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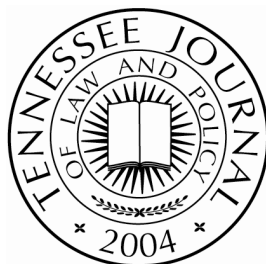
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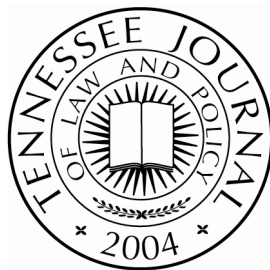
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ARTICLE

**TOWARD MORE EQUAL ACCESS TO JUSTICE:
THE TENNESSEE EXPERIENCE**

“With your help we will make Tennessee a model for the rest of the country.” - Janice Holder, Chief Justice of the Tennessee Supreme Court, announcing access to justice as the court’s number one strategic priority, December 2008.

By: Douglas A. Blaze and R. Brad Morgan***

I. Introduction

Courts, bar associations, and other professional leaders over the past several years have focused renewed attention on the need for greater access to justice for a larger number of Americans. The need has never been greater. Over sixty million Americans—one in five—qualify for federally funded legal assistance.¹ Studies show that those sixty million people by household average of 1.3 to 3.0 legal problems each year.² Many more low-income

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***The authors would like to thank and acknowledge the exceptional and patient work of Christy Woods in researching, editing, and preparing this article.

¹ LEGAL SERVS. CORP., BUDGET REQUEST FISCAL YEAR 2014 1, 8 (2014), *available at* <http://www.lsc.gov/sites/default/files/LSC/fy2014budgetrequest.pdf>.

² LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT STATE OF UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 15 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

people who fail to qualify for legal assistance are still unable to afford a lawyer.

Led by newly created access to justice commissions and task forces at the state and federal level, a number of innovative programs and initiatives have been deployed. Almost uniformly those efforts have focused on four strategies: 1) increased funding for existing legal services programs; 2) increased pro bono work by lawyers; 3) reducing justice system barriers for self-represented litigants; and, 4) leveraging emerging technologies to achieve the other three.³

II. Initial Tennessee Initiative

Tennessee joined the effort in 2008 as a result of a confluence of initiatives of the Tennessee Bar Association (“TBA”) and the Tennessee Supreme Court. Under the leadership of then-TBA president, George “Buck” Lewis, the “4ALL” Campaign made access to justice programming the number one priority.⁴ In December 2008, a unanimous Tennessee Supreme Court announced that access to justice

³ See generally *Resource Center for Access to Justice Initiatives*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (providing an overview of key issues in the ATJ initiative).

⁴ Johana Burkett, *George T. “Buck” Lewis Receives ABA Presidential Citation*, COM. APPEAL, Sept. 4, 2013, available at <http://www.commercialappeal.com/news/local-news/george-t-buck-lewis-receives-aba-presidential>, (The “Justice 4ALL” campaign was a collaborative effort initiated by the TBA to educate attorneys and other legal professionals across the state about the unmet legal needs of disadvantaged Tennesseans, and to encourage those professionals to support and participate in the effort to close the justice gap); see also Tenn. Supreme Court, *About the Tennessee Supreme Court’s Access to Justice Initiative*, <http://www.justiceforalltn.com/content/about> (last visited Apr. 13, 2015) (explaining priority).

was the court's number one priority.⁵ During early 2009, the court held a series of public meetings, each chaired by a justice, in public libraries across the state.⁶ The meetings engaged a broad range of stakeholders, policy makers, and members of the public in discussions of the needed work and creative solutions necessary to close some of the legal needs gap.⁷ As a result, the meetings fostered an improved understanding of the varied and complex nature of unmet legal needs in different areas of Tennessee.⁸

A. The Tennessee Supreme Court Access to Justice Commission

Following the public meetings, in April 2009 the court created the Tennessee Supreme Court Access to Justice Commission governed by simultaneously enacted Supreme Court Rule 50.⁹ Under Rule 50, the Commission was charged with developing an initial strategic plan consistent with the directives of the rule. Specifically, the court assigned the following responsibilities to the Commission:

- Encourage state and local bar associations, access to justice organizations, pro bono programs, judges, and court clerks across the state to promote and to recognize pro bono service by lawyers across the state;
- Encourage state and local bar associations, access to justice organizations, pro bono programs, judges,

⁵ TENN. ACCESS TO JUSTICE COMM'N, 2010 STRATEGIC PLAN 1 (2010), available at http://www.tncourts.gov/sites/default/files/docs/final_atj_commission_plan__appendices_2010.pdf.

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.*

⁹ TENN. SUP. CT. R. 50.

and court clerks across the state to encourage full and limited scope legal representation at reduced fees;

- Encourage the Alternative Dispute Resolution Commission and other groups to provide pro bono and reduced-rate mediation services to self-represented litigants and to litigants who, although represented, have modest means or who are pro bono clients;

- Address existing and proposed laws, rules, procedures, and policies that are barriers to access to justice for low income Tennesseans and to consider the role of community education and increased availability of technology in reducing these barriers;

- Develop and recommend initiatives and systemic changes to reduce barriers to access to justice and to meet the legal needs of 1) people who do not qualify for existing assistance programs but still cannot afford legal assistance, 2) people with disabilities that restrict access to courts and legal services, 3) members of language minorities, and (4) people whose legal needs may not met due to restrictions on representation by legal aid programs;

- Promote increased understanding of the importance of access to justice and of the barriers faced by many Tennesseans in gaining effective access to the civil justice system; and,

- Study and recommend strategies to increase resources and funding for access to justice in civil matters in Tennessee.¹⁰

B. Unique Attributes of the Commission

The approach adopted by the Tennessee Supreme Court was unique in several respects. First, in contrast to most commissions across the county, the Tennessee

¹⁰ *Id.* at § 2.04.

Commission consisted of only ten members.¹¹ Second, the composition of the Commission was exceptionally diverse in terms of background.¹² The court designed the Commission to provide new perspectives and involve new constituencies in the access to justice effort. The appointed commissioners included business leaders, general counsel of large corporations, religious leaders, bar leaders from both large and small firms, and law teachers. Third, the court provided financial support for the work by hiring a legally-trained Access to Justice Coordinator to provide staff support to the work of the Commission.¹³

Though the formal Commission was relatively small in size, the Commission decided at the outset to engage a large number of other people and organizations in the work of the Commission.¹⁴ For example, the initial strategic planning process was organized around eight committees, each chaired by a member of the Commission. The committees' membership, however, included a broad coalition of individuals and organizational representatives involved in access to justice in the broadest sense. Representatives of the legal service providers, bar associations, rural and urban lawyers from various practice settings, court clerks, judges, social service providers, and representatives from public libraries, served on the committees and numerous subcommittees of those committees.¹⁵

¹¹ TENN. ACCESS TO JUSTICE COMM'N (2010), *supra* note 5, at 4.

¹² *Id.* at app. C (roster of inaugural Commission).

¹³ *Id.* at 1.

¹⁴ The commission's approach was encouraged by TENN. SUP. CT. R. 50, § 2.03.

¹⁵ TENN. ACCESS TO JUSTICE COMM'N (2010), *supra* note 11, at 4-5, app. E (roster of all advisory committees).

These attributes, coupled with a receptive and supportive profession, have led to the ongoing success of the Commission and its partners.¹⁶

C. Strategic Planning

Strategic planning efforts have guided the work of the Commission since its inception. The Commission has structured that planning process to require ongoing review of progress on action items adopted as part of the plan and a revised plan and planning process every two years.¹⁷ As a result, the focus and work of the Commission can be divided into three phases to date, each phase defined by the applicable plan adopted in 2010, 2012, and 2014.

III. Phase One – Low Hanging Fruit

A. Planning Process

To develop the initial strategic plan, at the outset the Commission formed eight advisory committees, each headed by a commissioner. The advisory committees were:

- Community and Pro Bono Mediation;
- Court System;
- Education;
- Pro Bono and Attorney Involvement;
- Pro Se;

¹⁶ ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES *Hallmarks of Effective Access to Justice Commissions*, ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES (May 2014), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_effective_atj_commissions_hallmarks.authcheckdam.pdf (Explaining that many of the attributes are recognized as essential to a truly effective commission).

¹⁷ TENN. SUP. CT. R. 50, § 2.01.

- Unmet Legal Needs Alternative Strategies;
- Unmet Legal Needs Disability and Language Barriers; and,
- Resources and Technology.¹⁸

“The Advisory Committees were charged with developing recommendations for the Commission's strategic plan.”¹⁹ Many of the advisory committees formed working groups. Approximately thirty such groups met during the summer and fall of 2009.²⁰ Many of those who participated in the Supreme Court public access to justice hearings, including a significant number of judges and clerks, participated in this phase of the work as well.²¹ In addition, the Commission held two meetings that specifically focused on the resources and technology available in Tennessee to address the civil legal needs gap.²²

The Commission also conducted a survey of court clerks regarding how the civil needs crisis affects their offices.²³ Another survey of legal service providers and others in the access to justice community was conducted prior to the annual statewide Tennessee Alliance for Legal Services Equal Justice Conference in September 2009. This survey asked for a description of the systemic barriers to access to justice in Tennessee.²⁴

“By December 2009, the Advisory Committees submitted their recommendations to the Commission and its staff.”²⁵ Due to the hard work of over one hundred

¹⁸ TENN. ACCESS TO JUSTICE COMM’N (2010), *supra* note 15, at 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at app. H.

²⁴ *Id.*

²⁵ *Id.*

advisory committee members, over seventy substantive recommendations were submitted for the Commission's review.²⁶ Some of the recommendations from the advisory committees were acted upon by the Commission and the Supreme Court, before the preparation of the final strategic plan.²⁷ Most notably, the Commission recommended that the court adopt a pro bono reporting rule and the court adopted a voluntary reporting rule in November 2009.²⁸ The Commission also recommended, with support from two different advisory committees, that the court adopt a new rule to create an emeritus licensure status to allow attorneys to provide pro bono legal services in Tennessee through an established not-for-profit bar association, pro bono program, or legal services program.²⁹

“The Commission held a strategic planning retreat in January 2010.”³⁰ The Commission worked to distill the over seventy substantive recommendations from its Advisory Committees into a more streamlined series of recommendations to the Supreme Court and an outline for future Commission activities.³¹

B. 2010 Strategic Plan

The final plan was submitted to the Court in April 2010 and released to the public in June 2010.³² The plan outlined four overarching goals:

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 5-6.

³⁰ *Id.* at 6.

³¹ *Id.*

³² TENN. ACCESS TO JUSTICE COMM’N, 2012 STRATEGIC PLAN app. D (2012), available at http://www.tsc.state.tn.us/sites/default/files/docs/final_atjc_2012_strategic_plan.pdf.

1. To involve more lawyers and law students in meeting legal needs so that the public is better served;
2. To provide greater educational opportunities and resources for policymakers, self-represented litigants, the community, lawyers, court personnel, and others;
3. To make the justice system more user-friendly; and,
4. To remove barriers to access to justice, including but not limited to disability, language, literacy, and geography.³³

For each goal, the Commission outlined specific objectives and actions to be taken over the two-year period governed by the plan.³⁴ For example, to increase pro bono efforts, the plan called for the Supreme Court to convene a pro bono summit of all the stakeholders to discuss and develop strategies to achieve that goal.³⁵ The plan also called for a comprehensive education campaign directed at judges, lawyers, and clerks, to help foster more user-friendly courts.³⁶ To accomplish the tasks and achieve the goals of the ambitious plan, the Commission reorganized its committee structure around the stated priorities.³⁷

³³ TENN. ST. CTS., *Access to Justice*, <http://tncourts.gov/programs/access-justice> (last visited Feb. 12, 2015). (All information regarding Tennessee Access to Justice was taken directly from TNCOURTS.gov.)

³⁴ TENN. ACCESS TO JUSTICE COMM'N (2012), *supra* note 32, at app. E.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 5 (the committees constituted to carry out the plan were Disability and Language Barriers, Education/Public Awareness, Faith-Based Initiatives, Pro Bono, Pro Se/Forms, Resources, and Technology).

C. Phase One Accomplishments

1. Pro Bono Summit

“The Supreme Court and the Commission sponsored a Pro Bono Summit in Nashville” in January 2011.³⁸ All five members of the Tennessee Supreme Court spoke and participated in the Summit.³⁹ “Bar association officers, law firm managing partners, rural practitioners, corporate counsel, deans of Tennessee law schools, law students, legal service providers, representatives from the state libraries, and other service providers” all participated in the event.⁴⁰

The Summit focused on increasing pro bono service performed by Tennessee attorneys, and included a range of panel discussions such as: 1) developing a pro bono clinic; 2) how to increase attorney pro bono at large law firms and corporations; 3) pro bono issues in rural areas; 4) involving law students in pro bono; and, 5) utilizing technology to reach more indigent Tennesseans.⁴¹ All sessions were recorded and made available online.⁴²

At the conclusion, all “[p]articipants completed pledge cards stating how they planned to increase pro bono in their practice.”⁴³ “New ideas and partnerships were formed as a result of the Summit, including coordination among law school pro bono programs” and proposals for uses of technology in the rural communities.⁴⁴

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2-3.

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

2. Access to Justice Website

In November 2011, the Supreme Court and the Commission launched www.JusticeForAllTN.com to provide information both to the public and the bar.⁴⁵ The initial website included links for “legal help” to provide “information on how to find a lawyer, a glossary of common legal terms, links to court forms and plain language information on a variety of legal issues, including divorce, child support, housing information, healthcare, immigration, and mediation.”⁴⁶ One of the most popular tools on the site proved to be an interactive map of Tennessee’s 95 counties that directs users to county-specific contact information for legal aid providers, social service providers, governmental agencies and the court system.⁴⁷ The website also provides information for lawyers “ranging from how to volunteer with a legal aid provider or a bar association to a step-by-step guide for how to develop a pro bono clinic.”⁴⁸

3. Rule Changes

While the Commission was engaged in strategic planning, the Supreme Court was actively implementing a number of significant rule changes to encourage pro bono work and remove other barriers to greater access to justice.⁴⁹ The rules were supported and proposed by the Commission, the Tennessee Bar Association, the Tennessee Bar Foundation, the Tennessee Lawyers' Association for Women, and the Tennessee Association. Specifically, the court did the following:

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

- Revised Tennessee Supreme Court Rule 8, Rules of Professional Conduct 6.1 to add an aspirational goal of 50 pro bono hours per year for Tennessee lawyers;⁵⁰
- Adopted a new Tennessee Supreme Court Rule 8, Rules of Professional Conduct 6.5 permitting lawyers to provide limited scope advice;⁵¹
- Created new Tennessee Rule of Civil Procedure 23.08, which allows a court to distribute residual funds remaining from class action suits to programs or funds serving pro bono legal needs. The rule specifically references that funds may be distributed to the Tennessee Voluntary Fund for Indigent Civil Representation;⁵²
- Revised Tennessee Supreme Court Rule 21, Section 4.07(c) (Continuing Legal Education (CLE)) to increase the number of hours of CLE credit that lawyers may earn for the hours of pro bono legal representation they perform from one hour of CLE credit for every eight (8) hours to one hour of CLE credit for every five (5) hours of pro bono work;⁵³
- Revised Tennessee Supreme Court Rule 5 to allow judicial research assistants to engage in some types of pro bono work;⁵⁴
- Revised Tennessee Supreme Court Rule 43 and Rule 8, Rules of Professional Conduct 1.15 to make participation in the Interest on Lawyers Trust Accounts (IOLTA) program mandatory and to require comparability in rates paid on IOLTA accounts;⁵⁵
- Amended the rules governing multi-jurisdictional practice, Tennessee Supreme Court Rule 7, section 10.01

⁵⁰ TENN. SUP. CT. R. 8, RPC 6.1.

⁵¹ TENN. SUP. CT. R. 8, RPC 6.5.

⁵² TENN. R. CIV. P. 23.08.

⁵³ TENN. SUP. CT. R. 21, § 4.07.

⁵⁴ TENN. SUP. CT. R. 5(c).

⁵⁵ TENN. SUP. CT. R. 8, RPC 1.15 & 43.

(c) and Rule 8, Rules of Professional Conduct 5.5, to permit lawyers admitted in another jurisdiction to provide pro bono legal services in Tennessee following a major disaster and to allow attorneys authorized to practice in Tennessee as in-house counsel under Rule 5.5 to provide pro bono legal services in Tennessee through an established not-for-profit bar association, pro bono program, or legal services program,⁵⁶

- Revised Tennessee Supreme Court Rule 9, Section 20.11 to request that every attorney voluntarily file a pro bono reporting statement annually with the Tennessee Board of Professional Responsibility;⁵⁷ and

- Published a new rule for comment, Supreme Court Rule 50A, that would create an emeritus licensure status to allow those attorneys who have let their licenses become inactive to provide pro bono legal services in Tennessee through an established not-for-profit bar association, pro bono program, or legal services program.⁵⁸

IV. Phase Two– Leveraging Technology and Increasing Participation

A. Leveraging Technology

In its initial strategic plan, the Commission recognized that “[t]he enhanced use of technology such as websites, teleconferencing, email pro bono banks and remote access to courts could greatly benefit underserved populations, particularly in rural areas.”⁵⁹ More specifically the Commission articulated the needs to: (1) utilize technology to educate legal professionals and the public about existing resources; and, (2) leveraging technology to

⁵⁶ TENN. SUP. CT. R. 8, RPC 5.5 & 7, § 10.01(c).

⁵⁷ TENN. SUP. CT. R. 9, § 20.11.

⁵⁸ TENN. SUP. CT. R. 50A.

⁵⁹ TENN. ACCESS TO JUSTICE COMM’N (2012), *supra* note 34, at 10.

further the four primary goals communicated by the Commission in its Strategic Plan.⁶⁰

In subsequent plans, the Commission—with the benefit of the experiences of users of the early access to justice technologies—created a “disciplined approach” to “allow [the Commission] to place emphasis on the programs that have been the most effective, to discontinue spending resources on programs that have not been effective, and to use new technologies and the new information . . . gather[ed] to leverage existing programs and launch new programs where the need is the greatest.”⁶¹ The evolution of the use of technology in access to justice efforts is illustrative, and indicates the efficacy and efficiency that technology can have in the access to justice arena, particularly in geographic areas where needs and resources do not always share the same zip code.

As mentioned above, www.JusticeForAllTN.com—a user-friendly website—further the objectives described above through an innovative and effective dual purpose of providing information both to the public and the bar.⁶² Viewers who click “legal help” can find information on how to find a lawyer, a glossary of common legal terms, links to court forms and plain language information on a variety of legal issues, including divorce, child support, housing information, healthcare, immigration, and mediation.⁶³ Over the years, www.JusticeForAllTN.com has grown to include links and references to the other technologies that are being created and utilized in Tennessee. One such link is to OnlineTNJustice.org (“OTJ”), a project of the Tennessee Alliance for Legal

⁶⁰ See TENN. ST. CTS., *supra* note 33.

⁶¹ TENN. ACCESS TO JUSTICE COMM’N, 2014 STRATEGIC PLAN 8 (2014), available at https://www.tncourts.gov/sites/default/files/docs/final_2014_strategic_plan_and_appendices.pdf.

⁶² TENN. ACCESS TO JUSTICE COMM’N (2012), *supra* note 59, at 3.

⁶³ *Id.*

Services (TALS), the TBA, the Tennessee Supreme Court's Access to Justice Commission and the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.⁶⁴

OTJ is a website that permits qualifying Tennesseans to ask a lawyer for help with a legal issue.⁶⁵ Qualifying users⁶⁶ can post civil legal questions on the website and receive basic legal information and advice from approved volunteer attorneys. Users answer questions to determine their eligibility. Qualifying users then select the legal category to which their question relates, list any upcoming court date, and ask their civil legal question. Questions are posted to the queue where registered attorneys can review them. Users are notified by email when their question is answered. Users who do not have an email address are advised to log back into the site periodically to check for a response. "OTJ addresses the "connectivity" problem, which most states experience. Clients in urban areas who cannot connect to legal clinics because they lack transportation, have child care issues, face conflicting work schedules, etc., need a way to be served without having to be at a particular location at a set time. There are also many clients in rural areas where there are very few lawyers, clinics or other pro bono resources available—OTJ addresses both problems.⁶⁷

The OTJ program and associated technologies are owned by the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.⁶⁸ Its license is available for use

⁶⁴ *Volunteer with Online TN Justice*, TENN. ALLIANCE FOR LEGAL SERVS., <http://www.tals.org/volunteerwithotj> (last visited Feb. 13, 2015).

⁶⁵ *Id.*

⁶⁶ *Id.* (qualifying users are (1) low-income Tennesseans, whose household income is below two-hundred fifty percent (250%) of the Federal Poverty Guidelines, (2) are not incarcerated and (3) have less than five thousand dollars (\$5,000) in total assets).

