduct under plain error review, in part, by looking at context in both the first and second step of their analysis.[61]

II. FINDING THE DIVIDING LINE: WHAT IS (AND IS NOT) IMPROPER CONDUCT

This Part reviews the results of the first-step analysis of prosecutorial misconduct cases. Section A looks at conduct deemed to be improper, while Section B looks at conduct judged as proper. As Section B will demonstrate, context frequently differentiates those cases that do and do not lead to findings of prosecutorial misconduct. Indeed, often the same conduct is

54. Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010).

55. *Id.* Although Colorado sometimes fails to expressly state it, the first step is reviewed de novo review. *See Domingo-Gomez*, 125 P.3d at 1048.

56. *Domingo-Gomez*, 125 P.3d at 1048.

57. *Wend*, 235 P.3d at 1097 (quoting *Domingo-Gomez*, 125 P.3d at 1049).

58. *See Domingo-Gomez*, 125 P.3d at 1053 (reviewing different statements made in the same trial under different standards of review based on whether the statements were objected to at trial).

59. *Compare* People v. Avila, 944 P.2d 673, 676 (Colo. App. 1997) (noting that reversal for plain error occurs only where misconduct was "flagrantly, glaringly, or tremendously improper"), *with* Salcedo v. People, 999 P.2d 833, 841 (Colo. 2000) (noting that reversal under harmless error review occurs where there is a reasonable probability that the misconduct contributed to the conviction).

60. *Wend*, 235 P.3d at 1098.

61. *Id.* at 1096, 1098.

deemed improper in one case but found to be proper in another as a result of differing contexts.

A. Examples of Prosecutorial Misconduct

Prosecutorial misconduct arises in many ways. Sometimes misconduct emerges from unethical motives.[62] For example, a prosecutor cannot prosecute for vindictive reasons[63] or bring new charges to retaliate against a defendant who invokes her legal rights.[64] Other times, misconduct emerges from pre-trial negligence.[65] Accordingly, a prosecutor should not elicit information from a defendant without defense counsel being present,[66] nor should a prosecutor keep potentially exculpatory evidence from the defendant.[67]

Prosecutorial misconduct also frequently results from a prosecutor's conduct during trial.[68] For example, convictions can be overturned because a prosecutor expresses a personal opinion to the jury.[69] Thus, statements about the defendant's guilt or credibility are frequently improper,[70] as are opinions that require personal experience or expertise.[71] A prosecutor

62. *See* Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (finding it improper for the prosecutor to bring a more serious charge in response to the defendant invoking his statutory right to appeal because of the charge's potential vindictive nature in a habeas corpus review).

63. *See id.*

64. *Id.*

65. *See* Strickler v. Greene, 527 U.S. 263, 281–84, 289 (1999) (citing Brady v. Maryland, 373 U.S. 83 (1963)) (finding that the prosecutor failed to comply with the *Brady* rule's mandate that the prosecution must disclose all exculpatory or impeaching evidence).

66. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 202–04 (1964) (finding it improper for the government to obtain inculpatory post-indictment information through secretly recorded conversations between co-defendants where defense counsel was not present).

67. Banks v. Dretke, 540 U.S. 668, 691–93 (2004) (finding it improper for the government to have withheld potentially exculpatory evidence from the defendant in violation of the *Brady* rule in a habeas corpus review).

68. *See, e.g.*, Crider v. People, 186 P.3d 39, 40 (Colo. 2008) (finding it improper for the prosecutor to tell the jury that the defendant lied on the witness stand).

69. *See id.*

70. Cargle v. Mullin, 317 F.3d 1196, 1218 (10th Cir. 2003) (finding it improper for the prosecutor to contend that the state does not prosecute innocent people because this statement suggested that the defendant was guilty merely because he was being prosecuted).

71. *See, e.g.*, Gall v. Parker, 231 F.3d 265, 312 (6th Cir. 2000) (finding it improper for the prosecutor to suggest to the jury that it should heed his government expertise and dismiss the defendant's insanity defense), *superseded on other grounds by statute*, KY. REV. STAT. ANN. § 507.030(b) (LexisNexis 2011).

also should avoid making unscrupulous or unfair statements about people involved in the trial.[72] Such statements can lead to reversals, whether they are directed at the defendant,[73] defense counsel,[74] or witnesses.[75] Additionally, where a prosecutor comments on the defendant's legal strategy, a successful appeal from the defendant may follow.[76] This should caution a prosecutor from noting—even implicitly—that the defendant did not take the stand.[77] A prosecutor should also avoid suggesting that a defendant's post-arrest, post-*Miranda* silence indicates guilt.[78] Further, a wise prosecutor will not highlight to the jury that the defendant retained counsel.[79]

Unsurprisingly, a prosecutor's material misstatements of law[80] and fact[81] can be improper. A prosecutor, therefore, should limit opening statements to evidence she believes will be offered[82] and, in her closing, speak only of evidence actually admitted into the record.[83] Prosecutorial misconduct also occurs when a statement is meant to imply that the government's version of the case is the most credible.[84] Thus, a

72. *See, e.g.*, Malicoat v. Mullin, 426 F.3d 1241, 1256 (10th Cir. 2005) (finding it improper for the prosecutor to call the defendant "evil" and "a monster").

73. *See id.* In *Malicoat*, the court did not actually reverse the conviction because the prosecutor's comments did not rise to the level of plain error. *Id.*

74. *See, e.g.*, United States v. Friedman, 909 F.2d 705, 708–09 (2d Cir. 1990) (finding it improper for the prosecutor to state that defense counsel would "make any argument he can to get that guy off" and that "while some people . . . prosecute drug dealers . . . there are others who . . . try to get them off, perhaps even for high fees").

75. *Gall*, 231 F.3d at 312 (finding it improper for the prosecutor to describe defense witnesses as "blind men . . . asked to identify an elephant").

76. *See, e.g.*, Beardslee v. Woodford, 358 F.3d 560, 586–87 (9th Cir. 2004) (finding it improper for the prosecutor to call attention to the defendant's failure to express remorse because it implicitly criticized the defendant's decision to not testify at the penalty phase of his capital case).

77. *Id.*

78. Gravley v. Mills, 87 F.3d 779, 785–88 (6th Cir. 1996).

79. Marshall v. Hendricks, 307 F.3d 36, 72–74 (3d Cir. 2002).

80. *See, e.g.*, United States v. Perlaza, 439 F.3d 1149, 1172 (9th Cir. 2006) (finding it improper for the prosecutor to say that the presumption of innocence disappears once the jury begins the deliberation process).

81. United States v. Murrah, 888 F.2d 24, 27 (5th Cir. 1989) (finding it improper for the prosecutor to refer in both opening and closing to "testimony" by a witness that never testified and was not within the record).

82. *See, e.g.*, *id.*

83. *See, e.g.*, Le v. Mullin, 311 F.3d 1002, 1020–21 (10th Cir. 2002) (finding it improper for the prosecutor to implicitly suggest in closing that the defendant had murdered previously because evidence of the prior murder was not in the record).

84. *See, e.g.*, Floyd v. Meachum, 907 F.2d 347, 354–55 (2d Cir. 1990) (finding it improper for the prosecutor to implore the jury to consider the prosecutor's own integrity and ethics).

prosecutor ought to avoid vouching for the credibility of herself,[85] her office,[86] or her witnesses.[87] A prosecutor also must avoid statements that improperly inflame the passions of the jurors.[88] For example, mentioning the defendant's irrelevant prior convictions or bad acts could result in the defendant successfully appealing her conviction.[89] And, as this Note suggests, a prudent prosecutor will not call a defendant a liar.[90]

B. When Context Mitigates Poor Form

Although courts consistently find certain types of prosecutorial conduct improper, black-letter rules simply do not exist in the realm of misconduct proceedings. The very same conduct held as improper in one case may be permissible in another.[91] Hence, notwithstanding all the cases cited within Section A of this Part, prosecutors have acceptably expressed personal opinions about the defendant's credibility (including whether the defendant lied),[92] commented on the defendant's trial strategy[93] and past legal trouble,[94] vouched for the

85. *Id.* at 354.

86. *See, e.g.*, United States v. Gallardo-Trapero, 185 F.3d 307, 319 (5th Cir. 1999) (finding it improper for the prosecutor to ask the jury during closing whether federal agents and the prosecutor would "risk their career" to commit perjury).

87. *See, e.g.*, People v. Shipman, 747 P.2d 1, 2–3 (Colo. App. 1987) (finding it improper for the prosecutor to suggest that police officers are more credible than lay witnesses during voir dire).

88. *See, e.g.*, People v. Lee, 630 P.2d 583, 591–92 (Colo. 1981) (finding it improper for the prosecutor to allude to a miscarriage that resulted from events at issue in the case).

89. *See, e.g.*, People v. Goldsberry, 509 P.2d 801, 803 (Colo. 1973) (finding it improper for the prosecutor to purposely elicit statements from a witness about the defendant's past crimes).

90. *E.g.*, Wend v. People, 235 P.3d 1089, 1089 (Colo. 2010).

91. *Compare* United States v. Moreland, 622 F.3d 1147, 1162 (9th Cir. 2010) (finding that the prosecutor who called the defendant a liar was not acting improperly because it was a reasonable inference from evidence and the prosecutor indicated as much), *with Wend* 235 P.3d at 1096 (finding it improper for the prosecutor to classify the defendant's statements as "lies").