⁶⁷ *Id.*

⁶⁸ *Id.*

by bar associations, Access to Justice Commissions or other reputable pro bono organizations for free as long as the entity uses its best efforts to serve the client population in the area in which that entity operates.⁶⁹ Several other states have launched their own online justice site using the OTJ technology, furthering the access to justice cause well beyond the borders of Tennessee.⁷⁰

In addition to the link to OTJ found at JusticeForAllTN.com, links are provided to webinars hosted on Youtube.com that are designed to address “hot topic” areas of public interest law. These videos are planned, filmed, and posted as part of a collaborative effort between the Commission, the TBA, and the Tennessee Bar Association Access to Justice Education subcommittee.⁷¹ There are two series of videos: one series intended for public consumption, and a second series that is intended for consumption by legal professionals.⁷² The video topics are selected based upon information provided by the Commission and the Tennessee Bar Association Access to Justice Committee, which highlights the needs that are recurring and/or emergent for Tennesseans.⁷³

For example, it was determined that an introduction to domestic violence law would be an important topic to address in order to educate and empower legal professionals to assist those that may be facing domestic violence. To that end, a video was planned, filmed, and posted online through the joint efforts of the above described entities. This video has been viewed hundreds of times.⁷⁴

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Videos*, JUSTICE FOR ALL TENN., <http://www.justiceforalltn.com/videos> (last updated Dec. 2012).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

An example of a video created for the public is titled “Introduction to the Tennessee General Sessions Court,” and provides information to self-represented litigants about the Tennessee court system, what to expect at General Sessions Court, and how it works.⁷⁵ The video also includes information about free legal resources that may be available to unrepresented parties.⁷⁶ Two of the resources identified in this video—as well as on JusticeForAllTN.com—are the phone number 1-888-aLEGALz, and court approved pro se divorce forms.⁷⁷

1-888-aLEGALz (“aLEGALz”) was created by a coalition of Tennessee legal groups and Memphis-based International Paper.⁷⁸ Together, these entities have joined forces to fund and operate a toll-free phone line offering legal information and referrals to low-income Tennesseans.⁷⁹ aLEGALz assists Tennesseans in finding resources to deal with civil legal issues.⁸⁰ Tennesseans are able to call this number, leave a message, and then have those messages returned by a licensed Tennessee lawyer.⁸¹ aLEGALz, much like OTJ, addresses the “connectivity” issue by allowing Tennesseans in both urban and rural

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ International Paper Company is a pulp and paper company, the largest such company in the world. It has approximately 65,000 employees, and it is headquartered in Memphis, Tennessee. As stated on its webpage, “What makes International Paper is our commitment to do the right things, in the right way, for the right reasons.” *IP Giving*, INT’L PULP & PAPER CO., http://www.internationalpaper.com/US/EN/Company/IPGiving/PF_SegmentPage_1_13989_13989.html (last visited Mar. 5, 2015).

⁷⁹ *New Toll-Free Line Offers Free Legal Information, Referrals*, TENN. ST. CTS, <http://www.tncourts.gov/press/2013/01/14/new-toll-free-line-offers-free-legal-information-referrals> (last visited Feb. 13, 2015).

⁸⁰ *Id.*

⁸¹ *Id.*

areas, who otherwise would not have the ability to attend a legal clinic, to reach out and speak with an attorney, and receive information and referrals.⁸²

Finally, in 2011, the Tennessee Supreme Court approved uniform pro se divorce forms.⁸³ These forms are available for use by individuals that are seeking a divorce in Tennessee and meet certain qualifications.⁸⁴ These qualifications require that the parties have no minor children in the home, no real estate owned by either party, no retirement account owned by either party, and have already reduced to writing an agreement as to how any tangible assets and debt will be divided between the parties.⁸⁵ These forms allow for individuals who otherwise would not access the court system, or who would access the court system by inefficient and, perhaps, improper mechanisms to secure a divorce.⁸⁶

A review of the number of users—both by the public as well as by attorneys—of these technologies and forms suggests that not only is there an existing need for increased use of technology in support of closing the access to justice gaps, but that there is an opportunity to do so. An analysis of the number of users, by county, of both OTJ and aLEGALz reveals, first, that the public is increasingly using technology in an effort to meet legal needs, and second, that the populations being served by such technologies consists of, as expected and hoped, those that otherwise would find accessing legal assistance to be challenging.⁸⁷ More specifically, the number of client users of OTJ grew from 1,126 in 2011 to 5,445 as of the end of

⁸² *Id.*

⁸³ *Court Approved Divorce Forms*, TENN. ST. CTS., <https://www.tncourts.gov/help-center/court-approved-divorce-forms> (last visited Feb. 13, 2015).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ TENN. ACCESS TO JUSTICE COMM'N (2012), *supra* note 62, at 13.

2013.⁸⁸ It is important to note that not only did the number of users of OTJ grow, but the data indicates that the most significant growth of users came from counties in which access to traditional legal clinics or legal service providers is limited due to geography.⁸⁹ These data points are replicated in users of aLEGALz.⁹⁰ Not only did the number of public users of OTJ and aLEGALz grow, so did the number of attorney volunteers.⁹¹ This indicates that attorneys are amenable to the concept of providing legal services to the underrepresented through technology, and they actively seeking the opportunity to do so.

As seen above, the use of technology in addressing the gaps in the judicial system is not only viable, but it is worthy of serious consideration and deliberate implementation. Doing so has not only assisted thousands of Tennesseans, but has also engaged a portion of the profession in access to justice issues that otherwise would not be as engaged. The Commission's "disciplined approach" in focusing on the most effective and efficient uses of such resources has been validated and should remain a key component of any Commission's strategic planning.⁹²

B. Increasing Pro Bono Participation to 50%

In drafting the 2012 strategic plan, the Commission recognized that maintaining the status quo was not a viable option, and thus focused on increasing the access of Tennesseans to quality representation.⁹³ Although

⁸⁸ *Id.*; see also TENN. ACCESS TO JUSTICE COMM'N (2014), *supra* note 61, at 22, app. I.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² TENN. ACCESS TO JUSTICE COMM'N (2014), *supra* note 88.

⁹³ TENN. ACCESS TO JUSTICE COMM'N (2012), *supra* note 87.

increasing the educational resources available to self-represented persons through technology undoubtedly provides a useful and necessary service, the Commission's findings underscored the importance of quality legal representation.⁹⁴ Therefore, providing quality representation to indigent Tennesseans and addressing connectivity between potential indigent clients and lawyers was the primary objective of the 2012 strategic plan.⁹⁵

One driving factor behind the Commission's goal of increasing attorney participation in pro bono were from 2009, which indicated that only 18.26% of attorneys licensed in Tennessee voluntarily reported pro bono service with their Board of Professional Responsibility Annual Registration Packet.⁹⁶ That year, the average attorney reporting pro bono service donated seventy-nine hours per year.⁹⁷ "[I]n 2010, 38.96% of all licensed attorneys voluntarily reported pro bono service at an average of seventy-four hours per year . . . which exceeds the aspirational goal of 50 hours per year set forth in Tenn[essee] S[upreme] C[ourt] R[ule] 8, R[ule] of]P[rofessional] C[onduct] 6.1.⁹⁸ "With this information in hand, the Commission set the goal that 50% of attorneys residing in Tennessee will provide pro bono services as defined by the Court on an average of 50 hours per year on or before January 1, 2015."⁹⁹

In examining that goal, it is important to note that the Tennessee Supreme Court defines "pro bono services" as "services provided without a fee or expectation of a fee to persons of limited means or organizations that primarily

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at app G.

⁹⁸ *Id.* at 13.

⁹⁹ *Id.*

address the needs of persons of limited means.”¹⁰⁰ “Pro bono service can also be the delivery of legal services at a substantially reduced fee to persons of limited means . . . [or] the provision of legal services at no fee or at a substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights and liberties, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes where payment of standard legal fees would deplete the organization’s resources or would be inappropriate.”¹⁰¹ “Additionally, participation in activities for improving the law, the legal system, or the legal profession is deemed pro bono service by the Court.”¹⁰²

In pursuing this goal, the Commission articulated four main steps that would move attorney participation in pro bono closer to the 50% mark. These steps included, attorney education, attorney recruitment, client education and removal of barriers, and connecting lawyers with potential clients.¹⁰³ Each of these steps has been critical in moving the number of attorneys reporting pro bono involvement to 44.31% of all Tennessee attorneys, an increase of 26.05% since 2010.¹⁰⁴ The average amount of hours performed by those attorneys is an astounding 74.13 hours per year, far greater than the national average.¹⁰⁵

Although legal advice clinics are an important aspect of pro bono, the Commission sought to educate attorneys regarding the importance of a lawyer taking up representation of an individual, even if the representation is

¹⁰⁰ TENN. S. CT. R. 8. RPC 6.1 (a)(1)-(2).

¹⁰¹ *Id.* at (b)(1).

¹⁰² *Id.* at (3).

¹⁰³ TENN. ACCESS TO JUSTICE COMM’N (2014), *supra* note 92, at 13.

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.*

limited in scope.¹⁰⁶ After graduating from law school, practitioners quickly learn that their legal education does not necessarily provide adequate preparation to immediately handle many of the areas of the law that most often affect indigent Tennesseans,¹⁰⁷ which most often are within the areas of family law, consumer/credit issues, landlord/tenant, and benefits.¹⁰⁸ The Commission deemed it “vital and necessary” to provide lawyers with the necessary information to handle these “high need” areas of the law.¹⁰⁹ A particular emphasis of the Commission has been to focus on preparing pro bono lawyers to take on the direct representation of an individual, if an initial consultation does not resolve the legal issue.¹¹⁰ In furtherance of this objective, the Commission has:

1. Developed an online curriculum on “High Need” areas of the law, beginning with family law and debtor/creditor issues, to be available on Youtube.com, as described above;

2. Established a marketing and public relations campaign to communicate strategies and CLE opportunities to lawyers;

3. Promoted to other cities the partnership model established by Nashville law firms, the “Pillar Firm” model, whereby firms with strong access to justice commitments educate their attorneys on particular

¹⁰⁶ TENN. ACCESS TO JUSTICE COMM’N (2012), *supra* note 93.

¹⁰⁷ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Foundation for the Advancement of Teaching 2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

substantive areas of the law and then take more pro bono cases in those areas;

4. Proposed to the Tennessee Supreme Court and CLE Commission that excess CLE funds be designated by the CLE Commission and the Supreme Court to provide for the High Needs pro bono CLE training, the promotion thereof, and other access to justice initiatives; and,

5. Implemented steps to measure and track the results of this initiative by tracking attendance and following up with attorneys who participated in the curriculum to determine if they subsequently took a pro bono case.¹¹¹

Along with attorney education, in order to increase participation such that 50% of lawyers residing in Tennessee provide an average of 50 hours of pro bono per year, the existing pool of attorneys engaged in pro bono work must be increased. “The Commission recognized that there is a wide spectrum of law practices in Tennessee, ranging from solo practitioners to large law firms; that lawyers practice in urban, suburban, and rural communities; and that not every strategy is appropriate for every attorney or community.”¹¹² Therefore, in light of these circumstances, and in order to recruit more lawyers providing pro bono, the Commission:

1. Promoted www.JusticeForAllTN.com and www.onlineTNjustice.org to increase awareness of alternative ways to participate in access to justice initiatives;

¹¹¹ TENN. ACCESS TO JUSTICE COMM’N (2012), *supra* note 106, at 14.

¹¹² *Id.* at 15.

2. Provided attorneys in parts of the state that lack an organized pro bono program with resources such as “Attorney of the Day” materials to organize pro bono efforts tailored to their community;

3. Identified firms without pro bono policies and requested that those firms adopt such policies;

4. Combined efforts with the Tennessee Bar Association to recruit law firms in other communities to follow the partnership model established by Nashville law firms, the “Pillar Firm” model;

5. Convenes an annual conference of law school deans, law school pro bono directors, and students to create ways to partner to increase pro bono participation;

6. Developed a proposal for recognition by the Court of firms or legal departments with pro bono policies, individual attorneys, and pro bono organizations with exemplary pro bono participation; and,

7. Updates the Pro Bono Report annually to capture pro bono work statewide and to measure success.¹¹³

These strategies have been employed in an intentional and purposeful fashion in order to engage attorneys where they are, and involve them in access to justice initiatives in manners that are amenable to the varied circumstances of Tennessee lawyers. As discussed above, the technological tools that have been created and employed in furtherance of this cause have been particularly effective in reaching out to, and involving, attorneys from across the state of Tennessee.

¹¹³ *Id.*

Client education and removal of barriers has also been a key focus of the Commission. Specifically, the Commission found that “[p]roviding Tennesseans with an understanding of how to access a lawyer is integral to delivering access to justice. This requires a public awareness effort to reach Tennesseans in need through partnerships with places the public commonly goes to seek help, such as libraries, faith based organizations, courthouses and social service providers.”¹¹⁴ In pursuance of these ideals, the Commission has worked to educate the public on the availability of pro bono services and to remove barriers to finding a pro bono lawyer by:

1. Promoting the available existing technology such as Online Tennessee Justice, Tennessee Technology Centers, and www.JusticeForAllTN.com;
2. Providing information and resources to intake staff at legal service organizations through TALS, general sessions courts, and court clerks’ offices, so that they can direct the public to pro bono lawyers; and,
3. Making www.JusticeForAllTN.com available in languages other than English.¹¹⁵

If the Commission’s efforts to educate attorneys, recruit more attorney volunteers, and educate the public on how to connect with attorneys enjoys even a modicum of success—which these efforts have, in fact, enjoyed great success—then it becomes important to examine how to improve methods for connecting volunteer attorneys with potential indigent clients.¹¹⁶

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The Commission identified two primary ways that clients are currently connected with pro bono lawyers. One way is through legal aid providers federally funded by the Legal Services Corporation (“LSC providers”), and the second is through non-LSC providers. A non-LSC provider describes any organization that provides pro bono legal help but that does not receive federal funding from the Legal Services Corporation. The term includes state and locally funded legal service providers, bar associations, and faith-based organizations that provide legal advice and assistance. The Commission maintains that a comprehensive pro bono infrastructure must include both LSC providers and non-LSC providers.¹¹⁷

In Tennessee, the most widespread pro bono system available to the public consists of the pro bono programs of the four regional LSC programs. Together, their territory covers every county in the state and, even though Tennessee’s LSC programs allocate more than the required amount toward providing pro bono services, they remain unable to provide pro bono services in every county.¹¹⁸ Add

¹¹⁷ *Id.* at 17.

¹¹⁸ *Id.*

to this the fact that Congress continues to reduce federal funding to LSC programs, and the result is added strain to LSC programs in the face of growing demand for services.¹¹⁹

“Many non-LSC organizations provide services to a select population or a specific locality and serve client populations that LSC providers cannot serve. One such example is the plan adopted by the Tennessee and Memphis Conferences of the United Methodist Church, which uses the Church’s existing infrastructure and commitment to social justice to partner with the Commission to recruit member lawyers to provide pro bono services.”¹²⁰ As a portal for those in crisis, this faith-based organization is able to work with its legal partners to connect volunteer attorneys with those in need.¹²¹

Despite the superlative work performed each year by both LSC and non-LSC entities, more work is needed to address the burgeoning gaps in the legal system faced by indigent individuals experiencing situations that implicate the legal system.

In order to connect more lawyers with clients through LSC and non-LSC providers, the Commission will provide a foundation for a comprehensive system of delivery of pro bono services across the state by:

1. Coordinating regular meetings with the Executive Directors and Pro Bono Directors of each of the four LSC providers and with non-LSC providers, the TBA, and TALS;

¹¹⁹ LEGAL SERVS. CORP., BUDGET REQUEST FISCAL YEAR 2013 1-2 (2013), <http://www.lsc.gov/sites/default/files/FY%202013%20Budget%20Request.pdf>.

¹²⁰ TENN. ACCESS TO JUSTICE COMM’N (2012), *supra* note 112, at 18.

¹²¹ *Id.*

2. Developing resources for intake staff to assist in making referrals and foster accountability when their respective agencies cannot provide the client with legal help; and,

3. Establishing a statewide toll free information phone line in aLEGALz, which the lawyers staff, and which the public can access to get information on available resources throughout the state.¹²²

As more lawyers have become, and will continue to become, involved in pro bono work, the Tennessee Supreme Court has worked to establish a mechanism to recognize the efforts of these Tennessee “Volunteers.” More specifically, the Court has established a program entitled “Attorney for Justice,” whereby any Tennessee lawyer that provides 50 or more hours of pro bono work each year is recognized by the Tennessee Supreme Court at a local ceremony, with a certificate, and inclusion on the “Honor Roll” of “Attorneys for Justice.”¹²³ As stated by the Court “[in] an effort to increase the number of attorneys and law offices providing pro bono services to those who cannot afford legal costs, the Tennessee Supreme Court is launching an extensive recognition program. The Court will honor all attorneys providing at least 50 hours of service annually, with a goal of increasing statewide pro bono work to 50 percent participation.”¹²⁴ In its inaugural year, the Attorneys for Justice Program recognized close to 200 lawyers and law firms.¹²⁵

¹²² *Id.* at 19.

¹²³ *Supreme Court Pro Bono Recognition Program*. TENN. ST. CTS., <https://www.tncourts.gov/node/2392634> (last visited Feb. 13, 2015).

¹²⁴ *Id.*

¹²⁵ 2014 Pro Bono Honor Roll, http://www.tncourts.gov/sites/default/files/docs/honor_roll_attorneys_firms_-_february_2_2015.pdf

It is clear from the data and anecdotal evidence described, attorney participation in access to justice initiatives in Tennessee has increased since the formation of the Commission and the implementation of the Commission's strategic plans. But the Commission, has also worked purposefully to involve future attorneys in the access to justice cause.

C. Engaging Law Students

In its first strategic plan, the Tennessee Access to Justice Commission clearly indicated that law schools and law students play significant roles in the pursuit of more equal access to justice.¹²⁶ In fact, the first goal enunciated in the Commission's strategic plan is "[t]o involve more lawyers and law students in meeting legal needs so that the public is better served."¹²⁷ By deliberately and purposefully including law schools and law students in its strategic plan, the Commission recognized that law school curricula and programming related to access to justice issues can—through planning, oversight, administration, and evaluation—greatly impact both the present and future of unmet legal needs by providing overlooked services, instilling the ideals of public service in students and practitioners alike, and engaging resources and individuals that may otherwise remain on the sidelines.¹²⁸

In its strategic planning, the Commission included a specific provision for how the goal of involving more law schools and law students would be pursued. Rather than simply articulating the goal of involving more law students,

¹²⁶ TENN. ACCESS TO JUSTICE COMM'N (2012), *supra* note 120, at 2.

¹²⁷ *Id.*

¹²⁸ *Statistics of Law School Enrollment and Degrees Awarded, 2012* A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authenticateddam.pdf (last visited Mar. 5, 2015).

the Commission's strategic plan provides that, "Whenever possible, the Commission will use law students to further the projects outlined in this Plan."¹²⁹ Inclusion of this language has allowed the Commission, the committees, the bar, the six Tennessee law schools, and the Tennessee Supreme Court to be creative, flexible, and, importantly, proactive in involving and encouraging law school and law student involvement in Tennessee's access to justice initiatives.

For example, the Commission has encouraged law schools to designate an individual or individuals within each law school as main points of contact with regard to pro bono initiatives taking place at each campus. Such contacts include faculty sponsors, full time administrative personnel responsible for pro bono programming, and/or associate and assistant deans.¹³⁰ Additionally, the Access to Justice Committee of the Tennessee Bar Association has representatives from each law school serving on the Committee, whose members consist of not only pro bono administrators, but also experiential and clinical faculty from each law school. Creating for a statewide conversations to occur has greatly enhanced the ability of law schools and law students to learn from one another in areas including: needs throughout the state; sharing of clinical, other experiential learning, and pro bono programming best practices; opportunities to collaborate; sharing of resources; and encouragement to remain engaged in access to justice initiatives.¹³¹

Similar to the support the Commission expressed for the adoption of law firm pro bono policies discussed *infra*, the Commission encouraged each law school to adopt—to an extent that did not previously exist—a pro

¹²⁹ TENN. ACCESS TO JUSTICE COMM'N (2010), *supra* note 18, at 2.

¹³⁰ Barry Kolar, *Law Students Gather in Memphis to Learn Value of Pro Bono Work*, TENN. BAR ASS'N. (Sep. 29, 2014), <http://www.tba.org/news/law-students-gatherinmemphis-to-learn-value-of-pro-bono-work>.

¹³¹ *Id.*

bono policy for its students.¹³² Adoption of such a policy signals to law students that access to justice is valued by law school administration, faculty, and the profession as a whole. Through law school pro bono programming, students are inculcated that public service is an important part of the legal profession; a proposition that has been identified by several authors as being part of the “core competencies” of successful lawyers.¹³³ Attorneys that participated in pro bono projects as students, or early in their careers, are more likely to continue rendering public service throughout their careers.¹³⁴ Additionally, participation in a law school pro bono program “helps bridge the gap between theory and practice, and enriches understanding of how law relates to life.”¹³⁵ It is across this “bridge”—in addition to other experiential learning opportunities—that students are able to develop core competencies such as interviewing, fact-finding, rapport building, and teamwork.¹³⁶

Since the adoption of the strategic plan, the Tennessee Supreme Court, the Commission, Tennessee Bar Association, and law schools have remained dedicated to the goal of “involv[ing] more . . . law students in meeting

¹³² TENN. ACCESS TO JUSTICE COMM’N (2014), *supra* note 103, at 7.

¹³³ NATIONAL INSTITUTE OF TRIAL ADVOCACY, *The Future of Legal Education: A Skills Continuum* 7 (2009), available at http://www.nita.org/resources/docs/Future_of_Legal_Education.pdf; ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION 65-88 (2007); Neil W. Hamilton, *et al.*, *Encouraging Each Student’s Personal Responsibility for Core Competencies Including Professionalism*, 21 THE PROFESSIONAL LAWYER (2012), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tpl_21_3_20121105.authcheckdam.pdf.

¹³⁴ Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U.L. REV. 71, 82 (2012).

¹³⁵ Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2435 (1999).

¹³⁶ Hamilton *et al.*, *supra* note 133.

legal needs so that the public is better served.”¹³⁷ Another mechanism that these Tennessee entities employ on an annual basis in furtherance of this goal is the holding of an annual law school pro bono and public interest law summit. Each fall semester, one Tennessee law school hosts a two-day weekend retreat, during which students learn about and discuss the challenges and benefits that come from “an intentional commitment to pro bono and public interest work.”¹³⁸ These summits serve to remind students that they possess both the power to change the world and the responsibility to do so.¹³⁹ Each year, at least one member of the Tennessee Supreme Court will speak at the event, along with members of the Commission and bar leaders. Learning from and interacting with professionals in this setting not only validates student interest in access to justice issues, but also communicates that access to justice is important to the profession. These summits serve not only as a superb venue to learn and be inspired, but each year a portion of the time is dedicated to brainstorming and planning of methods in which the law schools can collaborate on access to justice initiatives.

An example of such collaboration can be found in the Immigration Alternative Spring Break Project cosponsored by the University of Memphis, Belmont University School of Law, and the University of Tennessee.¹⁴⁰ Subsequent to a summit planning session, these schools worked together to place student volunteers in an office handling U-Visa applications for victims of domestic and/or political

¹³⁷ TENN. ACCESS TO JUSTICE COMM’N (2010), *supra* note 129, at 2.

¹³⁸ Barry Kolar, *supra* note 130.

¹³⁹ Jason Collver, *Recent Pro Bono Conference a Huge Success*, UNIV. OF TENN. COLL. OF LAW (Sep. 9, 2013), <http://law.utk.edu/richmedia/recent-pro-bono-conference-a-huge-success/>.

¹⁴⁰ NATIONAL CENTER FOR ACCESS TO JUSTICE AT CARDOZO LAW SCHOOL, *Model Projects & Structures to Strengthen Law Student Pro Bono to Increase Access to Justice* (2012), available at <http://files.equaljusticeworks.org/ccf/probonomodelsmemo.pdf> (last visited Nov. 12, 2012).

violence.¹⁴¹ The students were supervised by Community Law Office attorneys, and spent their spring breaks learning substantive law related to immigration U-Visa applications, as well as how to interact with clients and other professionals.¹⁴² Through the efforts of these students, the Community Law Office was able to serve more individuals than it otherwise would be able to accommodate. This program is possible, in large part, due to the commitment of the participating law schools, the cooperation of the supervising attorneys, and the dedication of the students. The benefits to each participant are readily discernible. Students build core competencies such as peer and professional rapport building, interviewing skills, and teamwork.¹⁴³ The schools provide their students with an opportunity to connect classroom instruction with practical learning experience, and help to fulfill the schools' mission of service. Finally, the public is served because more clients receive legal assistance for their particular dilemmas, and through press releases the public at large sees how law schools participate in "giving back," thus increasing the public's perception of the profession as a whole.

The Tennessee Supreme Court, however, was not satisfied with simply encouraging the involvement of law schools and law students. In fact, the Court adopted a policy to recognize law students that have been involved in pro bono initiatives during law school.¹⁴⁴ Law students are designated by the Court as "Law Students for Justice" if the students "perform[] 50 or more hours of pro bono work during their law school career. . . ."¹⁴⁵ During 2014, 95 law

¹⁴¹ *History of Alternative Spring Break*, Cecil B. Humphreys School of Law, THE UNIV. OF MEMPHIS, <http://www.memphis.edu/law/career/asb.php> (last updated Nov. 14, 2014).

¹⁴² *Id.*

¹⁴³ Hamilton *et al.*, *supra* note 136.

¹⁴⁴ TENN. ST. CTS., *supra* note 60.

¹⁴⁵ *Id.*

students from across Tennessee were recognized by the Court as “Law Students for Justice.”¹⁴⁶

Through these initiatives, law schools and law students have become more involved in access to justice initiatives in Tennessee. The adoption of pro bono policies by each law school, collaborative efforts through both clinical course offerings and pro bono programming, as well as encouragement from legal professionals, has resulted in greater participation by the law schools and law students not only in the access to justice conversation, but also in actual work and service performed.¹⁴⁷ It is anticipated that these initiatives will have a long-term impact in addressing the gaps in the legal system as more law students and young professionals become aware of, and involved in, access to justice issues.¹⁴⁸

V. Third Phase – Maintaining and Measuring

The focus of the Commission’s third planning retreat, held in January 2014, was twofold. First and foremost, the Commission wanted to ensure that it could maintain the momentum achieved since 2009. The Commission had almost achieved the 50% participation rate for lawyers doing pro bono, instituted significant technological initiatives, and made considerable progress on court approved forms for use by self-represented litigants and lawyers handling pro bono. But the Commission deemed sustaining those efforts a critical challenge.¹⁴⁹

Second, the Commission recognized it needed to begin to measure the effectiveness of the efforts undertaken under the first two plans. The Commission recognized, in light of limited resources, the need to place emphasis on the

¹⁴⁶ *Id.*

¹⁴⁷ Hamilton *et al.*, *supra* note 143.

¹⁴⁸ *Id.*

¹⁴⁹ TENN. ACCESS TO JUSTICE COMM’N (2014), *supra* note 132, at 8-9.

programs that have been the most effective, to discontinue spending resources on programs that have not been effective; and to use new technologies and the new information to leverage existing programs and launch new programs where the need is the greatest.¹⁵⁰

A. Maintaining Momentum

To maintain the successes of the first two phases, the commission developed a series of recommendations to support ongoing efforts and to address areas of ongoing unmet need. First, the Commission recognized the significant potential of partnerships with the faith-based community to connect with low-income Tennesseans in need of legal assistance. To that end, the 2014 plan includes a goal of establishing 20 new faith-based programs across the state and directs staff support to achieve that goal.¹⁵¹ The Commission also recognized the potential of law school partnerships, and established a goal of holding an annual summit of law school students and faculty to encourage increased pro bono work by law students.¹⁵² The Commission also developed a pro bono recognition program for all lawyers and law firms meeting the aspirational goal of fifty hours of pro bono annually. Designated as “Attorneys for Justice” on an annual basis, the qualifying attorneys are recognized at a public event jointly sponsored by the Commission and the Supreme Court.¹⁵³

The Commission also recognized three areas of need that had not been adequately addressed, and developed initiatives to meet those needs. First, to meet the ongoing need for family law assistance for low-income

¹⁵⁰ *Id.* at 8.

¹⁵¹ *Id.* at 14-15.

¹⁵² *Id.* at 17-18.

¹⁵³ *Id.* at 19.

clients, the Commission set a goal of recruiting five large law firms to commit to focusing their pro bono work exclusively on family law matters.¹⁵⁴ Second, to further meet that need, the Commission reconstituted a mediation committee to increase the availability of pro bono mediation services, particularly in family law cases. Third, to try to more effectively meet the needs of rural Tennesseans, the Commission committed the time of staff and commissioners to establish a monthly pro bono clinic in each rural judicial district in the state.¹⁵⁵

The Commission also recognized a gap between the need and available resources. To close that gap, the 2014 plan recommends development of a public awareness campaign for outreach to those in need of legal assistance.¹⁵⁶

B. Measuring and Assessing Effectiveness

1. Legal Needs Study

The Commission's first recommendation in the 2014 Strategic Plan was to conduct a legal needs study. The last statewide legal needs study done in Tennessee was published in 2004 and utilized data collected in 2003. To help the Commission and its collaborative partners refine existing programs and launch new initiatives to impact the most Tennesseans in the most profound way, the Commission expressed the need for current information.¹⁵⁷

Thanks to a generous grant from the Ansley Fund of the Frist Foundation and in collaboration with the Tennessee Alliance for Legal Services and the Tennessee Bar Association, a new legal needs study was conducted by

¹⁵⁴ *Id.* at 13-14.

¹⁵⁵ *Id.* at 12-13.

¹⁵⁶ *Id.* at 18-19.

¹⁵⁷ *Id.* at 9-10.

the University of Tennessee, College of Social Work, which also conducted the study published in 2004.¹⁵⁸ The Legal Needs Study was completed in October 2014, and found that more than 60 percent of vulnerable Tennesseans face a significant civil legal need. In addition, the goal of the study was to examine the effectiveness of delivering legal assistance to those in need. The study showed that only 25 percent of the respondents were aware of resources to help find a lawyer, and even fewer knew where to find free legal services. Less than 40 percent sought any help pursuing a legal recourse, and a third of those decided to navigate the system on their own. The study surveyed over 1,400 Tennesseans who are considered low-income or impoverished, with low-income being defined as a family of four earning \$29,812 or less annually. A similarly sized impoverished family would make \$23,850 or less per year. Civil legal problems most cited by those answering the survey include conflicts with creditors, landlord-tenant issues, problems obtaining or paying for health care, and concerns regarding government benefits.¹⁵⁹

The study found that those most severely impacted by legal issues were the poorest, the youngest and minorities. The study also highlighted the fact that the most commonly reported problems were not always the most disruptive to people's lives. For example, medical bills and health insurance were frequent problems, but were not as disruptive as caring for a child after the breakup of a marriage – a less commonly mentioned problem. Respondents most often cited resignation to their situation

¹⁵⁸ *Id.*

¹⁵⁹ See *60 Percent of Low-Income Tennesseans Face Civil Legal Problems, Study Shows*, TENN. ST. CTS. (Nov. 25, 2014), <http://www.tncourts.gov/news/2014/11/25/60-percent-low-income-tennesseans-face-civil-legal-problems-study-shows> (press release summarizing study). The complete study is available at https://www.tncourts.gov/sites/default/files/docs/2014_legalneeds_report_1.pdf.

as a reason for not seeking help. Many also feared that their situation could get worse if they attempted to fight for any legal recourse.¹⁶⁰

2. Pro Bono Reporting

The Commission also restated its support for required reporting of pro bono work as part of the annual attorney registration process. The Commission reasoned that reporting would provide essential information necessary to evaluate the pro bono services being rendered and the volunteers providing those services.¹⁶¹

Reporting of pro bono on a voluntary basis had risen from 18% to more than 44%. Reporting peaked at 48% in 2013, extremely close to the Commission's goal of having 50% of Tennessee attorneys voluntarily providing pro bono services. The voluntary reporting, however, presents an incomplete picture of how much pro bono is being performed and who is volunteering. While the Commission remained unanimously against mandatory pro bono and strongly in favor of maintaining the confidentiality of each individual attorney's pro bono information, the Commission believed that the Supreme Court should require attorneys to report their pro bono hours with their annual registration.¹⁶²

The Commission filed a petition with the Tennessee Supreme Court in November 2014.¹⁶³ In addition to requesting that pro bono reporting be required of all attorneys, the petition also included a recommendation that

¹⁶⁰ *Id.*

¹⁶¹ TENN. ACCESS TO JUSTICE COMM'N (2014), *supra* note 149, at 11-12.

¹⁶² *Id.*

¹⁶³ A copy of the petition is available at http://www.tncourts.gov/sites/default/files/adm2014-02187_order_12-2-14_w_color_appendix.pdf.

the annual registration statement included the option for attorneys to make voluntary contributions to an access to justice fund. The Court established a comment period through February 2, 2015.¹⁶⁴ The petition remains pending.

3. Other Data Collection Efforts

The Commission also implemented other methods to increase measurement and accountability of the various initiatives implemented previously. Online Tennessee Justice, for example, now includes a follow up survey distributed to all users of the website.¹⁶⁵ The aLegalz toll free legal services hotline also conducts follow up surveys and provides ongoing data on the types of assistance sought and the direction provided. The Commission also adopted a recommendation that the Commission staff develop a measurement tool for clinic providers and pro bono programs to help assess their focus and efficacy.¹⁶⁶

VI. The Next Step – Really Closing the Gap

A. Pro Se

Inherent in the goals of the Access to Justice Commission's Strategic Plans is the idea that the justice system must become more accessible and understandable to pro se litigants.¹⁶⁷ In pursuit of this goal, the Commission has produced a series of educational videos for self-represented litigants.¹⁶⁸ It has developed and recommended plain-language forms for self-represented litigants and has

¹⁶⁴ *Id.*

¹⁶⁵ TENN. ACCESS TO JUSTICE COMM'N (2014), *supra* note 161, at 20; *see also supra* text and notes 41-47.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

expanded the available divorce forms to include forms for the uncontested divorce of parties with minor children.¹⁶⁹ Working with the General Sessions Judges Conference, the Commission has examined and made recommendations to increase attorney involvement in helping otherwise self-represented individuals through Attorney-of-the-Day programs and other limited-scope representation initiatives in the General Sessions Courts.¹⁷⁰ Also, in collaboration with the Tennessee General Sessions Judges Conference, a General Sessions Court pro se bench book, “Meeting the Challenges of Self-Represented Litigants,” has been created and circulated and is now being used as a model for the creation of a Circuit and Chancery Court Pro Se Bench book.¹⁷¹ In collaboration with the Board of Professional Responsibility, the Commission recommended and the Court adopted a policy distinguishing between legal information and legal advice that continues to provide guidance to court staff, clerks, and attorneys.¹⁷² The Commission has developed plain-language signage for courthouses and distributed it to courts across the state.¹⁷³ The Court has also made the Access to Justice website and the Supplemental Guidelines referenced above available in Spanish.¹⁷⁴

In short, the efforts and accomplishments of the Tennessee Access to Justice Commission and its partners have been nothing short of remarkable. But, and as often stated by the immediate past Chair of the Tennessee Access to Justice Commission, the fight for equal access to justice will never be over.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

As demonstrated through the “Statewide Legal Needs Assessment” completed in the State of Tennessee in 2014, there remain a significant number of individuals and families that have fallen into the access to justice gap.¹⁷⁵ This Assessment included a total of 1,184 completed surveys across the state, with a targeted sample for households with less than \$40,000.¹⁷⁶ The results of the survey can be generalized to poor or near-poor households in Tennessee at a 95% level of confidence with a +/- 2.85% margin of error.¹⁷⁷ As revealed in this Assessment, approximately four out of ten respondents (38.5%) indicated that their household had experienced no problems in the past 12 months.¹⁷⁸ For those households who experienced at least one problem, the average number of problems reported was 3.66.¹⁷⁹ This Assessment clearly and unequivocally indicates that there is a significant population of the indigent population of Tennessee that faces, on a regular basis, civil legal issues.¹⁸⁰

The work of the Commission that must be continued to try and meet these needs include:

- Continued development of educational materials, including online videos and written information, about the areas of the law that these individuals face;
- Continued support of the Tennessee Supreme Court in identifying access to justice as a strategic priority of the Court;

¹⁷⁵ *Statewide Legal Needs Assessment 2014*, TENN. ALLIANCE FOR LEGAL SERVS. (2014), available at https://www.tncourts.gov/sites/default/files/docs/2014_legalneeds_report_1.pdf.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 15.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 46.

- Continued involvement of the Bar in addressing these needs—particularly through volunteer attorneys that are willing to provide advice and/or representation to indigent individuals; and,
- Continued leveraging of technological resources—including the development of web-based “hot docs” websites for screening of clients and completion of basic forms.

As the pursuit of these objectives continues, it is likely that the needs of individuals such as those that comprise the sample of the Assessment—while not eradicating the gaps in the justice system—will be better addressed.

B. Increased Resources for Legal Services Programs

When the Legal Services Corporation was first created, the initial goal was to provide all low-income people with at least “minimum access” to legal services, defined as the equivalent of one legal services attorney for every 5,000 poor persons. This goal was briefly achieved in FY1980, but not maintained due to inflation and subsequent budget cuts. For example, in FY2004, the LSC estimated an appropriation of \$683 million would have been needed for minimum access; however, the LSC received \$335 million in appropriations that year. According to a 2009 LSC study (cited above), there is one legal services attorney for every 6,415 poor persons.¹⁸¹

The experience in Tennessee has been no different. At the funding peak, for example, LSC-funded programs employed approximately 80 lawyers in east Tennessee

¹⁸¹ Carmen Solomon-Fears, CONG. RESEARCH SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 5 (2013).

alone. There are less than 80 lawyers serving the entire state today, and only 26 in East Tennessee. Moreover, LSC funding is a decreasing percentage of the overall budget of each of the four Tennessee LSC-funded programs. For example, only 38% of the funding for Memphis Area Legal Services comes from LSC.¹⁸² Instead the programs all rely on other state and federal grants and funds, private foundation grants, and fundraising campaigns.¹⁸³

Yet the legal services organization, principally the LSC-funded programs, will always be the foundation and core of any access to justice efforts. Pro bono can only go so far in closing the gap and simply is not as efficient as providing direct service through a trained full-time legal services attorney.¹⁸⁴ While making the courts more user-friendly for self-represented litigants can make a meaningful difference, such efforts are not the functional equivalent of the assistance of an attorney. In fact, the availability of providing assistance through a trained legal services lawyer has a very significant positive economic impact.¹⁸⁵

To make significant meaningful progress towards closing the access to justice gap, therefore, there must be a major infusion of additional funding for legal service programs, both LSC and non-LSC funded. Some combination of state legislation, foundation and corporate

¹⁸² See *Funding*, MEMPHIS AREA LEGAL SERV, INC., (last visited Mar. 5, 2015), <http://www.malsi.org/about-us/funding/> (overview of MALS funding sources).

¹⁸³ See, e.g., *Id.*

¹⁸⁴ See Douglas A. Blaze, *Toward Equal Access to Justice: Rethinking the Role of Law Schools*, 2 TENN. J. L. & POL. 66, 70 nn.14-16 (2005).

¹⁸⁵ Kenneth A. Smith & Kelly Thayer, *Economic Impact of Civil Legal Aid Organizations in Tennessee: Civil Justice for Low-Income People Produces Ripple Effects that Benefit Every Segment of the Community*. TENN. B. ASS'N (2015), http://www.tba.org/sites/default/files/2015-TNFinal%20Report%20Package_Consolidated%20Statewide_3-18-2015.pdf.

support, lawyer contributions, and support from other private donors must be cultivated and implemented. The Commission, Tennessee Supreme Court, and their partners must elevate the needed increase in funding to the number one access to justice priority.

C. Leveraging Law Schools

Despite the recent increased attention on access to justice initiatives and inclusion of law schools and law students in addressing the same, the potential role of law schools has been largely ignored.¹⁸⁶ The oversight is understandable, however, due in part to the fact that historically law schools generally have not played a very significant role in helping to meet the legal needs of the poor.¹⁸⁷ For example, despite the longevity and importance of clinical programs at some law schools, the legal academy has been slow to embrace clinical education as a core and vital part of the curriculum.¹⁸⁸

Nevertheless, acknowledgement by the Tennessee Supreme Court and the Access to Justice Commission of the importance and potential of law schools and law students with respect to the access to justice arena has been empowering, invigorating, and has created an opportunity for Tennessee law schools to purposefully and reflectively consider their role in such initiatives. As Professor Phyllis Goldfarb recently wrote, “future value of law students’ three-year sojourn will require law schools to teach less about what the law is and more about what the law does

¹⁸⁶ Douglas A. Blaze & R. Brad Morgan, *More Equal Access to Justice: The Unrealized Potential of Law Schools*, 82 MISS. L.J. SUPRA 181, 182-83 (2013).

¹⁸⁷ *Id.*

¹⁸⁸ Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 939-43 (1997) (reviewing the history of clinical legal education).

and what lawyers do with law.”¹⁸⁹ Law schools in Tennessee are responding to this clarion call and invitation to be significant partners with the Court, Bar, and profession. Significant expansion in the number and types of law school clinics represent a potentially very meaningful source of needed legal representation, particularly in light of the unique position of law schools within the profession.¹⁹⁰ And the recent explosion of law pro bono programs can provide not only considerable direct representation, but also leverage the work of the private bar and legal services programs.¹⁹¹ For example, in terms of hours devoted to legal services by the students and faculty in a clinical setting, even a very conservative estimate approaches 20,000 hours annually – or the equivalent of ten full-time attorneys.¹⁹² That is from just one relatively small law school. Additionally, and as discussed above, the involvement of Tennessee law schools and students in pro bono initiatives has grown exponentially over the last six years, especially in terms of number of total hours dedicated to pro bono by law students, and the number of projects that the law schools and students support.¹⁹³

“But law schools have to step up. If the goal really is greater access to justice, as it must be, legal education has to commit to be a major player in the effort. Not just because it is the right thing to do, but because such a commitment would benefit students, faculty, and the clients they can serve.”¹⁹⁴ Despite the growth in terms of clinics and pro bono programs at Tennessee law schools, there are still those students and programs that remain on the

¹⁸⁹ Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 288-89 (2012).

¹⁹⁰ *Id.* at 301-02.

¹⁹¹ *Id.*

¹⁹² Students devote about 250 hours of legal work per semester in a six-credit clinical course and faculty members expend over 300 hours of supervision per semester. The calculation is based on the participation of 120 students and seven faculty members annually.

¹⁹³ Blaze & Morgan, *supra* note 186, at 183-84.