92. *See, e.g.*, United States v. White, 241 F.3d 1015, 1023 (8th Cir. 2001) (finding it to be questionable but not clearly improper that the prosecutor inferred from evidence that the defendant did not tell the truth).

93. *See, e.g.*, Nguyen v. Reynolds, 131 F.3d 1340, 1358–59 (10th Cir. 1997) (finding that the prosecutor's mention of the lack of an explanation for some of the defendant's conduct was not improper because it was not a clear, direct, or unequivocal reference to the defendant's failure to testify).

94. *See, e.g.*, United States v. Bowman, 353 F.3d 546, 551 (7th Cir. 2003) (finding that the prosecutor's statements that the defendant was a convicted felon,

integrity of the government[95] and its witnesses,[96] inflamed the jurors' consciences and passions,[97] and misstated the facts[98] and the law.[99]

Clearly, then, improper advocacy cannot be determined solely by the content at issue. This is because the ultimate message that a prosecutor's statement or conduct delivers can be significantly altered depending on the context in which it is made.[100] Admittedly, sometimes context will only minimally impact the ultimate message conveyed. The content at issue can bear on the statement's impropriety more than the context can. For example, context plays a small role in the impropriety of a prosecutor's statement that the defendant's brother was previously convicted for participating in the same conspiracy.[101] The prejudicial suggestion of guilt by association will ring in the jurors' ears in almost any context.

Sometimes, however, context plays a bigger role in understanding a message's true meaning than content does.[102] For example, it can be improper for a prosecutor to tell the jurors to ignore or disbelieve testimony from the defendant or

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carried an unregistered gun, and carried drugs were not improper because the statements were based on stipulated or uncontested facts).

95. *See, e.g.*, United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998) (finding that the prosecutor placing his own credibility at issue was not improper where the defendant's counsel was the first to raise the issue of the prosecutor's credibility).

96. *See, e.g.*, United States v. Carr, 424 F.3d 213, 228 (2d Cir. 2005) (finding that the prosecutor's remark that witnesses were required to tell the truth was acceptable because it was made in response to attacks on the witnesses' credibility by the defendant).

97. *See, e.g.*, United States v. Salameh 152 F.3d 88, 134–35 (2d Cir. 1998) (finding that the prosecutor telling a jury it must decide "guilt for the single most destructive act of terrorism ever committed here in the United States" was acceptable because the statement was rooted in evidence).

98. *See, e.g.*, United States v. Smith, 203 F.3d 884, 889–90 (5th Cir. 2000) (finding the prosecutor's inability to offer testimony promised during opening to come from a specific person a mere "alleged error" that did not warrant reversal because the promised evidence was presented at trial by alternative sources).

99. *See, e.g.*, United States v. Bryant, 349 F.3d 1093, 1096 (8th Cir. 2003) (finding that the prosecutor's suggestion that the defendant's presence at the scene of the crime was sufficient to support a guilty verdict was not improper because the defendant based his defense on not being at the scene).

100. *See, e.g.*, *Tocco*, 135 F.3d at 130.

101. *See* United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993).

102. *See, e.g.*, Beardslee v. Woodford, 358 F.3d 560, 587 (9th Cir. 2004) (finding it improper for the prosecutor to comment that the defendant expressed no remorse because the defendant exercised his constitutional right to remain silent); *Tocco*, 135 F.3d at 130.

her witness.[103] But when a prosecutor says to ignore a defendant's testimony after the defendant refused to speak during cross-examination—resulting in the defendant's direct examination being struck from the record—context dictates that the prosecutor's conduct was proper.[104]

Context also may either mitigate or exacerbate a prosecutor's statements. For example, revealing that a defendant has a prior murder conviction, which usually is improper,[105] can be mitigated by context. Such a statement is acceptable if it is made during a capital punishment sentencing hearing because a past murder conviction is an aggravating factor to be considered in capital sentencing proceedings.[106] In contrast, the impropriety of claiming that a defendant is "like all of the other co-defendants in this case" is exacerbated where the jury knows that the other co-defendants already took guilty pleas.[107] Accordingly, courts are best able to adjudicate on the substantive reality of whether or not the defendant received a fair trial by looking at both a statement's content and its context because both content and context can significantly contribute to a statement's ultimate substantive meaning.

III. WHY USING THE WORD "LIE" CAN BE IMPROPER

As the previous Part demonstrated, the use of the word "lie" is among the many ways a prosecutor can engage in misconduct. Courts have found that a prosecutor's use of the word "lie" to describe a defendant can be improper because it interferes with the defendant's right to a fair trial.[108] Two specific explanations have emerged to explain why a prosecutor's use of the word "lie" raises concerns of fairness.[109]

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103. *See, e.g.*, United States v. Zehrbach, 47 F.3d 1252, 1264 (3d Cir. 1995) (finding it improper for the prosecutor to state that the jury should disbelieve defense witnesses because they were guilty of "the same bankruptcy fraud that these two defendants are guilty of").

104. *See* Williams v. Borg, 139 F.3d 737, 744 (9th Cir. 1998) (finding that the prosecutor telling a jury to ignore the defendant's remarks was not improper because the remarks were not in the record).

105. *See, e.g.*, United States v. Jackson, 339 F.3d 349, 356–57 (5th Cir. 2003) (finding it improper for the prosecutor to make indirect reference to the defendant's prior convictions because the reference was more prejudicial than probative); Le v. Mullin, 311 F.3d 1002, 1020–21 (10th Cir. 2002).

106. *Beardslee*, 358 F.3d at 584–85.

107. United States v. Dworken, 855 F.2d 12, 29–31 (1st Cir. 1988).

108. *See* Domingo-Gomez v. People, 125 P.3d 1043, 1053 (Colo. 2005).

109. Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010).

First, when a prosecutor calls someone a "liar," she reflects a personal opinion, which juries may consider instead of the evidence properly before them.[110] Second, the word "lie" inflames the passions of jurors against the defendant, leading to convictions rooted in emotion rather than evidence.[111] Section A will take a closer look at the idea that the word "lie" necessarily places a prosecutor's opinion before the jury. Section B will discuss the idea that the word "lie" improperly inflames a juror's passions.

A. Use of the Word "Lie" Invokes Prosecutor Opinion

It is frequently improper for a prosecutor to express a personal opinion.[112] Courts consistently find a prosecutor's use of the word "lie" improper on this ground.[113] An example will help elucidate why a person, prosecutor or not, often expresses a personal opinion when she calls an individual a liar. In the Colorado case *Domingo-Gomez v. People*, Molotov cocktails[114] were thrown into a home at six o'clock in the morning.[115] This occurred the morning after an alcohol-related fight took place between the defendant and a resident of the home.[116] The defendant was accused of throwing the Molotov cocktails.[117] At trial, the parties disputed the defendant's whereabouts at the time that the Molotov cocktails were thrown.[118] No physical evidence linked him to the bottles, but a resident of the home identified the defendant as the person who threw the Molotov cocktails.[119] Meanwhile, the defendant and two other witnesses

110. *Id.*
111. *Id.*
112. *See, e.g.*, Hennon v. Cooper, 109 F.3d 330, 333 (7th Cir. 1997) (finding it improper for the prosecutor to imply that the defendant's election of a jury trial was a sign of guilt).
113. *See, e.g.*, United States v. Garcia-Guizar, 160 F.3d 511, 520 (9th Cir. 1998); *Wend*, 235 P.3d at 1096.
114. A Molotov cocktail is a breakable container with an explosive or flammable liquid inside it and a wick or similar device capable of igniting the container. In *Domingo-Gomez*, the Molotov cocktail was a beverage bottle filled with gasoline and a piece of cloth protruding from the bottle's neck. Domingo-Gomez v. People, 125 P.3d 1043, 1046 n.1 (Colo. 2005).
115. *Id.* at 1046.
116. *Id.*
117. *Id.* Domingo-Gomez was charged with first degree arson, attempted first degree assault, use of an explosive or incendiary device, and possession of an explosive or incendiary device. *Id.*
118. *Id.* at 1046–47.
119. *Id.* at 1046.

testified that the defendant could not be the perpetrator because he was at a friend's house nursing wounds incurred during the previous night's fight.[120] During closing arguments, the prosecutor claimed that the defendant and his witnesses lied.[121] On appeal, the court found the prosecutor's statements to be improper expressions of personal opinion.[122]

Although the *Domingo-Gomez* prosecutor may have been correct that the defendant and his witnesses lied, his belief was an inferential conclusion and therefore an opinion, not a fact.[123] The defendant did not tell the prosecutor that he lied; rather, a belief in the victim's story, a lack of trust in the defendant and his witnesses, and all of the other information available to the prosecutor led him to this conclusion.[124] This is problematic because the evidence lent itself to other reasonable conclusions.[125] For example, the victim-witness may have been lying to hurt the defendant, who fought the victim-witness's brother hours before the Molotov cocktails were thrown.[126] Furthermore, inconsistent statements do not always mean that someone lied. The defendant and his witnesses may have been correct when they surmised that the victim-witness simply misidentified the defendant.[127]

The Colorado Supreme Court recently explained why jurors are not supposed to hear a prosecutor's personal opinion.[128] In *Wend*, the court noted:

> [T]he word "lie" is such a strong expression that it necessarily reflects the personal opinion of the speaker. When spoken by the State's representative in the courtroom, the word "lie" has the dangerous potential of swaying the jury from their duty to determine the accused's guilt or innocence on the evidence properly presented at trial.[129]

Two concerns are apparent from this quote. The first and most pressing concern is that jurors will misuse a prosecutor's

120. *Id.* at 1046–47.
121. *Id.* at 1047.
122. *Id.* at 1053.
123. *See id.* at 1046–47.
124. *See id.*
125. *See id.*
126. *See id.*
127. *Id.* at 1046.
128. *See* Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010).
129. *Id.* (quoting *Domingo-Gomez*, 125 P.3d at 1050).

opinion.[130] The opinion could distract jurors from the actual evidence presented or, worse, fundamentally mislead the jury if the opinion is incorrect.[131] The second concern is that there is a "dangerous potential" that jurors will misuse the statement because prosecutors, as representatives of the people, carry heightened persuasive powers over juries as a result of their unique role in the judicial system.[132]

B. The Word "Lie" Inflames the Passions of Jurors

The second reason courts justify finding the word "lie" improper is that the word prejudices the jurors against the defendant.[133] Although a prosecutor is allowed to "employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance,"[134] such embellishments are improper if they lead a jury to "determine guilt on the basis of passion or prejudice, inject irrelevant issues into the case, or accomplish some other improper purpose."[135] In 2008, the Colorado Supreme Court explained that "the word 'lie' is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions" against the person it is used to describe.[136]

To be sure, as a result of the sensitive nature of some trial proceedings, jurors may experience visceral, emotional reactions to a prosecutor's comments in the same way an audience can respond to a religious sermon or political rally. When such passionate reactions are the basis for a guilty verdict, the judicial system is not functioning properly. The challenge, however, is determining where acceptable oratorical embellishing ends and improper inflaming of passions begins.[137] The Colorado Supreme Court recently acknowledged this, noting that the prejudicial impact of a statement "cannot be reduced to a specific set of factors, determinative in every

130. United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992); *Wend*, 235 P.3d at 1096.

131. *Kerr*, 981 F.2d at 1053; *Wend*, 235 P.3d at 1096.

132. *Kerr*, 981 F.2d at 1053 ("Because [a prosecutor] is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus."); *Wend*, 235 P.3d at 1096.

133. Crider v. People, 186 P.3d 39, 41 (Colo. 2008).

134. People v. Collins, 250 P.3d 668, 678 (Colo. App. 2010) (quoting People v. Allee, 77 P.3d 831, 837 (Colo. App. 2003)).

135. People v. Bowles, 226 P.3d 1125, 1132–33 (Colo. App. 2009).

136. *Crider*, 186 P.3d at 41.

137. *See, e.g.*, *id.* at 43.

case. . . . [T]he likelihood of prejudice must be evaluated in the totality of the circumstances, on a case-by-case basis."[138] Accordingly, where the trouble with a prosecutor's conduct is its inflammatory nature, courts should carefully account for context.[139]

IV. PROSECUTORIAL MISCONDUCT AND PLAIN ERROR REVIEW IN COLORADO

Once a reviewing court determines that a prosecutor acted improperly, it proceeds to determine whether or not the misconduct warrants reversal.[140] During plain error review, appellate courts give deference to trial court conclusions about the effects of a prosecutor's improper conduct.[141] Nonetheless, reviewing courts do reverse convictions, and, when reviewing for plain error, this occurs where errors affect substantial rights and interfere with the fundamental fairness of the trial.[142] This Part concerns itself with Colorado's plain error review of prosecutorial misconduct. It begins by outlining Colorado's deferential standard, proceeds to review the factors that Colorado courts consider in determining whether to reverse, and concludes by mentioning other factors found in federal cases that could—and should—be contemplated in Colorado.

In Colorado, "[t]he determination of whether a prosecutor's statements constitute inappropriate prosecutorial argument is generally a matter for the exercise of trial court discretion."[143] When prosecutorial misconduct occurs but no contemporaneous objection to the statement is made, plain error review applies.[144] Plain error review maximizes a reviewing court's deference to the trial court's determinations.[145] Despite this deferential standard, a reviewing court may order a new trial

138. *Id.*
139. *See id.*
140. *Id.* at 42.
141. *See, e.g.*, United States v. Stewart, 977 F.2d 81, 83 (3d Cir. 1992) (observing that the trial court is in a better position than the appellate court to weigh the effect of allegedly improper comments by a prosecutor); Domingo-Gomez v. People, 125 P.3d 1043, 1049–50 (Colo. 2005) (deferring to the trial court under plain error review).
142. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 631 (2002); Wend v. People, 235 P.3d 1089, 1097–98 (Colo. 2010).
143. Harris v. People, 888 P.2d 259, 265 (Colo. 1995).
144. *Domingo-Gomez*, 125 P.3d at 1053.
145. *Wend*, 235 P.3d at 1097.

to prevent injustice.[146] Thus, a reviewing court must determine "whether the errors seriously affected the fairness or integrity of the trial."[147] Misconduct that is "flagrantly, glaringly, or tremendously improper" will warrant plain error reversal.[148]

The particular facts and context of a case are essential to plain error review.[149] Only through an assessment of the totality of the circumstances can a reviewing court accurately decide whether error affected the fundamental fairness of the trial.[150] Often, a non-exhaustive list of factors is considered in an attempt to account for context.[151] For example, courts assess the cumulative effect of a prosecutor's conduct.[152] If a prosecutor's poor comments are "few in number, momentary in length, and . . . a very small part of a rather prosaic summation," then reversal is less likely to be warranted.[153] Likewise, courts look to the nature of the misconduct and the degree of its prejudicial effect.[154] Hence, if a court disapproves of a prosecutor's language, but the prosecutor nonetheless cabins the language to avoid reflecting her personal opinion, then reversal is less likely to occur.[155] Colorado courts also consider the strength of the other evidence of guilt[156] because the stronger the evidence, the less likely that the jury relied on the prosecutor's misconduct in deciding to convict.[157] A reviewing court will also consider the trial court's response to the conduct at issue.[158] If a trial judge *sua sponte*[159] objects and

146. *Harris*, 888 P.2d at 265.

147. *Wend*, 235 P.3d at 1097 (quoting *Domingo-Gomez*, 125 P.3d at 1053).

148. People v. Avila, 944 P.2d 673, 676 (Colo. App. 1997) (quoting People v. Vialpando, 804 P.2d 219, 224 (Colo. App. 1990)).

149. *See* Crider v. People, 186 P.3d 39, 43 (Colo. 2008).

150. *Id.*

151. *Domingo-Gomez*, 125 P.3d at 1053 (finding that in plain error review, "[f]actors to consider *include* the language used [and] the context") (emphasis added).

152. *Wend*, 235 P.3d at 1098.

153. People v. Mason, 643 P.2d 745, 753 (Colo. 1982).

154. *Crider*, 186 P.3d at 43.

155. *Id.*

156. *Domingo-Gomez*, 125 P.3d at 1053.

157. *Crider*, 186 P.3d at 43 (finding that the prosecutor's use of the word "lie" in closing did not warrant reversal because the "physical evidence and the testimony of uninvolved bystanders, as well as the admissions of the defendant himself, left no doubt" about the defendant's guilt).

158. *Domingo-Gomez*, 125 P.3d at 1053–54.

159. "*Sua sponte*" is Latin for "of one's own will." In the trial court setting, *sua sponte* usually refers to a judge's order that is made without a request by any party to the case. BLACK'S LAW DICTIONARY (9th ed. 2009). For example, in *Wend*, the judge could have *sua sponte* objected to the use of the word "lie" and told the

gives curative instructions to the jury, reversal is less likely.[160] Finally, the defendant's response to the prosecutorial misconduct is also considered.[161] At first blush, inquiring into the defendant's reaction seems odd, because plain error review necessarily implies that the defendant never contemporaneously objected to the prosecutor's conduct.[162] Nevertheless, Colorado finds it probative because "[t]he lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging."[163]

Challenging questions of impropriety arise in various cases because of unique contextual settings. Colorado's flexible totality of the circumstances plain error review is poised to take this into account.[164] Therefore, it is reasonable to predict that contextual factors percolating within the federal system could—and should—be included in future Colorado cases reviewed for plain error, where appropriate.[165] For example, Colorado courts should be willing to consider whether a prosecutor's conduct was deliberate or accidental.[166] Colorado courts should also consider whether the defendant compelled the prosecutor into her misconduct.[167] Indeed, when the defendant invites or forces the prosecutor's conduct, federal courts often will neither reverse nor find the prosecutor's conduct improper, reasoning that because the defendant introduced the matter into the trial, the defendant cannot

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prosecutor to stop using it even though the defendant never objected to the word "lie."

160. *See Domingo-Gomez*, 125 P.3d at 1053–54. Yet, interestingly, where a trial court does not *sua sponte* object, courts also may regard that fact as evidence that the prosecutor's conduct did not seem improper at the time. *See* Harris v. People, 888 P.2d 259, 265 (Colo. 1995).

161. *Domingo-Gomez*, 125 P.3d at 1054.

162. *Id.* at 1053.

163. People v. Rodriguez, 794 P.2d 965, 972 (Colo. 1990) (quoting Brooks v. Kemp, 762 F.2d 1383, 1397 n.1 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1987)).

164. *See Domingo-Gomez*, 125 P.3d at 1053.

165. *See* Wend v. People, 235 P.3d 1089, 1098 (Colo. 2010); *Domingo-Gomez*, 125 P.3d at 1053. The list of factors present in these cases does not explicitly or implicitly suggest that their presence precludes the possibility of other relevant factors. *Wend*, 235 P.3d at 1098; *Domingo-Gomez*, 125 P.3d at 1053.