¹⁹⁴ *Id.* at 197

sidelines. Additionally, law schools are often just a part of a larger university, and they have access to student and faculty expertise from other disciplines on behalf of clients. The value of such a multi-disciplinary approach to the legal needs of the poor is widely recognized.¹⁹⁵ The newest label for this type of legal service program is “holistic representation.” This approach requires consideration and analysis of the legal problem being confronted in the context of the client’s life and larger community problems. The “whole client condition is crucial, not just case resolution.”¹⁹⁶ An essential element of this broader problem-solving strategy is reliance on other professionals like social workers. But we’re not there yet. Partnering with other disciplines, and partnering throughout Tennessee law schools, must remain on the agenda.

As noted above, despite the potential of law school programs, there are significant limitations and hurdles.¹⁹⁷ First, securing ample alumni, faculty, and/or other attorney supervision is often difficult.¹⁹⁸ Because students are not licensed attorneys and must have appropriate supervision, student energy and resources may be left untapped if there are not ample attorneys to provide meaningful supervision of student volunteers.¹⁹⁹ This particular challenge may be most acute at law schools that have adopted graduation requirements that mandate pro bono participation. If such requirements follow the definition of pro bono as set forth in Model Rule 6.1, then the students must be adequately

¹⁹⁵ See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1766 (1999).

¹⁹⁶ Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 *GEO. J. LEGAL ETHICS* 401, 429 (2001) (discussing whole-client representation or holistic advocacy in criminal cases).

¹⁹⁷ Blaze & Morgan, *supra* note 194.

¹⁹⁸ Blaze, *supra* note 184, at 81.

¹⁹⁹ *Id.*

supervised at all times.²⁰⁰ If there is insufficient faculty, staff, or private bar support to supervise students subject to such requirements it may be difficult for the students to meet the requirements.²⁰¹

The second challenge—“securing a commitment from the law schools to accept the responsibility and to assume the mantle of leadership”—may be the biggest challenge facing law school access to justice programming.²⁰² Although the basis for any reluctance on the part of law schools to accept this “mantle of leadership” may involve law school culture or reticence on the part of faculty to assume this responsibility, the end result is the same: law schools and student bodies that are less than fully engaged in such efforts.²⁰³

If we accept the veracity of the preceding arguments and examples of the benefits of law school access to justice programming, then it stands to reason that these benefits can only be developed further as law school programming develops. “Developed” in this context includes: (1) growth of law school involvement; (2) growth of student involvement; and, (3) growth in the participation of society—especially external partners. In the event that law schools engage in the self-reflection advocated above, and determine that more emphasis on access to justice is in order, support from the faculty, staff, and administration can greatly improve the perception in the students’ eyes of the importance of engaging in this work.²⁰⁴

²⁰⁰ See MODEL RULES OF PROF’L CONDUCT R. 6.1 (2010).

²⁰¹ A mechanism to address any potential shortage of supervision in such programs would be to define “pro bono” for purposes of the graduation requirements in terms broader than those enunciated in Model Rule 6.1. For example, the University of Memphis Cecil C. Humphreys School of Law defines pro bono as follows: “Pro bono service may be legal in nature or may be charitable public service.”

²⁰² Blaze, *supra* note 198, at 81.

²⁰³ *Id.*

²⁰⁴ See Rhode, *supra* note 135, at 2431.

VI. Conclusion

Thanks to the foresight and leadership of the entire Tennessee Supreme Court, the creation of the Access to Justice Commission has had a significant impact on access to justice efforts in Tennessee. Prior to its creation, access to justice efforts—although significant—were too often fragmented and uncoordinated. The Commission’s unique composition, leadership, staff support, and strong buy-in by the larger access to justice community, have enabled that community to engage in more collaboration and coordinated planning. Through the combined efforts of the Court, the Commission, and the access to justice partners throughout Tennessee, increased awareness of, and participation in, access to justice initiatives has increased dramatically through the use of strategic planning, collaboration, recognition of attorney efforts, harnessing of technology, and measurement of results and allocation of resources. Although the fight is not yet over, the work of the Court, the Commission, and all those involved in pursuit of these goals has made a substantial positive impact on the amount and quality of services received by those Tennesseans who need most equal access to justice. In the long run, hopefully, the collaborations and innovations will continue to make significant progress toward more effective functioning of the wide range of strategies that have been developed.

ARTICLE

**TWELVE ANGRY HOURS: IMPROVING DOMESTIC
VIOLENCE HOLDS IN TENNESSEE WITHOUT VIOLATING
THE CONSTITUTION**

*By: Daniel A. Horwitz*¹

I. Introduction

Tennessee law currently provides that individuals who have been arrested for certain domestic violence offenses “shall not be released within twelve (12) hours of arrest if the magistrate or other official duly authorized to release the offender finds that the offender is a threat to the alleged victim.”² However, Tennessee law also provides an exception to this “12-hour hold” requirement that permits judges to grant the early release of alleged domestic violence offenders under either of two circumstances.³ Specifically, Tenn. Code Ann. § 40-11-150 states that even if a magistrate or duly authorized official finds an arrestee to be a threat to an alleged victim, a judge or magistrate “may . . . release the accused in less than twelve (12) hours if the official determines that sufficient time has or will have elapsed for the victim to be protected.”⁴

In June of 2014, public outcry erupted over the propriety of allowing judges to waive Section 150’s 12-hour hold requirement following an especially high profile

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² TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

³ *Id.*

⁴ *Id.*

incident of domestic violence in Nashville. On June 8, 2014, David Chase—a prominent local contractor—was arrested for assaulting his then-girlfriend after allegedly dragging her out of his apartment by her hair.⁵ Following Mr. Chase’s arrest, Judicial Commissioner Steve Holzapfel found that Mr. Chase posed a threat to the safety of his girlfriend, and he imposed the 12-hour hold compelled by Section 150 as a result.⁶

Less than three hours later, however—and Commissioner Holzapfel’s finding of dangerousness notwithstanding—General Sessions Judge Casey Moreland directed Commissioner Holzapfel to release Mr. Chase. Judge Moreland’s decision to order Mr. Chase’s release was apparently based on information provided to him during an ex-parte phone call from Mr. Chase’s attorney, who was both a “social friend”⁷ of Judge Moreland as well

⁵ Adam Tamburin and Tony Gonzales, *Nashville Contractor Charged in Second Domestic Assault After Judge Waived ‘Cooling-Off’ Rule*, THE TENNESSEAN, (June 11, 2014 9:40 AM), <http://www.tennessean.com/story/news/crime/2014/06/11/nashville-contractor-charged-two-domestic-assaults-judge-waived-cooling-rule/10328783/>; Staff Report, *David A. Chase Assault Case Timeline*, THE TENNESSEAN, (June 19, 2014 9:21 AM), <http://www.tennessean.com/story/news/crime/2014/06/19/david-chase-timeline/10848327/>.

⁶ *Id.*

⁷ Tennessee Administrative Office of the Courts, *BOARD OF JUDICIAL CONDUCT REPRIMANDS DAVIDSON COUNTY GENERAL SESSIONS JUDGE CASEY MORELAND*, (October 22, 2014), <http://www.tsc.state.tn.us/press/2014/10/22/board-judicial-conduct-reprimands-davidson-county-general-sessions-judge-casey>. Chris Craft, *October 22, 2014 Letter to The Honorable Casey Moreland, TN. BD. OF JUDICIAL CONDUCT* (Oct. 22, 2014), available at <http://www.tsc.state.tn.us/sites/default/files/docs/morelandpublic.pdf>.

as a political contributor to his reelection campaign.⁸ Shortly after his release, Mr. Chase allegedly returned to his apartment, began “throwing [his girlfriend] around,” and then pinned her to a bed and choked her, exclaiming: “You ruined my life. I'm going to kill you, I'm going to throw you out the balcony.”⁹

Mr. Chase was ultimately rearrested the following day on charges of aggravated assault by strangulation, interference with a 911 call, and vandalism.¹⁰ Additionally, several months later, Judge Moreland was publicly reprimanded by the Board of Judicial Conduct for failing to “comply with the law,” for failing to “promote public confidence in the judiciary,” and for “abus[ing] the prestige of his office.”¹¹

The outcry following what came to be known as “the David Chase incident”¹² was immediate and unreserved.¹³ Citizens were apoplectic. Media outlets in

⁸ Adam Tamburin, *Senators File Complaint Against Judge Casey Moreland*, THE TENNESSEAN, (July 12, 2014 1:56 AM), <http://www.tennessean.com/story/news/crime/2014/07/11/senators-file-complaint-judge-caseymoreland/12535059/>.

⁹ Tamburin and Gonzales, *supra* note 5.

¹⁰ See Staff Report, *supra* note 5.

¹¹ See generally *supra* note 5; Tony Gonzalez, *Judge Casey Moreland Reprimanded by State Judicial Board*, THE TENNESSEAN (Oct. 24, 2014), <http://www.tennessean.com/story/news/crime/2014/10/23/judge-casey-morelandreprimanded-state-judicial-board/17772843/>.

¹² Steven Hale, *Here's Chief Anderson's 2005 Memo on Domestic Violence Concerns*, THE NASHVILLE SCENE (June 17, 2014), <http://www.nashvillescene.com/pitw/archivees/2014/06/17/heres-chief-andersons-2005-memo-on-domestic-violence-concerns>.

¹³ Adam Tamburn and Anita Wadhwani, *Police Chief Slams Judge for Role in Assault 'Fiasco'*, THE TENNESSEAN (June 18, 2014), <http://www.tennessean.com/story/news/crime/2014/06/17/police-chief-slams-judge-role-assault-fiasco>

Nashville and across the state covered the story day after day. Demands for Judge Moreland's resignation reached a fever pitch.¹⁴ And calls for legislative reform came shortly thereafter, with Democrats and Republicans alike¹⁵—as well as both the Governor of Tennessee¹⁶ and the Speaker of the Tennessee House of Representatives¹⁷—professing the view that 12-hour holds should be mandatory in all

/10682387/; Adam Tamburin, *Senators File Complaint Against Judge Casey Moreland*, THE TENNESSEAN (July 12, 2014), <http://www.tennessean.com/story/news/crime/2014/07/11/senators-file-complaint-judge-caseymoreland/12535059/>.

¹⁴ Frank Daniels III, *Judge Moreland Should Resign. Now.*, THE TENNESSEAN (June 21, 2014), <http://www.tennessean.com/story/opinion/columnists/frank-daniels/2014/06/19/judge-moreland-resign-now/10877125/>; Michael Cass, *Megan Barry Calls on Judge Casey Moreland to Resign*, THE TENNESSEAN (June 18, 2014), <http://www.tennessean.com/story/news/politics/2014/06/18/megan-barry-calls-judge-casey-moreland-resign/10760299/>; Steven Hale, *Council Members to Call for Judge Casey Moreland's Resignation (Updated)*, THE NASHVILLE SCENE (June 19, 2014), <http://www.nashvillescene.com/pitw/archives/2014/06/19/council-members-to-call-for-judge-casey-moreland-resignation>.

¹⁵ Anita Wadhvani, *Lawmakers Pledge to Strengthen Domestic Violence Law*, THE TENNESSEAN (June 19, 2014), <http://www.tennessean.com/story/news/crime/2014/06/19/lawmakers-pledge-strengthen-domestic-violence-law/10890503/>.

¹⁶ Chas Sisk and Walter F. Roche, *Haslam Backs 12-Hour Wait in Domestic Violence Cases*, THE TENNESSEAN (June 23, 2014), <http://www.tennessean.com/story/news/politics/2014/06/23/haslam-backs-hour-wait-domestic-violence-cases/11278845/>.

¹⁷ TN Press Release Center, *House Speaker Proposes Making 12-Hour Domestic Abuse 'Cooling-Off Period' Mandatory*, TN REPORT (June 19, 2014), <http://tnreport.com/2014/06/19/house-speaker-proposes-making-12-hour-domestic-abuse-cooling-period-mandatory/>.

cases following domestic violence arrests with no exceptions permitted for any reason.

Motivated by the public's understandable outrage following the David Chase incident, two amendments to Section 150 have already been drafted in anticipation of the 2015 legislative session that would divest the judiciary of all discretion over 12-hour holds following certain domestic violence arrests.¹⁸ The immediate effect of these amendments would be to "require abuse suspects to remain in jail for 12 hours following an arrest, with no exceptions."¹⁹ According to one legislator and attorney who supports these proposed changes: "This is a very simple change to the law, but it will protect countless victims who have been abused and then potentially subjected to their attacker again before the 12 hour cooling off period."²⁰

While the goals underlying the proposed amendments to Section 150 are noble, it is worth noting that similar policies in other jurisdictions have drawn substantial criticism from legal scholars. One Memphis law professor, for example, has opined that "[i]t is doubtful whether . . . extended warrantless detention of [domestic violence] suspects . . . would pass constitutional muster," describing such policies as "unnecessarily prolonging the pretrial detention of persons presumed innocent under the law, based on a categorical assumption that all persons accused of [domestic violence] represent a public safety threat."²¹ Even so, the vital constitutional concerns implicated by the proposed amendments to Section 150 have—to this point—gone largely unrecognized.

¹⁸ *Id.*

¹⁹ *Id.* ("The legislation will require abuse suspects to remain in jail for 12 hours following an arrest, with no exceptions.")

²⁰ *Id.*

²¹ See Steven J. Mulroy, "Hold" On: *The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 862 (2013).

For obvious reasons, advocating in favor of a less ambitious attempt to improve a law aimed at curbing domestic violence is unlikely to be politically popular now or at any point in the future. That fact notwithstanding, however, a law divesting the judiciary of its authority to waive or decline to impose a 12-hour hold in domestic violence cases under any circumstances for any reason would likely be struck down as an unconstitutional abridgement of the Tennessee Constitution's separation of powers doctrine. Additionally, for the reasons detailed below, such a change may not be able to withstand constitutional scrutiny for several other reasons either. As a result, the legislature should retain TENN. CODE ANN. § 40-11-150's requirement that judges must find that a domestic violence arrestee poses a threat to an alleged victim prior to imposing a 12-hour hold, but the legislature should also strengthen Section 150 by removing the exception that currently allows judges to lift domestic violence holds if they determine that "sufficient time has or will have elapsed for the victim to be protected."²²

II. Potential Policy Problems with Mandatory Holds

Several examples shed light on why it would be problematic—as a policy matter—for the legislature to impose a mandatory hold on all domestic violence arrestees that brooks no exceptions under any circumstances, and that contemplates no judicial discretion of any kind for any reason. Consider, for example, a situation in which police are alerted to a domestic violence incident but given an incorrect address—resulting in the erroneous arrest of an individual who is not, in fact, suspected of having committed any crime at all. Even if the error is discovered immediately, the proposed amendments to Section 150

²² TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

would still require that the arrested individual remain in jail for a minimum of twelve hours—with no exception available to remedy the acknowledged law enforcement mistake. Such a problem could quickly and easily be resolved under current law, whereas the proposed amendments to Section 150 would dramatically exacerbate it.

Alternatively, consider another somewhat frequent scenario in domestic violence cases: a situation in which two family members are arguing loudly enough to be heard by concerned neighbors, but where no violence, threat of violence, or other issue justifying law enforcement's concern has taken place. Under such circumstances, if police are called to investigate the incident, the investigating officers are frequently under pressure—due to an official departmental policy or otherwise—to make an arrest, even if both parties are adamant that law enforcement's involvement is neither welcome nor necessary.²³ Such “mandatory arrest” policies can result in highly unfortunate consequences,²⁴ such as the mother who agrees to be arrested in place of her son because she does not want him to have a criminal record. Furthermore, in the non-trivial number of cases in which two individuals are arrested simultaneously and each is held for twelve hours (which can, and sometimes does, result in young children or infants being left unsupervised for dangerously long periods of time), or in situations in which one individual is arrested for an alleged domestic violence incident that

²³ See, e.g., Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence*, 10 JOURNAL OF INTERPERSONAL VIOLENCE 147 (1995) (“the adoption of mandatory arrest policies may exacerbate officers’ tendency to arrest victims.”), available at http://deepblue.lib.umich.edu/bitstream/handle/2027.42/68953/10.1177_0886260595010002001.pdf?sequence=2&isAllowed=y; <http://heinonline.org/HOL/LandingPage?handle=hein.journals/ajgsp2&div=9&id=&page=>

²⁴ *Id.*

occurred weeks, months, or even years in the past, it is unclear whether the goals underlying the legislature's push for a mandatory "cooling down" period are even implicated.

Finally, and perhaps most importantly, it is crucial to understand that the legal system is often used for retaliatory purposes by well-resourced batterers.²⁵ Toward this end, false allegations of domestic violence are possible and sometimes likely.²⁶ In total, just 16.4% of reported domestic violence incidents—and only 30.5% of domestic violence arrests—result in a conviction.²⁷ Moreover, victims of domestic violence are themselves arrested in an astounding 27% of reported domestic violence cases.²⁸ Without question, such statistics are indicative of serious systemic problems related to domestic violence prosecutions, but they provide cause for concern about the potentially high incidence of erroneous and retaliatory domestic violence arrests as well. Consequently, it is

²⁵ Antoinette Bonsignore, *Domestic Violence Survivors Battle Within the Courts: Confronting Retaliatory Litigation*, TRUTHOUT (June 22, 2012), <http://truth-out.org/news/item/9915-domestic-violence-survivors-battle-within-the-courts-confronting-retaliatory-litigation>.

²⁶ B.P. Foster, *Analyzing The Costs And Effectiveness Of Governmental Policies: The Domestic Violence Example*, COST MANAGEMENT (May/June 2008), <http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies>; <http://www.saveservices.org/downloads/False-DV-Allegations-Cost-20-Billion>.

²⁷ Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 CRIMINAL JUSTICE REVIEW Table 1-2 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236959.pdf>.

²⁸ Mary Haviland *et al.*, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City* (2001), available at http://www.connectnyc.org/cnyc_pdf/Mandatory_Arrest_Report.pdf.

foreseeable that in at least some instances,²⁹ the proposed revisions to Section 150 could actually be exploited by batterers or other individuals who “may have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials”³⁰ as a means of inflicting further harm upon those whom the law is intended to protect.³¹ Under such circumstances, even if overwhelming evidence comes to light that a particular arrestee was actually a *victim* of domestic violence—rather than an abuser—if the proposed amendments to Section 150 were to become law, the error could not be remedied until at least twelve hours had elapsed.

Unfortunately, the above examples represent just a few of the many possible unintended policy consequences that a mandatory 12-hour hold policy could produce in practice and which the proposed amendments to Section 150 would prevent the judiciary from resolving. Even if a mandatory 12-hour hold policy were to be enacted, however, the possibility that such a policy would

²⁹ In general, a statement from a citizen is sufficient by itself to establish probable cause to make an arrest. *State v. Williams*, 193 S.W.3d 502, 507 (Tenn. 2006) (“[I]nformation provided by a citizen informant is presumed to be reliable.”). This remains true even under circumstances when the individual providing the information necessary to establish probable cause is an estranged domestic relative or acquaintance of the person being arrested. *Id.* (citing *United States v. Phillips*, 727 F.2d 392 (5th Cir.1984) (finding probable cause under the totality of the circumstances where arrestee's wife “had recently quarreled with and left her husband”); *Massachusetts v. Upton*, 466 U.S. 727 (1984) (finding probable cause under the totality of circumstances analysis where information was provided by an estranged girlfriend); *State v. Wilke*, 55 Wash. App. 470 (1989) (finding probable cause under the two-prong *Aguilar–Spinelli* test where information was provided by the defendant's ex-wife); *State v. Luleff*, 729 S.W.2d 530 (Mo. Ct. App. 1987) (finding probable cause under the totality of circumstances analysis where information was provided by the defendant's estranged wife)).

³⁰ *United States v. Flynn*, 664 F.2d 1296, 1303 (5th Cir. 1982).

³¹ *Haviland*, *supra* note 28.

nonetheless be foreclosed as a constitutional matter provides serious cause for concern as well.

III. The Constitutional Implications of Proposed Changes

The practical effect of the proposed amendments to Section 150 would be to divest judges of any discretion to release individuals who have been arrested for certain domestic violence offenses within twelve hours of their arrest.³² Consequently, all individuals who are arrested for one or more of these offenses would be required to spend at least twelve hours in jail, with no exceptions to the “12-hour hold” requirement permitted for any reason. Such a policy would stand in sharp contrast to existing law, which requires judges to make a specific finding that an alleged offender “is a threat to the alleged victim” prior to imposing a 12-hour hold,³³ and which also permits a hold to be lifted by a judge before twelve hours have elapsed “if the official determines that sufficient time has or will have elapsed for the victim to be protected.”³⁴

Although seemingly minor at first glance, these proposed changes implicate at least four major constitutional issues: (1) the Tennessee Constitution’s separation of powers doctrine; (2) the right to bail under the Tennessee Constitution; (3) the right to be free from unreasonable seizures under both the federal and Tennessee Constitutions; and, (4) the federal and state constitutional right to due process of law. Of note, at least one local practitioner has also expressed the additional concern that “a mandatory twelve-hour hold could be viewed as a punishment, thus triggering double jeopardy protections

³² *TN Press Release Center, supra* note 17.

³³ TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

³⁴ *Id.*

and requiring dismissal of the charge.”³⁵ Although this concern is probably unfounded,³⁶ the four remaining issues

³⁵ See Ben Raybin, *What is Tennessee’s Domestic Violence “Cooling Off” Period?*, HOLLINS RAYBIN WEISSMAN CRIMINAL LAW BLOG (June 20, 2014), <http://www.hollinsleagal.com/2014/06/20/cooling-off-period/>.

³⁶ Because the pre-trial confinement compelled by TENN. CODE ANN. § 40-11-150 is imposed for the legitimate governmental purpose of protecting domestic violence victims, such detention does not qualify as punishment for double jeopardy purposes. See, e.g., *State v. Jones*, 130 So.3d 1 (La. App. 2013) (holding that cooling-off hold prior to admitting defendant to bail after domestic abuse arrest did not violate double jeopardy.) As the U.S. Supreme Court has explained: “Absent a showing of an express intent to punish on the part of the State,” whether a detention qualifies as punishment “generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.” *Schall v. Martin*, 467 U.S. 253, 269 (1984). See also *Doe v. Norris*, 751 S.W.2d 834, 839 (Tenn. 1988) (“In determining whether . . . confinement . . . is punishment, [a] Court must decide whether the confinement is imposed for the purpose of punishment or whether it is an incident of a legitimate governmental purpose. Where . . . no showing of an express intent to punish is made, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.”) (citing *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)); *State v. Pennington*, 952 S.W.2d 420, 423 (Tenn. 1997) (holding that post-arrest detention of suspected drunk drivers serves “a remedial purpose, not a punitive one,” and therefore does not preclude subsequent prosecution under double jeopardy principles); *State v. Coolidge*, 915 S.W.2d 820, 823 (Tenn. Crim. App. 1995) (“if the state action is remedial and not intended to inflict punishment as a means of vindicating public justice, the double jeopardy clause serves as no protection”), overruled on other grounds by *State v. Troutman*, 979 S.W.2d 271 (Tenn. 1998); *United States v. Grisanti*, 4 F.3d 173, 175 (2d Cir. 1993) (holding that because “bail revocation hearing [i]s not ‘essentially criminal,’ . . . pretrial detention was not punishment, [and Defendant] has not twice been put in jeopardy.”). This “alternative purpose” standard is satisfied by Section 150. See *Hopkins v. Bradley Cnty.*, 338 S.W.3d 529, 536 (Tenn. Ct. App. 2010) (“It is clear, based on reading Tenn. Code Ann. § 40-11-

pose legitimate constitutional concerns that merit serious consideration. Of these four issues, the one that is most likely to derail the proposed amendments to Section 150 is the separation of powers doctrine.

A. The Separation of Powers Doctrine

1. Judicial Supremacy Concerning Judicial Functions

The Tennessee Supreme Court has long been firm in holding that “[i]t is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.”³⁷ The fundamental rule established by the Tennessee Constitution’s separation of powers doctrine is that: “If the power is judicial in character, the legislature is expressly prohibited from exercising it.”³⁸ Based on recent precedent from the Tennessee Supreme Court, the essential question to be answered with respect to the proposed amendments to Section 150 is as follows: Does divesting the judiciary of the power to determine whether to release an individual within the first twelve hours of an arrest “frustrate or interfere with the adjudicative function of Tennessee courts”?³⁹ Because the proposed amendments to Section 150 would have the effect of precluding judicial review and suspending enforcement of the writ of habeas corpus within

150 in its entirety, that it was the intent of the General Assembly to protect the victims of domestic abuse from additional abuse when the offender is taken into custody.”)

³⁷ *State v. Mallard*, 40 S.W.3d 473, 482 (Tenn. 1991) (quoting *State ex rel. Shepherd v. Nebraska Equal Opportunity Comm’n*, 557 N.W.2d 684, 693 (Neb. 1997)) (alterations omitted).

³⁸ *Id.* at 483 (quoting *People v. Jackson*, 371 N.E.2d 602, 604 (Ill. 1977)).

³⁹ *State v. McCoy*, No. M2013-00912-SC-R11CD, 2014 WL 6725695, at *7 (Tenn. Dec. 1, 2014).

the first twelve hours of a defendant's arrest—and because they would also preclude the release of a warrantless arrestee even under circumstances in which a judge has determined that there was not probable cause to support a defendant's arrest in the first place—the answer to this question is likely to be “yes.”

The Tennessee Supreme Court's most thorough examination of the separation of powers doctrine is found in the 2001 case, *State v. Mallard*.⁴⁰ *Mallard's* primary holding was that “the legislature [has] no constitutional authority to enact rules . . . that strike at the very heart of a court's exercise of judicial power.”⁴¹ As the *Mallard* court explained:

Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state[.] . . . Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary to engage in the complete performance of the judicial function, this power cannot be constitutionally exercised by any other branch of government. In this area, the court is supreme in fact as well as in name.⁴²

Applying this reasoning, the *Mallard* court explained unequivocally that “any legislative enactment

⁴⁰ *Mallard*, 40 S.W.3d at 480-83 (Tenn. 2001).

⁴¹ *Id.* at 483.

⁴² *Id.* at 480-81.

that . . . impairs the independent operation of the judicial branch of government . . . can[not] be permitted to stand.”⁴³

Both in *Mallard* and in subsequent cases, the Tennessee Supreme Court has characterized the separation of powers inquiry in slightly different ways, generally asking whether a legislative enactment “strike[s] at the very heart of a court’s exercise of judicial power”⁴⁴ or otherwise “impairs the independent operation of the judicial branch of government.”⁴⁵ Most recently, however, in the December 2014 case, *State v. McCoy*, the Tennessee Supreme Court framed the inquiry as whether a particular law “frustrate[s] or interfere[s] with the adjudicative function of Tennessee courts.”⁴⁶ Furthermore, the Tennessee Supreme Court has explained that “[w]hile it is sometimes difficult to practically ascertain where Article II, section 2 draws the line, the distinction may be simply stated as that between cooperation and coercion.”⁴⁷

2. Judicial Deference to the Legislature

Despite the Tennessee Supreme Court’s avowed adherence to the principle of separation of powers, it is worth noting that the judiciary customarily defers even to legislative enactments that regulate practices and procedures of the judiciary if such laws: “(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court.”⁴⁸ Because “comity and cooperation among the branches of government are beneficial to all,” the court has explained, “such practices

⁴³ *Id.* at 483.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *McCoy*, 2014 WL 6725695, at *7.

⁴⁷ *Mallard*, 40 S.W.3d at 481-82.

⁴⁸ *Id.* at 481.

are desired and ought to be nurtured and maintained.”⁴⁹ Thus, “purely out of considerations of inter-branch comity . . . judges will lean over backward to avoid encroaching on the legislative branch’s power.”⁵⁰

The January 2014 case, *Bush v. State*,⁵¹ provides a particularly lucid example of the judiciary “lean[ing] over backward” to accommodate the state legislature.⁵² *Bush* involved a direct conflict between the courts and the legislature over when a new rule of criminal procedure must be applied retroactively to old cases. In *Meadows v. State*, the Tennessee Supreme Court had held that “a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial.”⁵³ Two years later, however, the legislature enacted the Post-Conviction Procedure Act, which called for an entirely different retroactivity rule. Specifically, rather than using *Meadows*’s “materially enhances the integrity and reliability of the fact finding process” standard, the Post-Conviction Procedure Act instead stated that: “A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule . . . requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.”⁵⁴

Thus, the question raised in *Bush* was whether the judiciary’s retroactivity standard or the legislature’s retroactivity standard would be used going forward to determine when a new rule of constitutional criminal

⁴⁹ *Id.*

⁵⁰ *Id.* at 482 (quoting *Anderson Cnty. Quarterly Court v. Judges of the 28th Judicial District*, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978)).

⁵¹ *Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014).

⁵² *Mallard*, 40 S.W.3d at 482.

⁵³ *Meadows v. State*, 849 S.W.2d 748, 755 (Tenn. 1993).

⁵⁴ TENN. CODE ANN. § 40-30-122 (1995).

procedure would be applied retroactively.⁵⁵ Faced with this question, the Tennessee Supreme Court not only “lean[ed] over backward” to avoid encroaching on the legislative branch’s power,⁵⁶ but arguably performed Olympic-level judicial gymnastics. First, the *Bush* court deferred entirely to the state legislature’s retroactivity rule, holding that:

...because Tenn. Code Ann. § 40–30–122 is an integral part of a purely statutory remedy created by the General Assembly and because its reach does not extend beyond the Post–Conviction Procedure Act, we hold that the retroactivity of new constitutional rules in post-conviction proceedings should henceforth be determined using Tenn. Code Ann. § 40–30–122.⁵⁷

Next, the court went even a step further. Rather than applying the comparatively broad retroactivity standard that had in fact been included in the Post-Conviction Procedure Act, the *Bush* court instead held that an even narrower *third* standard—which the court summarily concluded that the legislature must have “intended” to enact based upon a pair of confused statements made by the bill’s House sponsor nineteen years earlier—would henceforth govern retroactivity law in

⁵⁵ *Bush v. State*, 428 S.W.3d 1 (Tenn. 2014).

⁵⁶ *Mallard*, 40 S.W.3d at 482.

⁵⁷ *Bush*, 428 S.W.3d at 16.

Tennessee.⁵⁸ In light of such precedent, it stands to reason that judicial deference to legislative enactments will play a vital role in determining whether the legislature has unlawfully encroached upon the judicial power with respect to the proposed amendments to Section 150 as well.

3. Application to the Proposed Amendments to
TENN. CODE ANN. § 40-11-150

Although the Tennessee Supreme Court has acknowledged that “it is sometimes difficult to practically ascertain where Article II, section 2 draws the line” between legislative and judicial power, the legislature unquestionably oversteps its bounds when it crosses the line “between cooperation and coercion.”⁵⁹ Several considerations support the conclusion that the proposed amendments to Section 150 satisfy this standard. Specifically, by eliminating judicial review and effectively suspending judicial enforcement of the writ of habeas corpus within the first twelve hours of a defendant’s arrest,

⁵⁸ See *Bush*, 428 S.W.3d at 19-20. Unfortunately, this result is not easily explained. It is black-letter law that “courts must ‘presume that the legislature says in a statute what it means and means in a statute what it says there.’” See *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000) (quoting *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997)). Thus, “[i]t is not for the courts to alter or amend a statute.” *Id.* A court “certainly may not supply a provision no matter how confident [it is] of what the Legislature would do if it were to reconsider today.” *West v. Schofield*, No. M2014-00320-COA-R9CV, 2014 WL 4815957, at *9 (Tenn. Ct. App. Sept. 29, 2014), appeal granted (Oct. 21, 2014), quoting *MacMillan v. Director, Div. of Taxation*, 434 A.2d 620, 621 (N.J. Super. Ct. App. Div. 1981). Stated differently: “Where a statute is plain and explicit in its meaning, and its enactment within the legislative competency, the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it.” *Miller v. Childress*, 21 Tenn. 320, 321-22 (1841).

⁵⁹ *Mallard*, 40 S.W.3d at 481-82.

the proposed amendments force judges to permit the extended detention of domestic violence arrestees in all cases—even if they conclude that such arrests are unlawful due to the absence of probable cause.⁶⁰ Moreover, because the proposed amendments to Section 150 completely restructure the existing framework that applies to pre-trial detention,⁶¹ the judiciary’s interest in promoting inter-branch comity is unlikely to carry the day. Thus, notwithstanding the strong presumption of constitutionality accorded to legislative enactments,⁶² it seems likely that the judiciary will ultimately conclude that the proposed amendments to Section 150 unconstitutionally “frustrate or interfere with the adjudicative function of Tennessee courts.”⁶³

The most persuasive argument against the constitutionality of the proposed amendments is that they would significantly frustrate judicial review of the legality of a defendant’s confinement by forcing even unwilling judges to permit an arrestee’s continued detention for a minimum of twelve hours. Crucially, however, the right to challenge the legitimacy of one’s confinement at the hands of the state—in other words, the writ of habeas corpus—is perhaps the most fundamental individual right that exists

⁶⁰ In order to be lawful, an arrest must be supported by probable cause. *See* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause[.]”). *See also* *State v. Crutcher*, 989 S.W.2d 295, 300 (Tenn. 1999) (“custodial arrest[] is justified upon a showing of probable cause to believe that a crime has been committed, and that the suspect of the investigation committed that crime.”).

⁶¹ *Id.* at 483.

⁶² *See, e.g.,* *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (“[The judiciary’s] charge is to uphold the constitutionality of a statute wherever possible. In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.”) (internal citation omitted).

⁶³ *McCoy*, 2014 WL 6725695, at *7.

under either the federal or state Constitutions.⁶⁴ Known historically as “the Great Writ,” the writ of habeas corpus affords anyone who has been incarcerated an immediate judicial mechanism “for challenging all forms of detention . . . [that] requires the detaining authority to justify the detention of the subject or to release him.”⁶⁵ The judiciary alone is vested with the authority to vindicate a defendant’s claim for release under the Great Writ, and its practical value lies in the fact that it is available in nearly all circumstances to anyone who is incarcerated at any time.⁶⁶ As the Tennessee Supreme Court recently explained in *May v. Carlton*, “the essential purpose of a writ of habeas corpus is to subject imprisonment or any other restraint on liberty, for whatever cause, to judicial scrutiny.”⁶⁷

The United States Constitution, the Tennessee Constitution, and the Tennessee Rules of Criminal Procedure all separately afford arrestees an additional form of pre-trial judicial review of their arrests as well.⁶⁸ Both individually and collectively, each mandates that all arrests

⁶⁴ TENN. CONST. art. I, § 15 (“the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.”).

⁶⁵ See ALAN DERSHOWITZ, *FINDING, FRAMING, AND HANGING JEFFERSON: A LOST LETTER, A REMARKABLE DISCOVERY, AND THE FIRST AMENDMENT IN AN AGE OF TERRORISM*, 172-73 (2007).

⁶⁶ TENN. CONST. ART. I, § 15 (“the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.”); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993) (“a writ of habeas corpus may be brought at any time while the petitioner is incarcerated, to contest a void judgment or an illegal confinement.”).

⁶⁷ *May v. Carlton*, 245 S.W.3d 340, 346 (Tenn. 2008).

⁶⁸ *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn. 1996). TENN. R. CRIM. P. 5(a) (“Any person arrested—except upon a capias pursuant to an indictment or presentment—shall be taken without unnecessary delay before the nearest appropriate magistrate[.]”).

either be approved in advance by a judicial warrant or else promptly reviewed by a neutral and detached magistrate after a defendant has been taken into custody.⁶⁹ The express purpose of such requirements, of course, is to place a robust and upfront judicial check on the abuse of executive power. However, such a goal is substantially undermined by permitting—and, in fact, mandating—an extended period of detention for anyone who is arrested on suspicion of having committed a domestic violence offense when the defendant’s arrest is based exclusively on a probable cause determination made by law enforcement.⁷⁰

In light of these vital constitutional considerations, the conclusion that the proposed amendments to Section 150 would substantially “frustrate or interfere with the adjudicative function of Tennessee courts”⁷¹ seems almost unavoidable. The amendments plainly suspend judicial review within the first twelve hours of domestic violence arrests. Moreover, even if judicial review were to occur within the first twelve hours of a defendant’s arrest,

⁶⁹ *Id.*

⁷⁰ As the United States Supreme Court has explained:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

⁷¹ *McCoy*, 2014 WL 6725695, at *7.

divesting judges of any authority to release domestic violence arrestees would effectively suspend judicial enforcement of the writ of habeas corpus.⁷² Furthermore, in direct violation of both federal and state constitutional mandates requiring that arrests be supported by probable cause,⁷³ the proposed amendments to Section 150 would preclude judges from releasing a defendant before twelve hours have elapsed even if a judge determines that probable cause did not exist to justify the defendant's arrest in the first place.

Given the historical importance of the judiciary's ability to adjudicate and ensure the legitimacy of a defendant's confinement at the hands of the state, legislatively mandating that judges permit the extended detention of domestic violence arrestees under such circumstances represents a profound and substantial encroachment upon a quintessential and sovereign judicial function. As a result, it is difficult to imagine how such a law could not be deemed to be an unconstitutionally coercive⁷⁴ legislative attempt to "frustrate or interfere with the adjudicative function of Tennessee courts,"⁷⁵ and the proposed amendments would likely be invalidated accordingly.

B. The right to bail under the Tennessee Constitution

Article I, § 15 of the Tennessee Constitution provides: "That all prisoners shall beailable by sufficient

⁷² TENN. CONST. art. I, § 15 ("the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.").

⁷³ See *supra* note 61.

⁷⁴ *Mallard*, 40 S.W.3d at 481-82.

⁷⁵ *McCoy*, 2014 WL 6725695, at *7.

sureties, unless for capital offences, when the proof is evident, or the presumption great.”⁷⁶ The practical effect of Article I, § 15 is to create an affirmative right to bail for all non-capital offenses. Of note, the right to bail is considered so fundamental in Tennessee that even a defendant who has already been afforded bail but defaulted on his first bail bond must *still* be afforded access to bail.⁷⁷ Additionally, no exceptions are carved out for considerations of potential danger to victims, although such considerations certainly affect the amount at which bail is set. For these reasons, the Tennessee Constitution affords arrestees a markedly broader right to bail than is guaranteed by the federal Constitution, since “the Eighth Amendment does not mandate bail in all cases.”⁷⁸

Due to the fundamental importance of the right to bail under the Tennessee Constitution, a colorable claim can be made that the proposed amendments to Section 150 violate the Tennessee Constitution because they would suspend a defendant’s right to bail for a minimum of twelve hours. Of note, however, courts have thus far rejected similar arguments when considering challenges brought under the federal Constitution. Reasoning that the Eighth Amendment addresses only “the amount of bail, not the timing,”⁷⁹ such claims have previously failed to curry

⁷⁶ TENN. CONST. art. I, § 15.

⁷⁷ *Wallace v. State*, 245 S.W.2d 192 (Tenn. 1952).

⁷⁸ *Fields v. Henry Cnty., Tenn.*, 701 F.3d 180, 183-84 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 2036 (2013) (citing *United States v. Salerno*, 481 U.S. 739, 753–54 (1987)).

⁷⁹ *See Fields*, 701 F.3d at 185 (“[Defendant] also claims that the 12-hour holding period was a ‘denial of bail.’ Not so. The Eighth Amendment’s protections address the amount of bail, not the timing.”) (internal citation omitted), (citing *Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) (“There is no right to post bail within 24 hours of arrest.”)); *Woods v. City of Michigan City*, 940 F.2d 275, 283 (7th Cir. 1991) (Will, D.J., concurring) (“Nothing in the eighth amendment, however, guarantees instant release for misdemeanors or any other offense.”).

judicial favor.⁸⁰ Importantly, at least one federal court has opined that the Tennessee Constitution does not afford defendants “a specific right to post bail within a particular time frame,” either.⁸¹

In light of the authority referenced above, if Tennessee courts adopted the reasoning of the federal courts that have examined this issue, the proposed amendments to Section 150 would not be invalidated on the basis that they violate Article I, § 15. That said, however, it is worth noting that the reasoning of the above-cited cases lacks any explicit limiting principle, and thus may be subject to future reconsideration.⁸² Put differently: if the

⁸⁰ *Hopkins v. Bradley Cnty.*, 338 S.W.3d 529, 539 (Tenn. Ct. App. 2010) (“being held for twelve hours before being released on bail does not automatically constitute a constitutional violation.”) (citing *Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir. 2005) (city’s “official policy of holding domestic violence arrestees for a minimum period of 20 hours unless arraigned and released by the court” is not unconstitutional); *Lund v. Hennepin Cnty.*, 427 F.3d 1123, 1126–28 (8th Cir. 2005) (holding that no violation of due process occurred where defendant was held for twelve hours after judge ordered that defendant could be released with no bail); *Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) (“There is no right to post bail within 24 hours of arrest”). *See also* *Campbell v. Johnson*, 2006 WL 3408177, at *3 (N.D. Fla. 2006) (“[the defendant] has . . . failed to state a basis for a substantive Due Process claim, that is, that he has a fundamental right to access the bail system once bail has been set by the releasing authority, since courts have held that access to the bail system once an individual is found eligible for bail does not constitute a fundamental right, and government limitations on access to the bail system need only be reasonable.”) (citing *Broussard v. Parish of Orleans*, 318 F.3d 644, 651 (5th Cir. 2003)).

⁸¹ *See Fields*, 701 F.3d at 184, n. 1 (“While Tennessee grants criminal defendants a general ‘right to bail pending trial’ . . . it does not grant defendants a specific right to post bail within a particular time frame[.]”) (citations omitted).

⁸² *See generally* The Immigrant Legal Resource Center and Ozment Law, MOTIONS TO SUPPRESS PROTECTING THE CONSTITUTIONAL RIGHTS OF IMMIGRANTS IN REMOVAL PROCEEDINGS, § 6.9: INTERFERENCE WITH RIGHT TO BAIL (2d ed. 2013) (characterizing the

constitutional provisions guaranteeing defendants access to bail only address “the amount of bail, not the timing,”⁸³ then what would prevent a jurisdiction from lawfully delaying a defendant’s bail determination for a day, or a week, or a year? Furthermore, given that Article I, § 15 affords defendants a broader right to bail than the Eighth Amendment, there is ultimately no way to be certain that Tennessee courts would adopt the reasoning of federal courts when interpreting the scope of the right to bail guaranteed by the Tennessee Constitution.

C. The Right to be Free from Unreasonable Seizures

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

right to bail as a series of four separate rights that includes: [1] “the right to have bail set”; [2] “the federal constitutional mandate that bail not be excessive”; [3] “the right to post bail after it has been set”; and [4] “the right to be released from detention upon paying it.” *Cf. Fields*, 701 F.3d at 186 (“An expectation of release may qualify as a constitutionally protected liberty interest.”) (citing *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (“[T]he expectancy of release provided in this statute is entitled to some measure of constitutional protection.”)).