166. *See, e.g.*, United States v. Capelton, 350 F.3d 231, 238 (1st Cir. 2003) (finding that the prosecutor's misquote of the defendant's counsel was unintentional and therefore did not warrant reversal).

167. *See, e.g.*, United States v. Vázquez-Rivera, 407 F.3d 476, 484 (1st Cir. 2005) (finding that it was not improper to vouch for the government's witnesses because it was in reaction to defense counsel's attack on the same witnesses).

persuasively claim his right to a fair trial was denied.[168] Regardless of whether these factors find their way into Colorado appellate court opinions, however, plain error review will continue to be an ad hoc assessment of whether the defendant's trial was fundamentally unfair in light of the content and context at issue.

V. *WEND V. PEOPLE*

The Colorado Supreme Court got right to the point in *Wend*. In the opinion's second sentence, the court asserted that in Colorado the "use of the word 'lie' or any of its other forms is categorically improper."[169] In its fourth sentence, the court reversed Wend's conviction after asserting that the prosecutor's repeated use of the word "lie" in a trial where the defendant's credibility was essential to the defense constituted reversible plain error.[170] Before examining the *Wend* opinion, this Part begins with a review of *Wend*'s factual background in Section A. Next, Section B examines *Wend*'s trial proceedings. Section C then outlines the court's analysis and its two-part holding.

A. The Facts of the Case

Early on Christmas morning, 2002, Jennifer Lee-Renee Wend shot her roommate, Michael Adamson.[171] Adamson crawled to his room and died shortly thereafter.[172] Wend never contacted the police.[173] Instead, she waited two days before contacting her friend, Randy Anderson.[174] She told Anderson that she had killed Adamson because he had threatened her and her dog with a gun.[175] On December 27, Wend spoke to Adamson's friend, Debbie Van Tassel, when Van Tassel called

168. *See, e.g.*, United States v. Robinson, 485 U.S. 25, 31 (1998) (finding that it was not improper for the prosecutor to say that the defendant could have taken the stand where the defense counsel earlier said that the prosecution did not let the defendant explain his side of the story); Darden v. Wainwright, 477 U.S. 168, 182 (1986).

169. *Wend*, 235 P.3d at 1091.

170. *Id.*

171. *Id.*

172. *Id.* at 1091–92.

173. Respondent's Answer Brief, *supra* note 3, at 6.

174. *Id.*

175. *Id.* at 7.

Wend's house.[176] Wend told Van Tassel that she could come over.[177] When Van Tassel arrived, Wend told her that Adamson got angry and left on Christmas Eve.[178] Van Tassel returned to Adamson's house on December 28 and 29 and asked Wend if she could enter Adamson's bedroom.[179] Wend said no—probably because Adamson's body was still in the room.[180] Undeterred, Van Tassel climbed up a ladder to reach Adamson's open bedroom window and looked inside as Wend yelled at her from below, telling her not to go into the room.[181]

On December 31, six days after Adamson was killed, Anderson moved Adamson's body out of the house and helped Wend move her belongings out as well.[182] On January 1, Van Tassel reappeared at Wend's house and went into Adamson's room to retrieve Adamson's address book.[183] When Van Tassel entered the room she noticed that the room smelled.[184] After pulling back an area of carpet that hid blood on the floor, Van Tassel promptly fled the house.[185] The police were contacted and proceeded to search the house.[186]

On January 3, after the police searched her house, Wend spoke to the police about Adamson's disappearance for the first

176. *Id.* Van Tassel had tried several times to reach Adamson in the previous four days. *Id.*

177. *Id.*

178. *Id.* Wend told Van Tassel that Adamson went to Las Vegas, Nevada or Cripple Creek, Colorado. *Id.* at 7–8.

179. *See id.* at 8. Wend also said she was packing up and leaving because Adamson had kicked her out. *Id.* at 7–8.

180. *See id.*

181. *Id.* at 8.

182. *See id.* at 7. Three days later, Anderson took the body to a Castle Rock dump and hid it inside an abandoned refrigerator. *Id.*

183. *Id.* at 8. Van Tassel probably went into Adamson's room without Wend's permission, as Van Tassel again used a ladder to reach Adamson's bedroom window. *Id.* The reason Van Tassel was intent on getting into Adamson's room was probably not because she was suspicious that Adamson was dead. Rather, Van Tassel was allegedly Adamson's "dope runner," and she had previously expressed a desire to rob him. The defense also presented evidence suggesting that a number of people "rummag[ed] through" Adamson's house. In fact, Anderson might have taken Adamson's methamphetamine laboratory and surveillance equipment. *See* Opening Brief of Defendant-Appellant at 5, People v. Wend, No. 07CA1283, 2008 WL 5009627 (Colo. App. Nov. 26, 2008), 2007 WL 4938467, at *5.

184. Respondent's Answer Brief, *supra* note 3, at 8.

185. *Id.*

186. *Id.* They noticed both a rotten and a Pine-Sol odor, a blood stain in Adamson's room, and cleaning products strewn throughout the house but, of course, found no body. *Id.* at 8–9.

time.[187] She told police that she last saw Adamson on Christmas day, during which they fought right before she went to sleep.[188] She also claimed that she received a text message from Adamson the next day notifying her that he was in Las Vegas.[189] She told police that she thought Adamson was still alive but did not know where he was.[190]

However, the course of events was about to shift dramatically. A few days after Wend's first police interview, Anderson confessed to his role in Adamson's disappearance, agreed to plead guilty to an accomplice charge, and began cooperating with the state.[191] The police set up a second interview with Wend,[192] during which Wend initially denied any knowledge of the shooting.[193] Moments later, she changed her mind and said that Anderson killed Adamson.[194] Finally, Wend admitted to shooting Adamson.[195] She said it was in self-defense.[196]

Wend's self-defense argument was supported by tragic evidence. Adamson was a "methamphetamine manufacturer, dealer, and chronic user for at least seventeen years" with an "unrequited infatuation" for Wend.[197] Adamson apparently escalated his drug use in late 2002 and became so depressed that he attempted suicide.[198] He once bought two guns, gave one to Wend, and proceeded to tell people that "either [he or Wend] would go to jail for murder" and that "[i]f I'm lucky, [Wend will] shoot herself."[199] Previously, Adamson spoke of raping and killing Wend, spied on her with his surveillance equipment, and even put a gun to Wend's head.[200] Wend told

187. *Id.* at 9.
188. *Id.*
189. *Id.*
190. *Id.*
191. Wend v. People, 235 P.3d 1089, 1092 (Colo. 2010). Specifically, Anderson told the police about Wend's cover-up and showed the police the body's whereabouts. Wend was arrested the same day. Respondent's Answer Brief, *supra* note 3, at 9.
192. *Wend*, 235 P.3d at 1092.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Opening Brief of Defendant-Appellant, *supra* note 183, at 2. Apparently, Adamson imposed a sex-for-rent scheme. *Wend*, 235 P.3d at 1091.
198. Opening Brief of Defendant-Appellant, *supra* note 183, at 2.
199. *Id.* at 3.
200. *Id.*

people she feared for her life.[201] One night Wend even dialed 911 just so the dispatcher could listen to Adamson threatening to shoot Wend.[202]

According to Wend, on the night of the shooting, Adamson was angry and demanded that she have sex with him.[203] Both were high on methamphetamine, and they began to argue.[204] When she went to her room, Adamson followed, his gun pointed at her.[205] He said he was going to kill her.[206] Although she had heard this before, Wend claimed that the look in Adamson's eyes that night made her believe he was serious this time.[207] So when Adamson pointed his gun at Wend's dog after it began to growl, Wend took the opportunity to shoot him with her own gun.[208]

B. Trial Proceedings

At her trial for first-degree murder, Wend maintained that she killed Adamson in self-defense.[209] During trial, videos of both interrogations of Wend were introduced into evidence.[210] Those videos included the statements noted above, as well as her statement to the police that "I have not been telling you the truth," which accompanied her January 17 admission that she did in fact shoot Adamson.[211] The prosecutor repeatedly used

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* Adamson's autopsy revealed a methamphetamine level three times the lethal range. He also had an amphetamine level in the lethal range, "thirty plus times" any therapeutic level, and alcohol in his system equivalent to one or two drinks. The coroner determined that Adamson's drug combination would have been lethal to anyone other than a chronic abuser. *Id.* at 4–5. Methamphetamine at this high dosage and chronic use can cause "psychosis, paranoia, visual and auditory hallucinations, aggression, extraordinary strength, and a complete lack of judgment." *Id.* at 5.
205. *Id.* at 3.
206. *Id.* Wend's report of Adamson's verbal abuse is chilling. She claimed that he called her "a piece of shit [who] deserved to die . . . deserved to be eliminated" and "didn't have any family who would give a fuck anyway." *Id.* (second alteration in original).
207. *Id.*
208. Wend v. People, 235 P.3d 1089, 1091 (Colo. 2010).
209. *Id.* at 1092.
210. *Id.* The prosecutor played segments of the video for the jury in conjunction with questioning the government's witness, Detective Graham, who interrogated Wend in both interviews. *Id.*
211. Respondent's Answer Brief, *supra* note 3, at 42. The prosecutor misquoted Wend in his closing slightly, saying that she said, "I haven't been honest with you from the beginning." *Wend*, 235 P.3d at 1092.

the word "lie"—particularly in his opening and closing—when referencing Wend's interviews.[212] For example, during his opening statement, the prosecutor referred to the video interrogations and told the jury, "you'll hear lie after lie after lie after lie from Jennifer Wend about what happened to Michael Adamson" and "for about the first half of [the interrogation video,] same lies, same lies."[213] At trial, the prosecutor played segments of the videotaped interviews while Detective Derek Graham, who conducted both of Wend's interviews, was on the stand.[214] After playing various segments, the prosecutor asked Graham a number of questions, including Graham's sense of the veracity of Wend's comments.[215] Graham stated that Wend was "lying" at different stages of the interview.[216] And, in closing, the prosecutor began by saying:

> "I shot him." "I haven't been honest with you from the beginning." "I'm the one who shot him." January the 17th, 2003, the defendant tells that to Detective Derek Graham after weeks of games, calling back and forth, of lies and lies and lies and lies. You could hardly keep count of all the lies told in two interviews . . . .[217]

The prosecutor continued with more discussion of what the Colorado Supreme Court described as Wend's "misleading"[218]

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212. *Wend*, 235 P.3d at 1092. The defense raised prosecutorial misconduct issues aside from opening and closing, including: asking Anderson and Van Tassel whether Wend lied on specific occasions, goading a detective into testifying about Wend's truthfulness on specific occasions, arguing in closing that Wend would sell drugs if she were released, and divulging personal opinions about the defendant and her defense counsel. Respondent's Answer Brief, *supra* note 3, at 11–12.

213. *Wend*, 235 P.3d at 1092 (alteration in original).

214. *Id.* at 1092 n.1.

215. *Id.* Notably, the prosecutor did not use the word "lie" in his exchanges with Graham. Instead, he asked if Wend was truthful. *Id.* This can be just as improper as using the word "lie" under a totality of the circumstances review. United States v. Thomas, 246 F.3d 438, 439 n.1 (5th Cir. 2001) (finding that the prosecutor's statement that the defense witness was not telling the truth was improper). Yet, because the Colorado Supreme Court thinks that using the word "lie" is always improper, it is odd that the opinion did not comment on the difference in form.

216. *Wend*, 235 P.3d at 1092 n.1.

217. *Id.* at 1092–93.

218. *Id.* at 1093. The *Wend* opinion, of course, never calls Wend's statements lies. But an awkward dichotomy of form does emerge in the court's opinion. While vigorously disapproving of the prosecutor's use of the word "lie" to describe Wend's actions, the opinion refers to the same actions by Wend as "misleading" or "actively misleading." *Id.* at 1092 n.1, 1093. For now, ponder the substantive

comments. In the middle of his closing argument, the prosecutor gave a particularly inelegant narrative, saying, "[t]he people propose that the defendant was at least waist deep in denial, if not over her head. . . . Oh, and [Anderson] did it. Yeah, yeah, [Anderson]. *The fucking liar*."[219] The phrase "the fucking liar" was the prosecutor's attempt to quote the pinnacle of Wend's second interview, where she called Anderson "a fuckin' liar" after learning that Anderson had confessed to his role and told the police that Wend killed Adamson.[220] The court was quite clearly displeased with the prosecutor's restatement of that phrase.[221] Defense counsel, however, did not object to the prosecutor's use of the phrase.[222]

Notably, at trial, Wend's counsel also acknowledged that Wend lied in her police interviews.[223] In opening statements, defense counsel referred to the interrogation interviews and said, "[Wend] does lie to people about what happened to Michael Adamson. She lies because she's afraid of what's going to happen to her if she tells the truth."[224] In closing, defense counsel again repeatedly admitted that Wend "lied," first saying, "[y]es, Jennifer Wend lied. . . . She lied to a number of people. She lied about what happened . . . ."[225] Defense counsel continued: "And Jennifer Wend told a lie, and it takes on a life of its own. That lie had been told. . . . [S]he continued with it, and continued with it, and continued with it until there was no place left to go but to the truth."[226] He also later said: "[Wend] didn't trust the police, that's why she lied, ladies and gentlemen. She didn't lie because she didn't act in self-defense, she lied because she figured whatever happened, it was gonna be the same result."[227] Given defense counsel's own statements, it should come as no surprise that he never objected to the prosecutor's use of the word "lie" during trial.[228] The presiding judge did not find anything wrong with both sides' use of the

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distinction between lying to someone and actively misleading someone. The issue is discussed *infra* Part VI.A.1.

219. *Wend*, 235 P.3d at 1093 (emphasis added by the court).

220. *See id.*

221. *See id.*

222. *Id.*

223. *Id.* at 1092.

224. *Id.* (alteration in original).

225. Respondent's Answer Brief, *supra* note 3, at 65 (second alteration in original).

226. *Id.*

227. *Id.*

228. *Wend*, 235 P.3d at 1093.

word "lie" either; he did not request that either attorney change the way Wend's video statements were characterized.[229]

C. The Colorado Supreme Court's Analysis

In *Wend*, the Colorado Supreme Court cited to, and claimed to be using, the traditional prosecutorial misconduct framework.[230] The court said that the first step in the two-step analysis for prosecutorial misconduct is determining "whether the prosecutor's questionable conduct was improper based on the totality of the circumstances."[231] But the court never actually applied the traditional totality of the circumstances framework.[232] Instead, the court held that, in Colorado, "prosecutorial use of the word 'lie' and the various forms of 'lie' are categorically improper."[233] The categorical prohibition is based on two assumptions. First, that "[t]he word 'lie' is such a strong expression that it necessarily reflects the personal opinion of the speaker."[234] Second, when prosecutors, as state representatives, use the word "lie," this has the dangerous potential of inflaming the passions of the jury and distracting it from determining guilt or innocence on evidence properly presented at trial.[235] Of course, because the court determined that a prosecutor's use of the word "lie" is categorically improper, the court did not reference or analyze context.[236]

Next, the court considered whether the prosecutor's improper conduct warranted reversal according to the proper standard of review—in this case plain error because defense counsel did not object at trial.[237] The court noted that

229. *See id.* at 1092–93. The court never expressly said that the trial judge did not object to the use of the word "lie," but the word's pervasive presence demonstrates that the judge did not tell either counsel to stop using the word. *See id.*

230. *See id.* at 1096.

231. *Id.*

232. *See id.*

233. *Id.*

234. *Id.* (alteration in original) (quoting Domingo-Gomez v. People, 125 P.3d 1043, 1050 (Colo. 2005)).

235. *Id.*

236. *Id.* The court disposes of the first step of its analysis in three brief paragraphs. *Id.* This is reasonable in light of its categorical rule. On the other hand, the traditional prosecutorial misconduct framework and its incorporation of context (which the court stated it was applying) would make the conclusory section wholly inadequate.

237. *Id.* at 1096–97. No contemporaneous objections to the prosecutor's opening and closing statements were made, resulting in plain error review. However, the

traditional plain error review requires maximum deference to the trial court and that reversal occurs only where errors seriously affect the fairness and integrity of the trial.[238] The court also stated that a fair trial is determined by "the particular facts and context of the given case, because only through an examination of the totality of the circumstances can the appellate court deduce whether error affected the fundamental fairness of the trial."[239] In accounting for context, the court considered the cumulative effect of the prosecutor's statements, the exact language used, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt to be probative factors.[240]

The court then held that plain error review warranted reversal in the case because the repeated use of the word "lie" was improper and the context surrounding the statements failed to substantially mitigate their prejudicial impact.[241] The court found that the context actually aggravated the use of the word "lie" because Wend's self-defense argument depended largely on the defendant's credibility.[242] The court reasoned that the context imputed a "heightened degree of prejudice because the prosecution, with its inflammatory and extraneous language, improperly led the jury to distrust Wend."[243]

The court in *Wend* compared and contrasted the case's particular contextual dynamics to previous cases that upheld similar prosecutorial conduct under plain error review.[244] For example, *Wend* noted that *Domingo-Gomez* was not reversed on plain error review even though that prosecutor called the defendant a "liar" in closing.[245] *Wend* distinguished *Domingo-Gomez*, noting that in *Domingo-Gomez*, once the judge interjected *sua sponte* to disapprove of the prosecutor's use of the word "lie," the prosecutor adjusted his wording to say that

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defendant did object to some of the prosecutor's direct examination questions that tended to elicit witnesses' opinions of Wend's truthfulness. The court declined to address whether or not these objections preserved review for other statements regarding Wend's propensity to "lie," focusing instead on the prosecutor's opening and closing statements. *Id.* at 1099 n.6.