⁸³ *Id.* at 185.

searched, and the persons or things to be seized.⁸⁴

Similarly, Article I, § 7 of the Tennessee Constitution states:

That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.⁸⁵

Both the U.S. Supreme Court and the Tennessee Supreme Court have long held that unreasonably delaying a warrantless arrestee's opportunity to receive a judicial determination of probable cause implicates a citizen's constitutional right to be free from unreasonable seizures.⁸⁶

⁸⁴ U.S. CONST., amend. IV.

⁸⁵ TENN. CONST., art. I, § 7.

⁸⁶ *See* *Gerstein v. Pugh*, 420 U.S. 103; *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn. 1996). The Fourth Amendment is applicable to the states through the Fourteenth Amendment to the United States Constitution. *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Bridges*, 963 S.W.2d 487, 490 n. 2 (Tenn. 1997).

Thus, even if defendants cannot assert a constitutional right to a timely bail determination under the Eighth Amendment or Article I, § 15 of the Tennessee Constitution, there is reason to believe that the Fourth Amendment or Article I, § 7 provides this right instead.⁸⁷

Helpfully, both state and federal courts have provided guidance on this very question. Specifically, in 2010, the Tennessee Court of Appeals favorably quoted the following passage of a decision from the U.S. District Court for the Middle District of Tennessee, stating:

The U.S. Supreme Court has recognized that probable cause decisions must be made promptly, but has also recognized that states should be given enough time to combine such hearings with other preliminary procedures, including bail determinations. Thus, in *County of Riverside v. McLaughlin*, the Supreme Court held that jurisdictions which provide probable cause hearings within forty-eight hours will generally be immune from systemic challenges. The clear import of *McLaughlin*, then, is that a bail hearing held within 48 hours of a warrantless arrest is also presumptively constitutional—if indeed the

⁸⁷ *Id.*

Constitution speaks to that issue.

Given that a bail hearing may be delayed up to forty-eight hours absent some improper motive, the Court finds that a 12-hour delay in releasing Plaintiff in this case did not amount to a constitutional deprivation.⁸⁸

This persuasive precedent offers a strong indication that a reviewing court would hold that the proposed amendments to Section 150 comport with the requirements of the Fourth Amendment even though the amendments would delay a defendant's bail hearing for a minimum of twelve hours. Crucially, however, there are two major problems with relying on the above authority in support of the amendments' constitutionality.

First, the Tennessee Supreme Court has repeatedly held that Article I, § 7 of the Tennessee Constitution affords defendants greater protection than the Fourth Amendment provides,⁸⁹ and given the fundamental importance of the right to bail under the Tennessee Constitution,⁹⁰ mandating that domestic violence arrestees be subjected to extended pre-trial detention for the express purpose of delaying their bail hearings may be precisely the

⁸⁸ *Hopkins*, 338 S.W.3d at 538-39 (quoting *Tate v. Hartsville/Trousdale Cnty.*, No. 3:09-0201, 2010 WL 4054141, at *8 (M.D. Tenn. Oct. 14, 2010) (internal citations and quotations omitted)).

⁸⁹ *See, e.g.*, *State v. Randolph*, 74 S.W.3d 330, 337 (Tenn. 2002); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000); *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989); *Drinkard v. State*, 584 S.W.2d 650, 653 (Tenn. 1979); *State v. Lakin*, 588 S.W.2d 544, 548 (Tenn. 1979).

⁹⁰ *See supra* Section III-B

sort of situation that would merit greater protection under Article I, § 7. Thus, even if the proposed amendments to Section 150 were held to satisfy the minimum requirements of the Fourth Amendment, it is possible that they would still be unable to satisfy the “greater . . . protections [afforded] to the citizens of this State . . . under article I, § 7 of the Tennessee Constitution.”⁹¹

Second, there is a glaring omission and likely fatal flaw within the reasoning cited above. Specifically, the U.S. Supreme Court’s decision in *McLaughlin*—which held that “a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement” of the Fourth Amendment—was expressly based on the “inevitable” and “often unavoidable” administrative delays of an overly burdened criminal justice system.⁹² As the *McLaughlin* court explained:

[S]ome delays are inevitable. . . . Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the

⁹¹ *Randolph*, 74 S.W.3d at 335.

⁹² *McLaughlin*, 500 U.S. 44 at 56.

police cope with the everyday problems of processing suspects through an overly burdened criminal justice system. . . .

Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.⁹³

Toward this end, and in an effort to prevent law enforcement from abusing pre-trial detentions, the *McLaughlin* court offered three specific examples of delays that are categorically impermissible within the first forty-eight hours of a defendant's arrest, explaining:

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested

⁹³ *Id.* at 56-57.

individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are [1] delays for the purpose of gathering additional evidence to justify the arrest, [2] a delay motivated by ill will against the arrested individual, or [3] delay for delay's sake.⁹⁴

Thus, if *McLaughlin* provides the framework for determining the point by which defendants must be afforded a bail determination, then the major problem with the proposed amendments to Section 150 is that they would not cause a defendant's bail hearing to be delayed for "inevitable" and "often unavoidable" administrative reasons.⁹⁵ Instead, they mandate delaying a defendant's bail hearing for intentional and administratively unnecessary reasons. Given that *McLaughlin* should properly be read to prohibit any intentional and administratively unnecessary delays to a warrantless arrestee's judicial probable cause hearing,⁹⁶ there is strong reason to be concerned that a

⁹⁴ *Id.* at 56.

⁹⁵ *Id.* at 56-57.

⁹⁶ See Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds In Violation of County of Riverside v. McLaughlin*, 45 U. MEM. L. REV. 519, 539 (2015) ("the Fourth Amendment categorically prohibits law enforcement from deliberately delaying a defendant's *Gerstein* hearing for any administratively unnecessary reason[.]"). See also Mark J. Goldberg, *Weighing Society's Need for Effective Law Enforcement Against an Individual's Right to Liberty: Swinney v. State and the Forty-Eight Hour Rule*, 24 MISS. C. L. REV. 73, 106 (2004) ("[T]here is no common rationale shared among the examples of impermissible

statutorily mandated delay in a defendant's bail determination would not be able to withstand constitutional scrutiny under the Fourth Amendment.

D. The Right to Due Process

Both the federal Constitution and the Tennessee Constitution afford defendants a fundamental right to due process of law.⁹⁷ Under each, a governmental deprivation of a constitutionally-protected liberty interest implicates the guarantees of due process.⁹⁸ Without question, incarceration qualifies as a deprivation of such an interest.⁹⁹

In defining the contours of the Due Process clause, the U.S. Supreme Court has instructed that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁰⁰ Even so, however, the Supreme Court has also explained that the requirements of due process are “flexible and call[] for such procedural protections as the particular

delays [in *McLaughlin*]. . . . Consequently, if an individual can show that their [sic] judicial determination of probable cause was intentionally delayed for a purpose not relating to circumstances beyond law enforcement's control, a Fourth Amendment violation should be declared.”)

⁹⁷ See U.S. CONST. amend. XIV, § 1 (“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]”); TENN. CONST. art. I, § 8 (“[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”).

⁹⁸ See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

⁹⁹ See, e.g., *United States v. Salerno*, 481 U.S. 750 (1987). See also *State v. Thompson*, 508 S.E.2d 277, 287 (N.C. 1998) (“In considering the first factor articulated in both *Mathews* and *Mallen*, it is beyond question that the private interest at stake, liberty, is a fundamental right.”).

¹⁰⁰ *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

situation demands.”¹⁰¹ In determining what process is due in a given situation, the U.S. Supreme Court instructed in the seminal case, *Mathews v. Eldridge*, that:

“[T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁰²

Subsequently, however, the Supreme Court “slightly reformulated these factors for use in assessing the permissibility of post-deprivation process delay,”¹⁰³ stating:

In determining how long a delay is justified in affording a post-[deprivation] hearing and decision, it is appropriate

¹⁰¹ *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹⁰² *Id.* at 335.

¹⁰³ *Thompson*, 508 S.E.2d at 286.

to examine [1] the importance of the private interest and the harm to this interest occasioned by delay; [2] the justification offered by the Government for delay and its relation to the underlying governmental interest; and [3] the likelihood that the interim decision may have been mistaken.¹⁰⁴

¹⁰⁴ FDIC v. Mallen, 486 U.S. 230, 242 (1988). The U.S. Court of Appeals for the Fourth Circuit speculated that:

Presumably, this refinement was undertaken out of recognition of the awkwardness of a literal application of the *Mathews* factors in this context. Where the question is not whether there will be post-deprivation review, but the timeliness of such review, it is not meaningful to inquire, as it is in the typical procedural due process context, whether the procedure sought—sooner review—would reduce the likelihood of an erroneous deprivation. The deprivation has already occurred, it is understood that there will be judicial review, and the deprivation, even if in error, cannot be “undone” by sooner judicial review. At most, the risk of an extended erroneous deprivation could be reduced. The more relevant questions therefore are the harm to the private interests that will be occasioned by the delay in

The first factor of *Mathews* and *Mallen* compels consideration of the private interest at stake. Here, the proposed amendments to Section 150 implicate the liberty of a presumptively innocent individual. The significance of this liberty interest is not subject to reasonable disagreement, as the incarceration of a presumptively innocent individual for any period of time is a serious constitutional matter.¹⁰⁵ Toward this end, the U.S. Supreme Court has taken at face value the notion that “[e]veryone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail.”¹⁰⁶ “Pretrial confinement,” the U.S. Supreme Court has observed, may “imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships.”¹⁰⁷

Additionally, following the U.S. Supreme Court’s 2012 decision in *Florence v. Board of Chosen Freeholders of County of Burlington*, arrestees may even be forced to submit to the dehumanizing requirement that they “expose their body cavities for visual inspection as a part of a

review and the state’s justifications
for the delay.

Jordan ex rel. Jordan v. Jackson, 15 F.3d 333, 345 (4th Cir. 1994) (internal citations omitted).

¹⁰⁵ *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (“liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action”) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). Cf. *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that a juvenile’s “interest in freedom from institutional restraints, even for [a] brief time . . . is undoubtedly substantial[.]”).

¹⁰⁶ *McLaughlin*, 500 U.S. at 58.

¹⁰⁷ *Id.* (citing RONALD L. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32-91 (1965); LEWIS KATZ, JUSTICE IS THE CRIME 51-62 (1972)).

[warrantless] strip search” without any individualized basis for suspicion.¹⁰⁸ This notwithstanding, however, the magnitude of the deprivation at stake is tempered substantially by the fact that the 12-hour hold mandated by the proposed amendments to Section 150 is only meant to be temporary in nature. Taken together, on balance this factor weighs against the constitutionality of the proposed amendments to Section 150.

The second set of factors to be considered—under *Mathews*, “the risk of an erroneous deprivation of liberty through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and under *Mallen*, “the likelihood that the interim decision may have been mistaken”—is mixed. In order to trigger an arrest at all, either a law enforcement officer or a member of the judiciary must first determine that there is probable cause to believe that a defendant has committed a criminal offense.¹⁰⁹ This requirement provides a built-in procedural safeguard that reduces the risk of an erroneous deprivation of liberty, which weighs in favor of the constitutionality of the proposed amendments.

In most cases, however, the probable cause determination necessary to effect an arrest will be made exclusively by law enforcement, rather than pre-approved by a judge. With this in mind, the U.S. Supreme Court has cautioned that: “[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is . . . [that] inferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged

¹⁰⁸ See generally *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1516, (2012) (quoting *Bell v. Wolfish*, 441 U.S. 520 (1979)).

¹⁰⁹ See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”). See also *supra* note 61.

in the often competitive enterprise of ferreting out crime.”¹¹⁰ This unfortunate reality tempers the value of this procedural safeguard significantly.

Furthermore, there are several valuable and easily-administered procedural safeguards that could be added to supplement the proposed amendments to Section 150 in order to reduce the likelihood of an erroneous deprivation of liberty. Incidentally, however, these procedural safeguards are precisely those portions of the law that the proposed amendments to Section 150 seek to excise. For example, requiring individualized judicial fact-finding that an arrestee poses a threat to his or her alleged victim before the arrestee is subjected to a 12-hour hold is probably the single most effective way to reduce the likelihood of an erroneous deprivation of liberty. Additionally, the likelihood of an erroneous deprivation of liberty could be reduced even further by increasing the standard of proof required to support a judicial finding that “the offender is a threat to the alleged victim,”¹¹¹ since the likelihood of an

¹¹⁰ See *Gerstein*, 420 U.S. at 112-13 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

¹¹¹ Interestingly, TENN. CODE ANN. § 40-11-150 does not specify what standard of proof is necessary to support this finding. However, a colorable claim can be made that anything short of a “clear and convincing evidence” standard would not comport with due process. See *Addington v. Texas*, 441 U.S. 418, 431 (1979) (holding that “the preponderance standard falls short of meeting the demands of due process” with respect to involuntary civil commitment proceedings and that a “clear and convincing evidence” standard is the minimum level of proof required). Conversely, where, as here, the deprivation is limited in time and based on a reasonable legislative determination that domestic violence arrestees pose a heightened threat to victims in the period immediately following an arrest. See *infra* notes 114-15, this requirement of judicial fact-finding may yield. See, e.g., *State v. Atkinson*, 755 So. 2d 842, 844 (Fla. Dist. Ct. App. 2000) (approving statutorily mandated eight-hour detention of apparently drunk drivers, notwithstanding absence of judicial fact-finding requirement, and analogizing such detentions “to the detention of persons under

erroneous deprivation of liberty necessarily decreases as the required standard of proof increases. The proposed amendments to Section 150, however, would do away with the law's existing judicial fact-finding requirement entirely, effectively creating an irrebuttable presumption of dangerousness in all cases.¹¹² These concerns pose serious constitutional problems¹¹³ that, on balance, weigh against the constitutionality of the proposed amendments as well.

The third set of factors to be considered—the government's interest in and justification for imposing a 12-hour hold and the law's relation to this interest—weighs heavily in favor of the proposed amendments. To start, the “cooling off” period compelled by Section 150 would directly further at least two governmental interests. First, such a hold would provide immediate intervention to prevent violent recidivism during what is believed to be an especially heightened period of danger.¹¹⁴ Second, detaining domestic violence arrestees for a minimum of twelve hours would allow victims a sufficient and defined period of time to get to safety and to obtain legal

quarantine orders wherein a threat is posed to the public health and safety.”).

¹¹² TENN. CODE ANN. § 40-11-150(h)(1); TENN. CODE ANN. § 40-11-150(k)(1).

¹¹³ See, e.g., Steven J. Mulroy, “Hold” On: *The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 862 (2013).

¹¹⁴ Hyunkag Cho and Dina J. Wilke, *Does Police Intervention in Intimate Partner Violence Work? Estimating the Impact of Batterer Arrest in Reducing Revictimization*, 11 ADVANCES IN SOCIAL WORK 283-85 (2010) (citing Sherman & Berk, 1984 (concluding that arresting a batterer and detaining him overnight is the most effective law enforcement policy to prevent recidivism)). See also *In re Conard*, 944 S.W.2d 191, 201 (Mo. 1997) (“In many instances there are valid reasons for keeping an individual in jail for the twenty hours allowed by [state law]. This is so especially in instances of domestic abuse when continued violence is a threat.”).

protection—such as a restraining order—against their alleged abusers.¹¹⁵

These governmental interests are indisputably compelling. As the Supreme Court has explained: “The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”¹¹⁶ Additionally, “society’s interest in crime prevention is at its greatest” where “the [g]overnment musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community.”¹¹⁷ Of note, preventive detentions much more extensive than twelve hours have also been upheld by the Supreme Court in other contexts,¹¹⁸ albeit with the crucial additional caveat that the requirements necessary to justify the detentions in those cases carried much more robust procedural safeguards than those contemplated by the proposed amendments to Section 150.¹¹⁹ Assuming that

¹¹⁵ *See, e.g.*, *State v. Kapela*, 82 Haw. 381, 391, 922 P.2d 994, 1004 (Haw. Ct. App. 1996) (citing legislative history stating that “when we talked about a cooling[-]off period and we provided twelve hours for a cooling[-]off period, it was to give Daddy a chance to cool down a little bit, get his head together so when he comes home, he doesn't hit Mama anymore. Now, truly, we as a society are beginning to recognize that the cooling[-]off period isn't just for Daddy to cool down. The cooling[-]off period is necessary so that the woman can get a temporary restraining order to keep him away from her so he doesn't continue beating her and the kids. It's necessary for her to get legal counsel. It's necessary for her to find alternative shelters instead of going into the homeless environment.”).

¹¹⁶ *Schall*, 467 U.S. at 264 (citing *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)).

¹¹⁷ *United States v. Salerno*, 481 U.S. 739, 750 (1987).

¹¹⁸ *See, e.g.*, *Schall*, 467 U.S. 253 (pretrial detention of juvenile detainees); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (detention of involuntarily committed mental patients); *See also Gary H. v. Hegstrom*, 831 F.2d 1430 (9th Cir.1987) (detention of juveniles).

¹¹⁹ *Schall*, 467 U.S. 253. For example, required a specific and individualized judicial finding that there was “a ‘serious risk’ that the [detainee], if released, would commit a crime prior to his next court

Tennessee courts will defer to the legislature's conclusion that arresting alleged batterers and detaining them for a minimum period of twelve hours is an effective way to protect victims of domestic violence,¹²⁰ the government's vital interest in preventing recidivism and affording domestic violence victims a minimum period of time to get themselves to safety cannot realistically be doubted.

Considering these factors together, whether the proposed amendments pose a due process problem is an extremely close question. The liberty interest at stake is vitally important, and the absence of any individualized judicial determination of dangerousness to safeguard this interest is highly problematic. So, too, is the requirement that all people arrested for certain domestic violence offenses must be subjected to a 12-hour hold no matter the circumstances. Furthermore, each of these procedural omissions can be improved considerably without adding much in the way of administrative or fiscal burdens.¹²¹ Even so, however, the state's interest in domestic violence prevention is similarly compelling, and this interest is at its zenith under circumstances when an arrestee poses a heightened risk of violent recidivism.¹²² Taken together, and relying substantially on the rule that statutes carry a strong presumption of constitutionality,¹²³ it seems

appearance" unless the hold were implemented. 467 U.S. at 278. The procedure involved also required "notice, a hearing, and a statement of facts and reasons . . . prior to any detention." *Id.* at 277.

¹²⁰ See *supra* notes 114-15.

¹²¹ See, e.g., *Thompson*, 508 S.E.2d at 288 ("providing a domestic-violence arrestee with a pretrial-release hearing before the first available judge . . . would involve little or no expense to the State.").

¹²² *Salerno*, 481 U.S. at 750.

¹²³ See *Waters*, 291 S.W.3d at 882 ("[The judiciary's] charge is to uphold the constitutionality of a statute wherever possible. In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.") (internal citation omitted).

probable—although far from a guarantee—that Tennessee courts would hold that the proposed amendments to Section 150 satisfy due process.

IV. The Solution

Although the proposed amendments to Section 150 will face substantial constitutional obstacles if enacted, a middle-ground solution is available that would go a long way toward alleviating the constitutional concerns presented above. Specifically, the current version of Section 150 could be strengthened considerably by simply removing the exception permitting judges to lift domestic violence holds if they determine that “sufficient time has or will have elapsed for the victim to be protected.”¹²⁴

If the exception permitting judges to lift domestic violence holds under circumstances when they have determined that “sufficient time has or will have elapsed for the victim to be protected”¹²⁵ were removed—and if the current requirement that a “magistrate or other official duly authorized to release the offender find[] that the offender is a threat to the alleged victim” as a precondition to imposing any hold were retained¹²⁶—then this updated version of TENN. CODE ANN. § 40-11-150 would likely be able to overcome each of the aforementioned constitutional obstacles. First, by maintaining near-immediate judicial review of domestic violence arrests, such a change would completely avoid any legislative encroachment on the judicial function, sidestepping entirely the law’s most daunting constitutional hurdle.¹²⁷ Moreover, both a temporary denial of bail and a temporary judicial hold—

¹²⁴ TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See supra* Section III-A.

even one intentionally created by statute—would be made eminently more reasonable following a judicial determination that an alleged batterer was both arrested legitimately and poses an immediate threat to his or her victim.¹²⁸ Finally, preserving the requirement that a judge make an individualized determination of dangerousness as a precondition to imposing a hold would avoid the most troubling due process concerns raised by the proposed amendment to Section 150 by reducing erroneous deprivations of freedom and by retaining an essential judicial check on potential missteps made by law enforcement.

Most importantly, however, such a change would finally end the highly questionable practice of releasing domestic violence arrestees based on nothing more than judicial speculation that “sufficient time has or will have elapsed for the victim to be protected.”¹²⁹ This reform would also go a long way toward preventing the premature release of batterers resulting from either poor judgment or judicial misconduct—as apparently occurred in the David Chase incident—which prompted the demand for policy reform in the first place. In sum, although the legislature should retain Tenn. Code Ann. § 40-11-150’s requirement that judges must find that a domestic violence arrestee poses a threat to an alleged victim prior to imposing a 12-hour hold, the legislature should still strengthen Section 150 by removing the exception allowing judges to lift domestic violence holds if they determine that “sufficient

¹²⁸ See *supra* Sections III-B and III-C. Of note, the U.S. Supreme Court has also expressly authorized jurisdictions to delay an arrestee’s probable cause hearing for the purpose of preparing for “combination” proceedings that combine both a probable cause determination and other pre-trial proceedings that occur early in the pretrial process. See *McLaughlin*, 500 U.S. at 58.