238. *Id.* at 1097.
239. *Id.* at 1098.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

the defendant "did not tell you the truth."[246] Accordingly, the judge's objection and prosecutor's correction made reversal unwarranted.[247] The *Wend* court therefore felt *Domingo-Gomez*'s situation was similar only because in both cases the defense failed to object at trial.[248] Yet, immediately after explaining that *Domingo-Gomez* was not factually similar, the *Wend* court found that the absence of *Domingo-Gomez*'s mitigating factors counted against the prosecutor in *Wend*.[249] Specifically, the court suggested that because he did not use "weaker" euphemistic words such as "untruthful" alongside the "stronger" word of "lie," the prosecutor's use of the word "lie" in *Wend* was actually worse.[250]

After disposing of *Domingo-Gomez*, the court favorably compared *Wend* to *Wilson v. People*, a sexual assault case that had warranted plain error reversal.[251] In *Wilson*, a prosecutor stated that the defendant and his wife had lied on the stand.[252] No contemporaneous objection occurred, but because the sexual assault charges depended primarily on conflicting testimony between the victim, the defendant, and the defendant's wife, the court held that plain error warranted reversal due to the inherently critical role credibility plays in a sexual assault defense.[253] The *Wend* court concluded that, as in *Wilson*, credibility was a critical issue in the case.[254] Thus, the court held that the pervasive use of the word "lie" denied Wend a fair trial.[255]

The court's plain error, totality of the circumstances review therefore weighed, on the one hand, the following aggravating factors: (1) the cumulative nature of the word "lie"; (2) the absence of clear evidence undermining Wend's self-defense theory; (3) the court's failure to *sua sponte* correct the prosecutor; (4) the absence of weaker language alongside the word "lie"; and (5) the relevance of the defendant's credibility to

246. *Id.*
247. *Id.*
248. *Id.*
249. *See id.* at 1098–99.
250. *Id.* As a factual matter, the court is incorrect to say that the prosecutor did not use weaker comments. *See id.* at 1098. The prosecutor did use euphemisms like "untruthful" throughout trial. *See, e.g.*, Respondent's Answer Brief, *supra* note 3, at 67.
251. *Wend*, 235 P.3d at 1099.
252. Wilson v. People, 743 P.2d 415, 417 (Colo. 1987).
253. *Id.* at 420–21.
254. *Wend*, 235 P.3d at 1099.
255. *Id.*

her theory of the case.[256] On the other hand, the court did not acknowledge the existence of a single potentially mitigating factor.[257]

VI. WHERE THE COLORADO SUPREME COURT WENT WRONG IN *WEND*

The final Part of this Note makes two broad arguments. First, the Colorado Supreme Court's categorical rule prohibiting prosecutors from using the word "lie" is premised on dubious assumptions and is ultimately a rule of form more than substance. Second, the court's plain error review lacks the necessary completeness to be a genuinely impartial accounting of whether Wend was truly denied a fair trial.[258] Therefore, Section A of this Part begins with an argument against *Wend*'s categorical rule prohibiting the word "lie." Section B then critiques *Wend*'s failure to confront relevant, contextually mitigating factors that weighed against reversal in its plain error review. The failure to address these factors is particularly regrettable considering the court's elimination of context from the first step of its prosecutorial misconduct framework.

A. Calling the Word "Lie" Categorically Improper Is Unnecessary and Elevates Form over Substance

As an initial matter, the court's opinion is structurally disappointing and confusing in the way it set up the first part of its analysis. The court claimed to apply the first step of the traditional two-part analysis for prosecutorial misconduct when it said it must determine "whether the prosecutor's questionable conduct was improper based on the totality of the

256. *See id.* at 1097–99.

257. *See id.*

258. While this Note questions the forcefulness, wisdom, and thoroughness of *Wend*, it is in no way intended to suggest either that the prosecutor's constant use of the word "lie" was clearly proper or that the prosecutor's conduct in *Wend* clearly did not warrant reversal. Pre-*Wend* prosecutorial misconduct jurisprudence, specifically as it relates to the use of the word "lie," admittedly makes the court's finding of impropriety reasonable, even if the court's categorical rule is unnecessary. Likewise, although the finding of plain error is quite questionable, it is also true that aspects of this case make the court's decision justifiable. This was a challenging case; given *Wend*'s unique facts, whatever decision the court made, it was going to subject itself to scrutiny from the losing side.

circumstances."[259] But the court never engaged in a totality of the circumstances review. Instead, it created (or, at minimum, further expanded)[260] a contradictory rule when it held that a prosecutor's use of the word "lie" is categorically improper.[261] The court therefore held that it is categorically improper to use the word "lie" without addressing the fact that a categorical rule contradicts the totality of the circumstances framework that the court claimed to be using.[262] This rule necessarily implies that the traditional framework does not apply to all forms of prosecutorial misconduct. Implicitly avoiding a longstanding framework as applied to one word creates confusion. But *Wend*'s opinion went one step further. It implicitly avoided a longstanding framework as applied to one word while it claimed to be using the very same framework that it avoided.

Ultimately, the implicit disregard for the traditional prosecutorial misconduct framework is a mere collateral concern to the bigger question of the categorical rule's wisdom. *Wend*'s categorical rule is unwise for three reasons. First, the two justifications that the court gave do not warrant the categorical rule. Second, the categorical rule elevates form over substance because it forecloses any inquiry into context, which

259. *Wend*, 235 P.3d at 1096.

260. *Wend* asserts that *Crider v. People*, 186 P.3d 39, 41–42 (Colo. 2008), and *Domingo-Gomez v. People*, 125 P.3d 1043, 1050–51 (Colo. 2005), explicitly held that a prosecutor's use of the word "lie" was categorically improper. *Wend*, 235 P.3d at 1096. Those cases did no such thing. *Domingo-Gomez*, although clearly distrustful of prosecutors' use of the word "lie," neither expressly nor categorically prohibited its use. *See Domingo-Gomez*, 125 P.3d at 1048–51 (finding the use of the word "lie" to describe *witness testimony* improper *because* it was an improper statement of personal opinion). In fact, *Crider* supports the idea that *Domingo-Gomez* did not make an express rule by citing to *Domingo-Gomez*'s discussion about the impropriety of using the word "lie" to describe *witness testimony* with a "*see*" citation, thereby acknowledging an inferential rather than express rule. *Crider*, 186 P.3d at 41. And while *Crider* does make an express rule about the use of the word "lie," the rule is both broader and narrower in scope than *Wend*'s categorical rule. *Compare id.* at 44 ("[T]here should be no question that it is improper in this jurisdiction for an *attorney* to characterize a *witness's testimony or his character for truthfulness* with any form of the word 'lie.' ") (emphasis added), *with Wend*, 235 P.3d at 1096 ("*[P]rosecutorial* use of the word 'lie' and the various forms of 'lie' are *categorically* improper.") (emphasis added). The distinctions matter in *Wend* because the statements by the prosecutor did not refer in any way to witness testimony, which is what *Crider* and *Domingo-Gomez* contemplate. Thus, neither the *Crider* rule nor the *Domingo-Gomez* rule squarely covers the factual scenario confronted in *Wend*, which might explain its more expansive holding.

261. *Wend*, 235 P.3d at 1096.

262. *Id.*

is essential to an accurate determination of whether a statement is improper. The inquiry also enables for more flexible rulings when it serves the interest of justice. Third, the court's rule is unnecessary because the traditional rule adequately ensures that defendants receive fair trials. This Section will discuss these three topics in turn.

1. The Categorical Rule's Justifications Are Inadequate

Wend's categorical rule is founded upon two justifications.[263] First, "[t]he word 'lie' is such a strong expression that it necessarily reflects the personal opinion of the speaker."[264] Second, "the word 'lie' is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions against the witness."[265] These are not compelling justifications for a categorical prohibition against prosecutors' use of the word "lie."

The first justification—that the word "lie" necessarily reflects the personal opinion of the speaker—is questionable for several reasons. First, it misconstrues the complex dynamic between facts and opinions.[266] " '[F]acts' and 'opinions' are regions in a continuum, and they differ in degree rather than kind . . . ."[267] This continuum concept—where some statements are almost wholly fact, other statements are almost wholly opinion, and yet other statements are in an ethereal position of seemingly being neither wholly fact nor opinion—is an observation of linguistics and logic applicable to matters of all dialogue, including a prosecutor's use of the word "lie." Accordingly, the claim that a prosecutor's use of the word "lie" necessarily imputes a prosecutor's opinion into a case ignores that, in reality, a prosecutor's use of the word "lie" can be a statement of fact in the right context.[268]

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263. *See id.*

264. *Id.* (alteration in original) (quoting *Domingo-Gomez*, 125 P.3d at 1050).

265. *Id.* (quoting *Crider*, 186 P.3d at 41).

266. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 605 (6th ed. 2008).

267. *Id.* Mueller's and Kirkpatrick's point is relevant to *Wend*'s theory that the use of the word "lie" is necessarily an opinion. It should be noted, however, that they make their observation in the context of introducing another form of trial dialogue: opinion and expert testimony. *Id.* at 605–06.

268. *See, e.g.*, United States v. Gartmon, 146 F.3d 1015, 1023–25 (D.C. Cir. 1998) (finding that the prosecutor calling the defendant a liar was not improper

Where a prosecutor nakedly asserts to a jury that a witness's trial testimony was a "lie," with nothing to substantiate the statement, the prosecutor's words seem accurately classified as a statement tending toward opinion.[269] But *Wend*'s circumstances make it a unique, and therefore informative, case. The prosecutor's statements were almost certainly factual observations. Recall that the prosecutor classified comments Wend made during her interviews as lies in the following context: (1) Wend admitted in her second interview that she had been lying;[270] (2) the statements giving rise to Wend's admission to lying were captured on video and introduced into evidence;[271] (3) at trial, Wend's lawyer conceded multiple times during opening and closing that Wend lied;[272] and (4) the trial judge, through his silence, apparently also thought that the fact that Wend lied was beyond dispute.[273]

The most likely reason that neither defense counsel nor the judge objected to the prosecutor's classification of Wend's interrogation statements as lies is that the only reasonable explanation for her various incompatible comments is that Wend did lie. Indeed, aside from the possibility of Wend having lied, the only conceivable explanation for the discrepancies among her statements is that Wend was mentally infirm during her interviews. Consider just one example of the wholly contradictory statements that Wend made. She told the police that (1) Adamson was alive, (2) Anderson killed Adamson, and (3) she killed Adamson in self-defense.[274] Each one of those statements is logically irreconcilable with the other two. They can never exist together, and no rational individual could believe each one to be true at the same time. Moreover, the mental infirmity possibility, while very unlikely to begin with, is almost wholly implausible considering Wend was not found too incompetent to stand trial or insane.[275] Realistically, Wend's counsel was probably correct when he chalked Wend's

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because the word was an accurate description of the conduct alleged and not a statement of opinion).