¹²⁹ TENN. CODE ANN. § 40-11-150(h)(1) (2012); TENN. CODE ANN. § 40-11-150(k)(1) (2012).

time has or will have elapsed for the victim to be protected.”¹³⁰

¹³⁰ *Id.*

ARTICLE

**PROMOTING THE SUSTAINABILITY OF BIOFUELS IN
AMERICA: LOOKING TO BRAZIL**

*By: Julia Johnson**

“We stand now where two roads diverge. But unlike the roads in Robert Frost’s familiar poem, they are not equally fair. The road we have long been traveling is deceptively easy, a smooth superhighway on which we progress with great speed, but at its end lies disaster. The other fork of the road — the one less traveled by — offers our last, our only chance to reach a destination that assures the preservation of the earth.”
— Rachel Carson, *Silent Spring*

I. Introduction

Many Americans today would struggle to envision the United States (“U.S.”) completely independent from foreign oil. The U.S. is so intertwined with its foreign oil interests that debates over the U.S.’s continued reliance on foreign oil now pervade the country’s political, economic, and national security agenda. Calls for increased energy independence¹ and a transition to a green economy have largely failed to materialize.² Moreover, the U.S.’s economy remains stagnant in the wake of the 2008 recession, leaving

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¹ *Final Staff Report of the Select Committee on Energy Independence and Global Warming*, H.R. REP. NO. 11-709, (2011) (statement of Edward of J. Markey) (stating that “[o]ther countries are taking the lead in clean energy and the United States must act now if it is to remain competitive in this rapidly developing global market.”).

² Matthew L. Wald & Edmund L. Andrews, *Call to Cut Foreign Oil is a Refrain 35 Years Old*, N.Y. TIMES, Jan. 31, 2006, at A16.

policymakers struggling to revive America's prosperity. Perhaps then, it is ludicrous to strive for an increased role for alternative energy sources, which so far have failed to garner widespread public support and remain highly partisan.³ Nonetheless, installing innovative energy policies has become increasingly important as the U.S. stands at a crossroads.

Previous attempts at incorporating biofuels into energy legislation have failed to experience widespread success because the U.S. has not adequately incentivized consumers to purchase biofuel blends. Notably, the U.S. has not sufficiently promoted the competitiveness of biofuels in the marketplace, thereby limiting their long-run viability.⁴ While the U.S.'s policies remained targeted at subsidizing producers, Brazil's policies place a greater emphasis upon creating and maintaining ethanol demand.⁵ Due to this approach, Brazil's biofuels framework has now become a model for emulation.⁶

³ See *Letter to Congress from Secretary Jacob J. Lew*, U.S. DEP'T OF TREASURY (May 31, 2013) (warning of consequences of the failure to raise the debt ceiling).

⁴ See *NREL Highlights 2012 Utility Green Power Leaders: Top 10 Programs Support More Than 4.2 Million MWh of Voluntary Green Power*, NAT'L RENEWABLE ENERGY LAB (June 5, 2013) (detailing alternative energy providers and price markup over conventional fuels).

⁵ See Nancy I. Potter, *How Brazil Achieved Energy Independence and the Lessons the United States Should Learn from Brazil's Experience*, 7 WASH. U. GLOBAL STUD. L. REV. 331, 346–7 (2008).

⁶ ROLAND A. JANSEN, *SECOND GENERATION BIOFUELS AND BIOMASS: ESSENTIAL GUIDE FOR INVESTORS, SCIENTISTS AND DECISION MAKERS* 159–60 (2013) (stating “Brazil is considered to have the world's first sustainable biofuels economy and be the biofuel industry leader, a policy model for other countries, and its sugarcane ethanol ‘the most successful alternative fuel to date’”) (emphasis in original).

For the U.S.'s biofuels policies to be more effective, the nation must employ better consumer-side factors and devise policies around promoting biofuels' ability to compete with conventional fuels. Consumer-side factors include biofuels' accessibility and pricing, as well as the ease and attractiveness of purchasing alternative energy-powered vehicles. As shall be discussed, the U.S.'s initiatives have neither been aggressive enough, nor sufficiently comprehensive, to enable the U.S. to mirror Brazil's success.

This article will review the factors that have limited the efficacy of the U.S.'s biofuels initiatives, as compared to Brazil. First, a background of Brazil's ethanol framework will be provided. Second, the U.S.'s biofuels policies will be reviewed. Third, the factors reducing the success of the U.S.'s policies, as compared to those policies in Brazil, shall be considered. Finally, recommendations will be set forth describing how the U.S. can more effectively incorporate biofuels into its energy framework.

II. Background

A. Energy Policy in Brazil

By taking a multi-faceted approach that integrates supply-side and demand-side considerations, Brazil's biofuels program has remained viable for the past thirty years.⁷ Furthermore, Brazil's continued efforts to promote and cultivate ethanol have also played a vital role in fostering the nation's energy independence, though increased domestic oil production has been employed as a corresponding strategy.⁸

Broadly, there have been several key government initiatives attributed to ethanol's current success. Specifically, Brazil has: (1) generated and maintained consumer demand for alternative fuels;⁹ (2) artificially reduced the price of ethanol for consumers;¹⁰ (3) developed infrastructure supports, including ensuring that consumers have ready access to fueling stations selling ethanol;¹¹ (4) effectively utilized its natural opportunities for expanded sugarcane ethanol production as a

⁷ Potter, *supra* note 5, at 345.

⁸ *Id.* at 334 (stating "following the 1973 oil crisis, Brazil adhered to a two-prong strategy of increasing domestic oil production through the state-owned oil company Petrobras and decreasing petroleum demand by developing sugarcane-based ethanol as a viable alternative").

⁹ David N. Cassuto & Carolina Gueiros, *The Evolution of Brazilian Regulation of Ethanol and Possible Lessons for the United States*, 30 WIS. INT'L L. J. 477, 488 (2012).

¹⁰ Sergio Barros, *Brazil: Biofuels Annual*, U.S. DEP'T AGRIC. FOR. AGRIC. SERV. (2010), at 4 (providing that "the government set a 65 percent price ratio (later increased to 67 percent) between hydrated ethanol (E100) and gasoline prices at the pump based on the energy power both fuels").

¹¹ Potter, *supra* note 7, at 337 (stating that "[o]ver twenty-nine thousand filling stations across the country are equipped with ethanol pumps, which enables the market to function and allows consumers to choose equally between ethanol and gasoline").

centerpiece for its biofuels program;¹² and, (5) created incentives for private investors, who otherwise may have been deterred by unstable or tepid market demand, to engage in research and development within the industry.¹³ Consequently, increasing consumer demand for ethanol has promoted its long-term sustainability by fostering continued production and development.¹⁴

The history of Brazil's ethanol policies may be broken down into four phases. Phase 1 comprises the initiation of *Pró-Álcool* beginning in 1975. Phase 2 comprises the period beginning in mid-1979 whereby Brazil strengthened and refined its ethanol targets. Phase 3 is characterized by deregulation and a decline in ethanol production. Phase 4 begins in 2003 and comprises the beginning of widespread use of flex-fuel vehicles (FFVs) in the nation.

¹² *Id.* at 348.

¹³ Barros, *supra* note 10, at 5, 7 (noting the role of the private sector).

¹⁴ *See id.* at 7.

1. PHASE 1

Phase 1 of Brazil's biofuels program began on November 14, 1975, when Decreto No. 76.593 launched the beginning of *Pró-Álcool* in response to the 1973 foreign oil crisis.¹⁵ Although Brazil had previously attempted a variety of initiatives to encourage biofuel use, *Pró-Álcool* marked a substantial turning point in Brazil's energy policy by requiring that ethanol be mixed into conventional fuels, thereby merging the sugarcane and fuel industries.¹⁶

Decreto No. 76.593 lays out the regulatory framework of *Pró-Álcool* (also referred to herein as the National Alcohol Program).¹⁷ In its early phases, the National Alcohol Program was overseen by the National Commission on Alcohol (hereinafter "Commission"), which was comprised of representatives from the Ministries of Finance, Agriculture, Industry and Trade, Mines and Energy, Interior, as well as the Planning Secretariat of the Presidency of the Republic.¹⁸ A key

¹⁵ National Alcohol Programme (PROALCOOL), Decreto No. 76.593 de 14 de Novembro de 1975, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.11.1975 (Braz.) [hereinafter Decreto No. 76.593].

¹⁶ James Bixby, *The 2005 Energy Policy Act: Lessons on Getting Alternative Fuels to the Pump from Minnesota's Ethanol Regulations*, 26 WASH. U. J. L. & POL'Y 353, 359-60 (noting that, in response to the 1973 oil crisis, among other initiatives, the Brazilian government required gasoline to contain at least 10 percent ethanol); see also Vanessa M. Cordonnier, *Ethanol's Roots: How Brazilian Legislation Created the International Ethanol Boom*, 33 WM. & MARY ENVT. L. & POL'Y REV. 289, 296-97 (2008).

¹⁷ For purposes of this paper, *Pró-Álcool* and National Alcohol Program are used synonymously.

¹⁸ Decreto No. 76.593, (1975), art. 3. Please note that the Commission was replaced in 1979 by the National Council of Alcohol, though the Council inherits these responsibilities. See also Decreto No. 83.700 de 05 de Julho de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1979 (Braz.) [hereinafter Decreto No. 83.,700], art. 4.

role was conferred upon the Commission, that of creating biofuel initiatives and considering proposals for revising the Program's framework.¹⁹ The Commission also devised policies that directly and indirectly helped expand ethanol production.²⁰ For example, the Commission worked to formulate a criterion that best determined where to place ethanol production facilities geographically.²¹ Similarly, the Commission developed an annual schedule specifying the appropriate use for a variety of types of biofuels.²²

Among other initiatives, early legislation notably created the minimum blend- requirements for ethanol in fuel, which demand that a certain minimum percentage of ethanol must be mixed into gasoline prior to sale, and remains in place today. In response to supply fluctuations and other market factors, the Ministerio da Agricultura, Pecuaria e Abasecimento ("MAPA") received the responsibility to periodically alter the minimum blend requirements.²³ Furthermore, throughout this period, the Instituto do Acucar e Alcool ("IAA")

¹⁹ Decreto No. 76.593 (1975).

²⁰ *Id.*

²¹ *Id.* When determining where an ethanol production facility will be located, the Commission considers factors including (i) reducing income disparities within a region, (ii) availability of resources, (iii) costs of transportations, as well as (iv) production needs of the unit. *Id.*

²² *Id.* Decreto No. 83.700 develops factors that the Commission must consider when reviewing the Alcohol Program's framework, including (i) economic production, (ii) investment levels, (iii) production factors availability, (iv) where consumption is located, (v) transportation costs, (vi) road infrastructure and other distribution issues, as well as (vii) income disparities within a region. Decreto No. 83.700, (1970), art. 4.

²³ See Cassuto & Guerios, *supra* note 9, at 490. See Portaria No. 143/2007/MAPA, Article 1, de 29 de Junho de 2007, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.), Portaria No. 7/2010/MAPA, Article 1, de 12 de Janeiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.), Portaria No. 678/2011/MAPA, de 1 de Setembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] Braz.).

controlled the price of ethanol; the IAA helped to promote price parity between ethanol and sugar, and subsidized the price of ethanol relative to gasoline.²⁴ During this time, the IAA subsidized the price of ethanol for consumers so that its price remained consistently 59% of the price of gasoline.²⁵

Brazil also encouraged modernization of production methods²⁶ and redevelopment of existing idle sugar distilleries.²⁷ Brazil's government banks, including Banco Nacional do Desenvolvimento Economico e Social, Banco da Amazônia, Banco do Brasil, and Banco do Nordeste do Brasil, assisted with funding for investment in ethanol production.²⁸ Similarly, the National Monetary Council helped to fund and develop projects to spur production in regions that traditionally had little ethanol production.²⁹ Coupled with government funding and support, Brazil also promoted ethanol's viability on the commercial market by developing an ethanol distribution system to facilitate its sale at petroleum companies.³⁰ Even more, Brazil encouraged private investment in sugarcane ethanol production by dispersing over \$4.9 billion in subsidized government loans with interest rates that were below the nation's inflation levels.³¹

²⁴ Decreto No. 76.593, *supra* note 15, art. 8; Decreto No. 80.762 de 18 de November de 1977, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] 18.11.1977 (Braz.), art. 8 (amending Decreto No. 76.593).

²⁵ Decreto No. 76.593, (1975), art. 8; *see also* Michael McDermott, Marcio Cinelli, Denise J. Luethge & Philippe Byosiere, *Brazil and Biofuels for Autos: A Model for Other Nations*, 2 GSTF BUS. REV. 162 (Mar. 2013).

²⁶ *Id.* at Art. 2.

²⁷ *Id.*

²⁸ *Id.* at Art. 5(a).

²⁹ *Id.* at Art. 5(b)§1.

³⁰ *Id.* at Art. 7.

³¹ Renato Guimarães Jr. & Bruce B. Johnson, *Legal Implications of Biomass Energy: The Case of Brazil's Alcohol Program* 3–4 (São

Many of the policies encompassed within *Pró-Alcool* have been refined or expanded since the initial authorizing legislation was devised. Notably, in 1978, Decreto No. 82.476 established a reimbursement plan as a way to encourage investment by ethanol producers.³² Similarly, additional infrastructure supports were also developed. For instance, in 1979, through government assistance, initially about 300 ethanol pumps were outfitted at gas stations and storage tanks were built to store ethanol in between locations where the ethanol was being produced and consumed.³³

Moreover, in 1979, Decreto No. 83.700 further refined the National Alcohol Program.³⁴ Expanding membership and regulatory oversight of the Program, Decreto No. 83.700 abolished the Commission and created the National Council of Alcohol (“Council”).³⁵ The Council is comprised of former members of the Commission, as well as representatives from the Ministries of Transport and Labor, representatives from the National Confederation of Agriculture, Trade, and Industry, and the Technological Affairs Deputy Chief of Staff of the Armed Forces.³⁶ The Council inherited the Commission’s responsibilities and has the authority to develop criteria to help determine ethanol market prices, as well as other financing conditions.³⁷

In conclusion, Phase 1 was marked by the development of a number of initiatives to spur investment, as well as the creation of minimum blend requirements

Paulo Conference on the Law of the World. Work Paper, 1981). *See also* McDermott et. al., *supra* note 25.

³² Decreto No. 82.476, de 23 de Outubro de 1978, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.10.1978 (Braz.).

³³ Cordonnier, *supra* note 16, at 297.

³⁴ *See* Decreto No. 83.700 (1979).

³⁵ *Id.* at Art. 4.

³⁶ *Id.* at Arts. 2–6.

³⁷ *See id.* at Art. 2.

and the beginning of significant price subsidies for ethanol.

2. PHASE 2

Motivated by the 1979 Middle East oil shocks, Brazil responded by reinvigorating its ethanol policies.³⁸ Expanding upon early legislation, Phase 2 heightened ethanol-blend requirements³⁹ and, during this time, on average required that ethanol constitute roughly 22% of conventional fuel blends.⁴⁰ Moreover, Brazil also pushed automobile makers to redesign vehicle engines to more effectively run on ethanol.⁴¹ In 1982, Brazil set forth an objective that required automobile makers to produce and retail 500,000 ethanol-powered vehicles before the year's end.⁴² To further expand ethanol production in anticipation of heightened demand, the government created new financial incentives that encouraged the creation of new ethanol distilleries.⁴³

In addition to its production-side initiatives, the Brazilian government also worked to promote consumer confidence in ethanol's quality as compared to gasoline.⁴⁴ For instance, in 1981, as a way to promote transparency surrounding ethanol products to consumers, Brazil required that fueling stations affix "direct-reading, temperature-corrected hydrometers" at

³⁸ Cassuto & Gueiros, *supra* note 9, at 484.

³⁹ Guimarães & Johnson, *supra* note 31.

⁴⁰ See e.g., Portaria No. 144/1984/MAPA, Article 1, de 21 de Agosto de 1984, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.).

⁴¹ Cordonnier, *supra* note 16, at 298.

⁴² *Id.* at 302. Please note these vehicles were not the FFVs as will be later discussed.

⁴³ *Id.*

⁴⁴ Cassuto & Gueiros, *supra* note 9, at 484–85.

each ethanol dispenser that would “allow the consumer himself to verify the quality of the product.”⁴⁵

Brazil’s efforts to increase the palatability, accessibility, and affordability of ethanol fuel were largely successful.⁴⁶ The number of ethanol-run vehicles increased dramatically within a few years, and as of 1984, 84% of vehicles sold in Brazil could run on ethanol.⁴⁷

3. PHASE 3

Beginning in 1986 with the demise of Brazil’s dictatorship, Phase 3 is characterized by the deregulation and decrease in support for ethanol production.⁴⁸ These policies resulted in a consequent reduction in ethanol supply.⁴⁹ In 1990, the IAA, which had been controlling ethanol prices, was disbanded.⁵⁰ As the Brazilian government ceased to regulate ethanol, its use as a fuel in vehicles declined dramatically.⁵¹ Ethanol production became subject to market forces, which largely reduced ethanol’s attractiveness.⁵² Consequently, as the century came to an end, it appeared that ethanol would no longer play a prominent role in Brazil’s energy framework.

4. PHASE 4

Beginning in 2003 and continuing to present-day, Phase 4 is notably characterized by the introduction of

⁴⁵ Cordonnier, *supra* note 16, at 302.

⁴⁶ *Id.* at 303.

⁴⁷ *Id.*

⁴⁸ Cassuto & Gueiros, *supra* note 9, at 485.

⁴⁹ *Id.*

⁵⁰ Decreto No. 99.240, de 7 de Maio de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] DE 7.5.1990 (Braz.), art. 1.

⁵¹ Cassuto & Gueiros, *supra* note 9, at 486.

⁵² *Id.* at 486–87.

flex-fuel vehicles (“FFVs”) in the nation, thereby initiating a dramatic resurgence in the use of ethanol fuel.⁵³ FFVs have become extremely popular among consumers and are now retailed in a variety of makes and models. By 2006, 83% of vehicles sold in Brazil had the capacity to run on either ethanol or gasoline, and this figure had ballooned to roughly 90% by 2009.⁵⁴ Unlike the FFVs sold in the U.S., which can only operate on gasoline or E85,⁵⁵ Brazilian FFVs can operate on any gasoline-to-ethanol combination.⁵⁶ Therefore, by fostering the consumer’s ability to choose which fuel to purchase by quickly comparing the price of ethanol to that of gasoline, FFVs have simultaneously promoted consumer choice and revived ethanol’s competitiveness.⁵⁷ Even more, for those vehicles operating on gasoline, Brazil’s ethanol blend requirements have also remained intact and conventional fuel continues to be blended with ethanol. The mandatory ethanol blend requirement for automobiles varies, but has in recent years wavered between 20% and 25%.⁵⁸

⁵³ *Id.* at 487–88.

⁵⁴ Juscelino F. Colares, *A Brief History of Brazilian Biofuels Legislation*, 35 SYR. J. INT’L L. & COM. 293, 295 (2008).

⁵⁵ *See id.* (noting that “[t]he introduction of ‘flex fuel’ engine technology in Brazil has allowed motorists to safely switch between consumption of either gasoline or ethanol depending on prices at the pump”). E85 is a fuel blend that is 85% ethanol and 15% gasoline.

⁵⁶ Cassuto & Guerios, *supra* note 9, at 487–88; *see also* Jose Goldemberg, *Brazil’s Energy Story: Insights for U.S. Energy Policy*, ASPEN INST. (2013) (noting that FFVs in Brazil “can run on any proportion of ethanol and gasoline, from zero to 100 percent, as they have sensors that can detect the proportion and adjust the ignition electronically”).

⁵⁷ *Id.* at 488.

⁵⁸ *Compare* Portaria No. 143/2007/MAPA, Article 1, de 29 de Junho de 2007, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.), *with* Portaria No. 7/2010/MAPA, Article 1, de 12 de Janeiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.), *and with* Portaria No. 678/2011/MAPA,

Next, although Brazil has not reintroduced the ethanol subsidies and stringent pricing regimes of earlier decades, the nation continues to employ a number of mandates, subsidies, and taxes that help to accommodate ethanol production.⁵⁹ For instance, under the Contribuicao de Intervencao no Dominio Economico (“CIDE”), Brazil imposes higher taxes on gasoline than it does on ethanol.⁶⁰ Likewise, Brazil continues to provide credits for ethanol producers to further spur innovation and investment; over 94% of this funding is applied to capital investments such as machinery and equipment.⁶¹ As a complementary strategy, Brazil has also recently sought to more effectively incorporate biodiesel into its energy framework.⁶² As one example, in 2005, pursuant

de 1 de Setembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.) (demonstrating the variability of ethanol requirements between 20 and 25 percent); *see also Country Analysis Briefs: Brazil*, U.S. ENERGY INFO. ADMIN (Feb. 28, 2012) at 5.

⁵⁹ Lei No. 9.478, de 6 de Agosto de 1997, (Braz.) (discussing national energy policy which oversees ethanol production and use). *See also* Lei No. 12.249, de 11 de Junho de 2010, (Braz.) art. 131 (establishing infrastructure incentives); Barros, *supra* note 10 at 6–7 (providing examples of Brazilian government support programs).