269. *See, e.g.*, Wilson v. People, 743 P.2d 415, 420 (Colo. 1987).

270. *Wend*, 235 P.3d at 1092–93.

271. *Id.* at 1092.

272. *Id.*

273. *See id.* at 1098–99.

274. *Id.* at 1092; Respondent's Answer Brief, *supra* note 3, at 9.

275. *See Wend*, 235 P.3d at 1092 (reviewing Wend's trial, meaning she was not deemed incompetent to stand trial).

lies up to Wend being scared of the consequences of the police finding out about Adamson's death.[276]

Some of the Colorado Supreme Court's very own prose suggests that Wend's statements were lies. The court certainly never called Wend's statements "lies," even though *Wend*'s context suggests that the prosecutor's use of the word "lie" was a correct observation of fact and not a statement of opinion. Yet, the court described Wend's statements in a disconcerting manner. While it vigorously disapproved of the prosecutor's use of the word "lie" to describe Wend's actions, the opinion refers to the same actions by Wend as "misleading" or "actively misleading."[277] There is no substantive distinction between someone who "lies" and someone who "misleads"; those two words are synonyms.[278] The court's prose therefore puts the *Wend* opinion in an absurd posture because it condemned as improper the prosecutor's description of Wend's statements while describing Wend's statements in an essentially identical manner.

Most importantly, the logical implications of *Wend*'s categorical rule are troubling when viewed in light of the court's first justification for it. If some of Wend's statements were in fact lies, or at least in *some* cases whether someone lied is a knowable fact, then the uncomfortable reality is that the court's categorical rule makes it improper for a prosecutor to refer to probative facts properly admitted into evidence and accepted by all parties involved.

Alternatively, even assuming that prosecutors do necessarily express their personal opinion when they use the word "lie," this still does not justify the categorical rule's sweeping nature. Prosecutors do receive a reasonable (and linguistically vital) degree of flexibility in espousing personal opinions rooted in evidence.[279] During argument, prosecutors may discuss trial evidence and reasonable inferences gleaned from that evidence.[280] When a prosecutor puts forth an inference drawn from trial evidence, she is usually expressing her personal opinion. In *Wend*, the prosecutor's use of the word "lie" in opening, in closing, and even during the direct

276. *Id.*
277. *Id.* at 1092 n.1, 1093.
278. *E.g.*, ROGET'S INTERNATIONAL THESAURUS 275 (Barbara Ann Kipfer ed., 6th ed. 2001).
279. *See* People v. Rodriguez, 794 P.2d 965, 975 (Colo. 1990).
280. *Id.*

examination of Detective Graham were, if not statements of fact, at least reasonable inferences gleaned from evidence properly admitted in trial.[281] After all, both interviews were admitted at trial, so the jury saw Wend's inconsistent statements and also saw her admit to lying at the end of the second interview.[282]

At a minimum, surely there are *some* cases for which use of the word "lie" would be considered a reasonable inference from trial evidence.[283] Accordingly, ruling that a prosecutor's use of one word is categorically improper on the premise that it invokes the prosecutor's opinion outruns the justification behind it. A prosecutor does not always invoke her opinion when she says the word "lie," and it is not categorically improper for a prosecutor's opinion to be put to the jury.

The court's second justification for its new categorical rule is that, when prosecutors use the word "lie," the word has the dangerous potential of inflaming the passions of the jury and distracting it from determining guilt or innocence on the evidence properly presented at trial.[284] This is another tenuous justification for a categorical rule. Sometimes evidence properly admitted at trial is the very basis for the prosecutor's claim that a defendant or witness lied.[285] In such instances, with *Wend* being an example, the use of the word "lie" does not distract the jury from evidence properly admitted at trial but instead points them toward it. Moreover, inflaming jurors' passions can certainly be acceptable if it is the result of referring to evidence at trial or making reasonable inferences from that evidence.[286]

What is legally prohibited is inflaming the passions of jurors through statements bearing no relation to evidence admitted at trial or making arguments related to evidence but "calculated to appeal to the prejudices of the jury," both of which may lead a jury to base its decision on factors outside the

281. *See Wend*, 235 P.3d at 1091–93.

282. *Id.* at 1092 n.1.

283. *See, e.g.*, United States v. Beaman, 361 F.3d 1061, 1065–66 (8th Cir. 2004) (finding that it was not improper for the prosecutor to state that a witness lied to police out of fear because it was a reasonable inference from trial evidence).

284. *Wend*, 235 P.3d at 1096.

285. *See id.*

286. *Compare* People v. Rodriguez, 794 P.2d 965, 974–75 (Colo. 1990), *with* Domingo-Gomez v. People, 125 P.3d 1043, 1049 (Colo. 2005) (quoting COLO. R. PROF'L CONDUCT 3.4(e)).

evidence presented at trial.[287] Accordingly, even granting that a prosecutor's use of the word "lie" has the dangerous potential of inflaming the passions of the jury, the court's rule overextends itself beyond its justification because sometimes the word "lie" can be used to directly address evidence and is in no way calculated to inflame the jurors' passions. The word "lie" should be permitted in those circumstances where its use directs the jurors toward the evidence and does not appear to have been used to inflame the jurors' passions but instead to properly describe a piece of evidence. Therefore, neither of the court's justifications warrants the court's categorical rule.

2. The Categorical Rule Elevates Form over Substance by Foreclosing Any Contextual Inquiry

The previous Section demonstrated that the court's categorical rule is not warranted by either of the court's justifications for it. This Section will show that because context can shape the ultimate meaning of a statement, which the Colorado Supreme Court has recognized in other cases,[288] *Wend*'s categorical rule elevates form over substance by foreclosing any inquiry into context. The court's categorical rule will inevitably lead to cases where conduct is deemed improper due to its form, while in substance the conduct is proper. To the extent that this is true, the court does the judicial system a disservice by using a specific word as a proxy for a statement's categorical substantive impropriety.

Even though the court ultimately concluded that the prosecutor's repeated use of the word "lie" was improper in light of the defendant's self-defense argument, the court should have grappled with the contextual factors relevant to its impropriety and left itself the flexibility to decide future cases that involve the use of the word "lie" differently. After all, other reasonable first-step conclusions can apply to *Wend* or cases similar to it. For example, *Wend*'s facts suggest that the court could have concluded, as the court in *United States v. Gartmon* did, that the prosecutor's use of the word "lie" in this context was not improper because the prosecutor did not assert an

287. *Domingo-Gomez*, 125 P.3d at 1049 (emphasis removed) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 3-5.8(c) (3d ed. 1993)).

288. *See, e.g.*, *id.* at 1050 ("Factors to consider when determining the propriety of statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction.").

opinion but correctly described the conduct in question.[289] *Wend*'s facts also lead to the conclusion, found in *United States v. Moreland*, that calling a defendant a liar is not improper where it is a reasonable inference from the evidence.[290] As a final option, the court could have determined, like in *United States v. Virgen-Moreno*, that the prosecutor's use of the word "lie" was not improper because the defendant's own conduct was what invited the prosecutor to use the word.[291] Justice Oliver Wendell Holmes once noted that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[292] Regardless of its rule, Colorado's Supreme Court cannot escape the reality that the ultimate meaning—and impropriety—of the word "lie" cannot be summarily reduced to the statement's content.

3. The Traditional Prosecutorial Misconduct Framework Is Adequate

If the categorical rule in *Wend* was in fact correct, then one of two disturbing implications would logically follow. Because the new rule discards the first-step analysis of the traditional rule by not looking into context, it suggests that either the use of the word "lie" is unique from all other potential forms of misconduct or the first step of the traditional prosecutorial misconduct test is generally insufficient. Notably, in *Wend*, the court never tried to distinguish the word "lie" from other forms of improper conduct, and understandably so.[293] It is hard to fashion a compelling argument that the word "lie" is somehow distinct from all other verbal forms of potential misconduct.[294]

289. *See* United States v. Gartmon, 146 F.3d 1015, 1023–24 (D.C. Cir. 1998) (finding that calling the defendant a liar and abusive toward women was not improper because the words were not expressions of opinion but rather correct descriptions of the alleged conduct).

290. *See* United States v. Moreland, 622 F.3d 1147, 1162 (9th Cir. 2010).

291. *See* United States v. Virgen-Moreno, 265 F.3d 276, 292 (5th Cir. 2001) (finding that the prosecutor's rebuttal comments referring to the defendant's failure to call witnesses were not improper because they were made in response to the defense's argument).

292. Towne v. Eisner, 245 U.S. 418, 425 (1918).

293. *See* Wend v. People, 235 P.3d 1089, 1096 (Colo. 2010).

294. Maybe the reason the court never acknowledged that it was departing from its traditional misconduct analysis was that it could not form a cogent

However, devising that argument is no easier than arguing that the first step of the traditional framework is incapable of adequately protecting defendants from prosecutorial misconduct. For example, if the traditional framework's contextual first step is truly inadequate, that would suggest that a prosecutor's misstatement of fact is always improper. An outcome of that sort would render the term "improper" meaningless as a legal term of art in light of the unrehearsed nature of a trial setting and the imperfections of human memory and dialogue.

Regardless of whether the court believes that the word "lie" is different from all other forms of misconduct or instead believes that the traditional framework is insufficient, the court is incorrect. The new rule does not protect defendants from improper conduct that they were not already protected from. Indeed, anything deemed categorically improper can also be found improper under a totality of the circumstances review. The traditional rule protects defendants from the denial of a fair trial and was capable of doing so in *Wend*.[295]

B. The Court's Plain Error Review Is Inadequate

Probably the most disappointing aspect of the *Wend* decision is its plain error analysis. Although the court engaged in a contextual inquiry in its plain error review, it evaded tough issues that the case presented and that the court should have confronted. This Section argues that the court's plain error review thoroughly discussed only contextual factors in favor of reversal, distorted the impact of certain mitigating factors, and wholly failed to address other factors that it had a duty to confront. Subsection 1 begins with a review of the contextual issues that the court did address. Then, Subsection 2 looks at those contextual factors that the court had an obligation to address but did not. In light of the court's decision to forgo the traditional, context-driven first-step analysis in *Wend*, the inadequacy of the court's plain error review is disappointing because it foreclosed an appropriate contextual inquiry in the case. The court's plain error review also raises

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explanation for why this one form of misconduct is distinct enough to justify its own rule.

295. *See, e.g.*, Wilson v. People, 743 P.2d 415 (Colo. 1987). The Colorado Supreme Court found *Wilson* to be the most analogous case to *Wend*. *Wilson* was reversed under the traditional test. *See Wend*, 235 P.3d at 1099.

concerns about whether the court was completely focused on the question of whether Wend was actually denied a fair trial.

1. *Wend*'s Context According to the Court

To some extent, *Wend*'s plain error review did look to both content and context.[296] In holding that the repeated use of the word "lie" merited reversal, the court found that the context actually aggravated the word's use.[297] However, this is because the court only addressed contextual factors that arguably worked against the prosecution.[298] In its analysis, the court weighed the following factors: (1) the cumulative nature of the word "lie"; (2) the centrality of the defendant's credibility to her theory of the case; (3) the absence of clear evidence against her self-defense theory; (4) the trial court's failure to *sua sponte* correct the prosecutor; and (5) the prosecutor's failure to use weaker language alongside the word "lie."[299] The court found every one of these factors to be aggravating.[300]

While the cumulative use of the word "lie" and the fact that credibility was critical to Wend's self-defense theory of the case can reasonably be viewed as contextually aggravating circumstances,[301] the court's analysis of the other contextual factors is dubious. For example, the lack of a *sua sponte* objection from the trial court is arguably evidence that the prosecutor's use of the word "lie" did not come across as inflammatory. Indeed, note the court's incongruent tension in concepts. It first asserted that plain error review imposes deference to the trial court because it is "in the best position to assess [the] potential prejudicial impact" of a statement.[302] Yet, the court then immediately turned around and concluded that the trial court's lack of an objection supported the conviction's reversal.[303]

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296. *See Wend*, 235 P.3d at 1098.
297. *Id.*
298. *See id.* at 1097–99.
299. *See id.*
300. *Id.*
301. *See, e.g.*, Wilson v. People, 743 P.2d 415, 420–21 (Colo. 1987) (finding that the use of the word "lie" was aggravated by the fact that credibility was critical to the case, given that the charge was sexual assault); *but see* United States v. Donato, 99 F.3d 426, 432 (D.C. Cir. 1996) (finding that the prosecutor's use of the word "liar" was not improper partly because the case turned on the defendant's credibility).
302. *Wend*, 235 P.3d at 1096.
303. *Id.* at 1098.

Additionally, the court's finding that a prosecutor's isolated use of the word "lie" is actually *worse* than a prosecutor's use of the word "lie" alongside a euphemism, such as "did not tell you the truth,"[304] is perplexing and disappointing. Using euphemisms in conjunction with the word "lie" simply reinforces the prejudicial impact of the substantive meaning of the word "lie." Moreover, intended or not, this particular argument gives the impression that the court holds a considerable lack of faith in the people of Colorado. The state's jurors understand that saying that someone was "dishonest," was "untruthful," or "did not tell you the truth" is substantively equivalent to saying that someone "lied."

The entire analysis of euphemisms is another illustration of the Colorado Supreme Court's elevation of form over substance in *Wend*. Although in this instance the court's focus on form benefits the defendant, the court's reasoning should worry future defendants as well. *Wend*'s bright line between the word "lie" and similar words like "untrustworthy" portends by negative inference that future courts are more likely to give disproportionate weight to the fact that a prosecutor merely used a euphemism. Calling a defendant "untrustworthy" certainly can be just as improper as calling him a "liar,"[305] whether or not the *Wend* opinion suggests otherwise.

2. The Court's Contextual Omissions

In the court's effort to demonstrate how context aggravated the prosecutor's conduct, the court did not acknowledge a single mitigating factor in its plain error review.[306] In one instance, the court did not ignore but rather turned a critical mitigating factor on its head by neutralizing the defense counsel's use of the word "lie."[307] The court found that while defense counsel's use of the word "lie" only related to the interrogation video, the prosecutor's use of the word "lie" implicitly included Wend's entire self-defense story.[308] It is fair to claim that defense

304. *Id.*

305. *See, e.g.*, United States v. Thomas, 246 F.3d 438, 439 n.1 (5th Cir. 2001) (finding that the prosecutor's declaration to the jury that a defense witness was not telling the truth to be improper).

306. *See Wend*, 235 P.3d at 1097–99.

307. *See id.* at 1098–99.

308. *Id.* at 1099.

counsel's use of the word "lie" related only to the videos.[309] But it is less than clear how the prosecution's use of the word "lie" went beyond describing the same videos.[310] Moreover, by correctly approving of defense counsel's use of the word "lie" because it referred to evidence admitted at trial, the court exposed its one-sided perspective on the matter. Where the prosecutor's use of the word "lie" simply refers to evidence, the impropriety of its use is at least mitigated. But the court never addressed this either.[311] Not surprisingly, the court also did not acknowledge that defense counsel's use of the word suggested that the prosecutor's use of the word "lie" was not a personal opinion but rather a fact accepted by all.[312] Nor did the court confront the idea that defense counsel's willingness to call the defendant a liar demonstrates that the prosecutor's use of the word "lie" was not actually inflammatory.[313]

Given the court's unwillingness to reconcile defense counsel's use of the word "lie" with the court's new categorical rule, it is not surprising that the court never addressed many of the most critical contextual factors bearing on whether the defendant's trial was fundamentally unfair. The court's avoidance is all the more unfortunate because the facts that it did not address were mitigating. Indeed, the court failed to address that Wend made statements on video to police officers that cannot reasonably be regarded as anything but lies and that those statements were admitted into evidence for the jury's consideration.[314] Likewise, the court also failed to address the fact that the defendant herself admitted that her statements to the police were lies and that her admission was captured on video and admitted into evidence for the jury's consideration.[315]

By failing to address the impact of those contextual factors, the court failed to conduct an impartial plain error review. The

309. *See* Respondent's Answer Brief, *supra* note 3, at 64–65. Although, defense counsel did attempt to justify Wend's lies, claiming that she did so only because "she didn't trust the police." *Id.* at 65. This is defense counsel's opinion, not a reflection of the record.

310. *Wend*, 235 P.3d at 1099. The court did give an explanation for why the prosecution's use of the word "lie" implicitly included Wend's self-defense story. It amounted to noting that there was "indiscriminate" and repeated use of the word "lie." *Id.*

311. *See id.* at 1096–99.

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.*

court itself noted that plain error review "maximizes deference" to the trial court, with reversal occurring only where, under a contextual, totality of the circumstances analysis, the defendant was denied her right to a fair trial.[316] Needless to say, Wend's lies and admission to telling them are factors of critical significance to a review of whether the trial was fundamentally fair. To reverse a conviction because a prosecutor referred to a defendant's very own statements captured on video and admitted into evidence, which defense counsel also regularly referred to, is an exceptionally rare outcome. At a minimum, before an appellate court reverses on those peculiar grounds under plain error review, it should confront how the defendant's own conduct and inculpatory statements that served as the basis for the prosecutor's actions impacted the trial's fundamental fairness. In *Wend*, the Colorado Supreme Court simply failed to do that. The court avoided the case's hard issues and abruptly overturned a murder conviction.

CONCLUSION

Wend is a regrettable example of a result-oriented appellate decision. The opinion occasionally defies common sense and generally avoids confronting the tough and important questions that the case presented. The Colorado Supreme Court articulated a categorical rule prohibiting the use of one word by one kind of lawyer. In doing so, it refused to use the traditional legal test that it and other courts nationwide use for all other forms of prosecutorial misconduct without explaining why this one word was different than every other potential form of misconduct. It explained why the word "lie" is improper, yet the explanations do not logically suggest that the word "lie" is always improper. It created a superfluous rule that affords no more protection than the traditional test does. And it elevated form over substance by expressly making context irrelevant in the first step of any prosecutorial misconduct review.

In addition, the opinion's plain error review was incomplete. It only addressed contextual factors that it could classify as aggravating. It never addressed Wend's statements and the reality that they were lies. It never addressed that

316. *Id.* at 1097.

Wend admitted that those statements were in fact lies. And it never addressed that Wend's lies and admission to making them were placed into evidence for the jury to consider. Regardless of whether the final outcome of a reversal of this case was correct, the Colorado Supreme Court ought to have written a more measured and open opinion that better reflected and confronted the unique reality of this fascinating case.