⁶⁰ Cassuto & Gueiros, *supra* note 9, at 490 (noting that “the imports and internal sales of gasoline is R\$860 per cubic meter, while ethanol imports and internal sales are charged only R\$37.20 per cubic meter”).

⁶¹ Constanza Valdez, *Brazil’s Ethanol Industry: Looking Forward*, U.S. DEP’T AGRIC. ECON. RES. SERV. (June 2011) at 24.

⁶² Rodrigo Augusto Rodrigues & José Honório Accarini, *Brazil’s Biodiesel Program*, (Dec. 15, 2013), <http://dc.itamaraty.gov.br/imagens-e-textos/Biocombustiveis-09ing-programabrasileirobiodiesel.pdf> (last visited Dec. 15, 2013); *see* Decreto No. 5.297, de 6 de Dezembro de 2004, DIÁRIO OFICIAL DA UNIÃO (Braz.) (implementing the Social Fuel Seal); *see also* Gabriella P.A.G. Pousa, André L.F. Santos & Paulo A.Z. Suarez, *History and Policy of Biodiesel in Brazil*, 35 ENERGY POL’Y 5393, 5393 (2007) (discussing the current biodiesel fuels used in Brazil).

to Lei No. 11.097, Brazil required that at least 5% biodiesel be blended into diesel fuel.⁶³

Phase 4 is also characterized by policies addressing ancillary considerations that can be intertwined with ethanol production, such as promoting development in rural areas, ensuring the profitability of smaller sugarcane ethanol farms, and zoning and environmental considerations. For example, in 2003, Brazil created the National Programme of Biodiesel Production (hereinafter “PNPB”) to encourage increased biodiesel production, especially outside of urban centers.⁶⁴ Similarly, in order to preserve small farmers’ profitability, the Ministério de Desenvolvimento Agrário (“MDA”) created the Selo Combustível Social, which promotes business relationships with small ethanol farmers.⁶⁵ Additionally, Brazil has recently implemented an agroecological zoning plan to expand sugarcane ethanol production, while placing a significant emphasis on mitigating environmental damage.⁶⁶

⁶³ Lei No.11.097, de 13 de Janeiro de 2005, (Braz.) (mandating that at least 5% biofuel by volume be incorporated). The portion of the law cited has been repealed by Law No. 13.033.

⁶⁴ See *National Program for Production and Use of Biodiesel*, MINISTÉRIO DE MINAS E ENERGIA, <http://www.mme.gov.br/programas/biodiesel/menu/biodiesel/pnpb.html> (last visited Nov. 17, 2013) (providing that “[s]ince the launch of PNPB, the private sector is contributing resources, investing in the distribution of fuel, in laboratories, in research, production of raw materials, all thanks to the security of the regulatory environment provided by the regulatory setting goals and creating a legal framework for biodiesel”).

⁶⁵ See generally ANDRE CHAGAS ET AL., *An Application of Dynamic Spatial Panels to Municipalities in the State of Sao Paulo, Brazil*, in ENERGY BIO FUELS AND DEVELOPMENT: COMPARING BRAZIL AND THE UNITED STATES 292 (Edmund Amann et al. eds, 2011); see also Decreto No. 5297, de 6 de Dezembro de 2004.

⁶⁶ Marlon Arraes J. Leal, *The Agro-ecological Sugarcane Zoning in Brazil*, MINISTÉRIO DE MINAS E ENERGIA (Sept. 16, 2010), <https://www.iea.org/media/bioenergyandb>

In sum, the effectiveness of Brazil's biofuels regime can be attributed to its emphasis on all aspects of ethanol's production and sale.⁶⁷

B. History of Biofuel Initiatives

Like Brazil, the U.S. responded to the 1973 foreign oil crisis by enacting legislation to reduce the nation's dependence on foreign oil. However, in seeking to reduce its foreign oil reliance, the U.S. has traditionally focused more upon reducing the nation's overall fuel consumption and less upon increasing biofuels use. Due to this approach, biofuels have not yet experienced comparable success in the U.S. Moreover, though the U.S. has recently taken strides to increase its biofuels initiatives, these policies have been largely aimed at reducing production costs for biofuels producers.

As a response to the sharp spike in oil prices caused by the crisis, Congress passed the Energy Policy and Conservation Act of 1975 ("1975 Act"), which aimed to reformulate U.S. energy initiatives and increase fuel conservation.⁶⁸ Notably, the 1975 Act set forth the Corporate Average Fuel Economy ("CAFE") standards, which created fuel economy requirements for American vehicles.⁶⁹ At present, the CAFE standards, requiring gradual improvements in vehicle efficiency, have played a key role in reducing fuel consumption in vehicles.⁷⁰

iofuels/06_arraes.pdf.

⁶⁷ Sizou Matsuoka, Jesus Ferro & Paulo Arruda, *The Brazilian Experience of Sugarcane Ethanol Industry*, IN VITRO CELLULAR & DEVELOPMENTAL BIOLOGY – PLANT 372, 379 (2009).

⁶⁸ Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975).

⁶⁹ *Id.* at § 301.

⁷⁰ Virginia McConnell, *The New CAFE Standards: Are They Enough on Their Own?*, RESOURCES FOR THE FUTURE 1, 29 (2013),

Nonetheless, despite their success in increasing vehicle efficiency,⁷¹ the CAFE standards have not been correspondingly effective in promoting biofuels.⁷² For instance, one of the shortcomings of the CAFE standards is that automobile manufacturers have been able to obtain CAFE credits for selling FFVs in the form of large vehicles and SUVs that in practice nearly always run on gasoline.⁷³

The Energy Policy Act of 1992 (“1992 Act”) was the next major legislation targeted at improving the U.S.’s energy efficiency and increases the authority of the Department of Energy (“DOE”) to oversee alternative fuels use and production.⁷⁴ The 1992 Act contains several provisions specifically devised to increase the use of biofuels and other renewable energy sources. Among other efforts, the Act creates the Alternative Fuel Vehicle Program, which incentivizes research that focuses upon improving engine technology in alternative fuel-powered vehicles.⁷⁵ The 1992 Act also develops production

<http://www.rff.org/RFF/Documents/RFF-DP-13-14.pdf> (noting that the “new reformed CAFE rules would require fuel use and CO₂ emissions by light-duty vehicles to fall by close to 40 percent over the next 15 years”).

⁷¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-921, REFORMING FUEL ECONOMY STANDARDS COULD HELP REDUCE OIL CONSUMPTION BY CARS AND LIGHT TRUCKS, AND OTHER OPTIONS COULD COMPLEMENT THESE STANDARDS 3 (Aug. 2, 2007).

⁷² *Id.* at 5.

⁷³ REPORT TO CONGRESS: EFFECTS OF THE ALTERNATIVE MOTOR FUELS ACT: CAFE INCENTIVES POLICY, U.S. DEP’T OF TRANSP., U.S. DEP’T OF ENERGY, U.S. ENVTL. PROT. AGENCY (2002), at *xii*; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-551T, PASSENGER VEHICLE FUEL ECONOMY: PRELIMINARY OBSERVATIONS ON CORPORATE AVERAGE FUEL ECONOMY STANDARDS 17 (2007) (noting that CAFE credits “may be actually increasing oil consumption among passenger vehicles”).

⁷⁴ *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

⁷⁵ *Id.* at § 2023(a)–(c).

incentives for renewable energy sources and alternative fuels, including payment for qualified producers.⁷⁶ More broadly, the Act reduces tax burdens for renewable energy projects.⁷⁷ Similarly, in order to encourage innovation, the Act creates the Renewable Energy Advancement Awards, which provide monetary awards for innovative projects.⁷⁸

Among other initiatives established pursuant to the legislation, DOE's increased regulatory authority under the 1992 Act has led to the development of new programs aimed at improving the viability of biofuels.⁷⁹ For example, in 1993, in response to its heightened authority, the DOE created the 'Clean Cities' program as a way to promote the use of alternative fuels in major cities.⁸⁰ As of 2013, the 'Clean Cities' program is estimated to have reduced petroleum usage by 6.5 billion gallons since its inception.⁸¹

More recently, the Energy Policy Act of 2005 ("2005 Act") reinvigorated attempts⁸² to incorporate

⁷⁶ *Id.* at § 1212.

⁷⁷ *Id.* at § 1205. Please note that "renewable energy" is not limited to biofuels, but may encompass other energy forms such as wind and solar.

⁷⁸ *Id.* at § 1204.

⁷⁹ *Key Federal Legislation: Alternative Fuels Data Center*, U.S. DEP'T OF ENERGY, (Dec. 15, 2013), http://www.afdc.energy.gov/laws/key_legislation.

⁸⁰ *About Clean Cities*, U.S. DEP'T OF ENERGY, (Dec. 10, 2013), <http://www1.eere.energy.gov/cleancities/about.html> (providing that "DOE created Clean Cities in 1993 to provide informational, technical, and financial resources to EPA-regulated fleets and voluntary adopters of alternative fuels and vehicles").

⁸¹ *Clean Cities Goals and Accomplishments*, U.S. DEP'T OF ENERGY, (Dec. 10, 2013) <http://www1.eere.energy.gov/cleancities/accomplishments.html>.

⁸² *See Methyl Tertiary Butyl Ether (MTBE)*, ENVTL PROT. AGENCY, (Dec. 12, 2013) www.epa.gov/mtbe/gas.htm. The 1990 Clean Air Act Amendments set forth the Reformulated gasoline (RFG) program, which demanded an oxygenate requirement for gasoline. However,

alternative fuels.⁸³ Notably, the 2005 Act created the Renewable Fuels Standard (“RFS”), which mandates that a certain volume of ethanol be blended into automobile gasoline.⁸⁴ The RFS originally mandated that, by 2012, 7.5 billion gallons of alternative fuels be mixed into gasoline.⁸⁵ The Energy Independence and Security Act of 2007 (“EISA”) later expanded upon the 2005 Act’s provisions by increasing RFS mandates and setting volume targets for usage of advanced biofuels.⁸⁶

EISA broadened the scope of the RFS to expand its application to diesel fuel and demands use of a variety of advanced biofuels, including cellulosic biofuel and biomass-based fuels.⁸⁷ EISA also raises the RFS mandate to require that 36 billion gallons of renewable fuels be mixed into gasoline by 2022.⁸⁸ The 2013 RFS requires that cellulosic biofuel comprise 0.004% of total U.S. fuels, biomass-based diesel comprise 1.13% of total fuel, advanced biofuel comprise 1.62% of total fuel, and renewable fuel comprise 9.74% of total fuel.⁸⁹ Largely due to the RFS

upon discovering the toxicity of Methyl Tertiary Butyl Ether (MTBE), a key oxygenate, the Energy Policy Act of 2005 removed this requirement and replaced it with the Renewable Fuel Standard. *Id.*

⁸³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 [hereinafter EPA 2005].

⁸⁴ *Id.* at § 1501.

⁸⁵ *Id.*

⁸⁶ See Energy Independence and Security of 2007, Pub. L. No. 110-140, §202, 121 Stat. 1492 [hereinafter EISA].

⁸⁷ *Id.*; See *Renewable Fuel Standard (RFS)*, U.S. ENVTL. PROT. AGENCY (Nov. 18, 2013), <http://www.epa.gov/OTAQ/fuels/renewablefuels/>.

⁸⁸ EISA § 202.

⁸⁹ 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794 (Aug. 15, 2013) codified at 40 C.F.R. pt. 80); see also 2012

Renewable Fuels Standards, 77 Fed. Reg. 1320 (Jan. 9, 2012) (codified at 40 C.F.R. pt. 80). The 2012 Renewable Fuel Standards provide that there must be 10.45 million gallons of cellulosic biofuel, 1.5 billion

mandates, ethanol and other biofuels are currently mixed into roughly 50% of all U.S. gasoline, though most is mixed at 10% ethanol or lower levels.⁹⁰ Nonetheless, because the vast majority of U.S. vehicles are not equipped to run on fuel that is comprised of more than 10–15% ethanol without risking significant engine damage, and thereby encountering what is known as the “blend-wall,” the RFS’s continued expansion may be limited.⁹¹

In addition, the U.S. has also created a variety of tax credits in order to help encourage biofuel use.⁹² For example, in 2004, the Volumetric Ethanol Excise Tax Credit (“VEETC”) was created and fostered the development and production of biofuels through tax incentives.⁹³ The VEETC became one of the major ways by which the U.S. subsidized ethanol until it expired in 2011.⁹⁴ The VEETC provided that, subject to certain restrictions, ethanol blenders could be “eligible for a tax

gallons of biomass- based diesel, 2.0 billion gallons of advanced biofuel, and 15.2 billion gallons of renewable fuel. *Id.*

⁹⁰ Hazardous Liquid Pipelines Transporting Ethanol, Ethanol Blends, and other Biofuels, 72 Fed. Reg. 45002 (Aug. 10, 2007) (to be codified at 49 C.F.R. pt. 452) (stating that “[t]oday, nearly half of all U.S. gasoline contains some ethanol (mostly blended at the 10 percent level or lower)”).

⁹¹ See *EPA Proposes 2014 Renewable Fuel Standards/ Proposal Seeks Input to Address “E10 Blend Wall,” Reaffirmed Commitment to Biofuels*, ENVTL PROT. AGENCY (Dec. 15, 2013), <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceecac8525735900400c27/81c99e6d27c730c485257c24005eecb0!opendocument>.

⁹² American Jobs Creation Act of 2004, § 301, Pub. L. No. 108-357, §301, 118 Stat. 1418, 1459-63, (2004) [hereinafter Jobs Creation Act].

⁹³ *Alternative Fuels Data Center: Expired, Repealed, and Archived Incentives*, U.S. DEP’T. ENERGY, http://www.afdc.energy.gov/laws/laws_expired.

⁹⁴ Zachary M. Wallen, *Far From A Can of Corn: A Case For Reforming Ethanol Policy*, 52 ARIZ. L. REV. 129, 135 (2010).

incentive in the amount of \$0.45 per gallon of pure ethanol . . . blended with gasoline.”⁹⁵ Costing nearly \$6 billion annually, the VEETC garnered widespread criticism that it did not adequately promote advanced biofuels and instead unnecessarily incentivized corn ethanol production.⁹⁶ Among other incentives,⁹⁷ further examples have included the Small Ethanol Producer Credit, which provided 10 cents per gallon to small ethanol producers to offset production costs,⁹⁸ and the Biodiesel Tax Credit, which provided a \$1.00 per gallon tax credit to biodiesel producers.⁹⁹ Similarly, another policy that has been proposed includes taxing the carbon dioxide output on conventional fuels.¹⁰⁰ Nevertheless, many of these initiatives have been allowed to expire amid considerable backlash.¹⁰¹

Moreover, in addition to tax credits, there are working groups and programs already in place¹⁰² that have been created to promote investment in biofuels

⁹⁵ *Alternative Fuels Data Center*, *supra* note 93.

⁹⁶ See e.g., *Let the VEETC Expire: Moving Beyond Corn Ethanol Means Less Waste, Less Pollution and More Jobs*, NAT. RES. DEF. COUNCIL (Aug. 2010), at 1–2 (describing shortcomings of VEETC).

⁹⁷ See BRENT D. YACOBUCCI, CONG. RES. SERV., R40110, BIOFUELS INCENTIVES: A SUMMARY OF FEDERAL PROGRAMS, 1–5 (2012) (listing biofuels initiatives).

⁹⁸ Omnibus Budget Reconciliation Act of 1990 § 11502, Pub. L. No. 101-508 (1990) [hereinafter Omnibus Act]

⁹⁹ See *Alternative Fuels Data Center*, *supra* note 95 Jobs Creation Act § 302.

¹⁰⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-713, BIOFUELS: DOE LACKS A STRATEGIC APPROACH TO COORDINATE INCREASING PRODUCTION WITH INFRASTRUCTURE DEVELOPMENT AND VEHICLE NEEDS 22 (2007); see also Phil Izzo, *Economists Back Fossil-Fuel Tax To Spur Alternative Energies*, WALL ST. J., Feb. 9, 2007, at A6.

¹⁰¹ YACOBUCCI, *supra* note 97, at 1.

¹⁰² *Id.* at 2-3.

production.¹⁰³ For instance, in 2009, the U.S. created the Biofuels Interagency Working Group to expand and promote the competitiveness of the biofuels market.¹⁰⁴ Likewise, in 2008, the Food, Conservation, and Energy Act created the Biorefinery Crop Assistance Program (“BCAP”), which provides financial assistance for developing biorefineries to produce advanced biofuels.¹⁰⁵ BCAP aims to simultaneously help producers transition to cellulosic energy crop production while promoting economic development in rural areas.¹⁰⁶ On October 21, 2013, USDA announced that the government would provide \$181 million to help fund these initiatives.¹⁰⁷

¹⁰³ See e.g., Production Incentive or Cellulosic Biofuels, 74 Fed. Reg. 52,867 (to be codified at 10 C.F.R. pt. 452) (providing an example of additional incentive).

¹⁰⁴ Biofuels and Economic Development: Memorandum for the Secretary of Agriculture, the Secretary of Energy, [and] the Administrator of the Environmental Protection Agency, 74 Fed. Reg. 21,531 (May 5, 2009) (proposing that the Working Group shall develop “the Nation’s first comprehensive biofuel market development program”).

¹⁰⁵ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §9009, 112 Stat. 1651, 2089-93 (2008); see also *USD Announces Availability of Funding to Develop Advanced Biofuels Projects*, U.S. DEP’T AGRIC. (Oct. 21, 2013), <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2013/10/0195.xml&printable=true&contentidonly=true>.

¹⁰⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-446, BIOFUELS: POTENTIAL EFFECTS AND CHALLENGES OF REQUIRED INCREASES IN PRODUCTION AND USE 48 (2009). (“Under [BCAP], producers would enter into multiyear contracts with USDA to obtain payments of up to 75 percent of the cost for planting and establishing a perennial energy crop”).

¹⁰⁷ See *USDA Announces Availability of Funding to Develop Advanced Biofuels Projects*, *supra* note 105. There, Tom Vilsack, USDA Secretary, stated that “benefits [of BCAP] go beyond reducing our dependence on foreign oil. These biorefineries are also creating lasting job opportunities in rural America and are boosting the rural economy as well.” *Id.*

Thus, like Brazil, some recent U.S. biofuels policies have been motivated by dual aims.

In sum, the U.S. has already undertaken a substantial investment to promote the viability and use of alternative fuels; a report by the U.S. Government Accountability Office (“GAO”) estimated that from 1979 to 2000, about \$11 billion in tax incentives were employed to promote ethanol fuels.¹⁰⁸ However, despite these expenditures, the policies devised by the U.S. have not been as effective as those in Brazil.

III. Comparing U.S. AND Brazilian Policies

Despite a number of similarities, the U.S.’s policies have not been as successful as those in Brazil because they do not consider consumer-side factors to the same extent as do Brazil’s policies.¹⁰⁹ Consumer-side initiatives help to create and sustain market demand, and also encourage private-sector investors to infuse additional resources into research and development.¹¹⁰

¹⁰⁸ Letter from Jim Wells, U.S. Gen. Accounting Office, to Sen. Tom Harkin (Sept. 25, 2000), at 2, *available at* <http://www.gao.gov/archive/2000/rc00301r.pdf>.

¹⁰⁹ CHAGAS ET AL., *supra* note 65, at 292; *see also* Mauricio Antonio Lopes, Agricultural Innovation and Challenges in Promotion of Knowledge and Information Flows in Agrifood Systems in Brazil, OECD (2012).

¹¹⁰ CRAIG A. HART, CLIMATE CHANGE AND THE PRIVATE SECTOR: SCALING UP PRIVATE SECTOR RESPONSE TO CLIMATE CHANGE (2013), at 82-83; McDermott, et. al., *supra* note 25. Moreover, as shall be further discussed, the U.S. has not undertaken sufficient efforts to ensure that biofuels are accessible, nor has the U.S. forced large oil companies and car makers to play a role in spearheading technological and infrastructure changes. For instance, as FFVs have become increasingly popular in Brazil, car makers, including mainstream producers Ford and Toyota, have responded by creating a number of attractive vehicles models and sizes, which has further bolstered the success of Brazil’s biofuels policies.

Additionally, the U.S. and Brazil's policies differ in their extent; Brazil's initiatives have been significantly more stringent and have had a broader application.¹¹¹ Nonetheless, as demonstrated by the number of commonalities between the U.S. and Brazil's biofuels policies, increasing biofuels use can be both viable and sustainable in the U.S.

A. Brazil's ethanol-blend mandates have nearly always been more stringent than the U.S.'s RFS, and biofuels are mixed into a greater proportion of Brazil's conventional fuel supply.

First, Brazil's biofuels policies have had a greater impact because the nation's biofuels mandates are significantly more demanding and are broader in reach than comparable U.S. policies.

The U.S. and Brazil's present-day biofuels policies are facially similar in many regards. Both nations employ a two-track regime for incorporating biofuels into the fuel supply: through biofuel-blend requirements in gasoline and through the sale of FFVs. These policies have both proven effective in ensuring that biofuels are incorporated into each nation's fuel supply¹¹² and guarantee constant demand for these fuels.¹¹³ Moreover, though Brazil's

¹¹¹ Kaylan Lytle, *Driving the Market: The Effects on the United States Ethanol Industry if the Foreign Ethanol Tariff is Lifted*, 28 ENERGY L.J. 693, 695–96 (2007).

¹¹² Constanza Valdes, *Can Brazil Meet the World's Growing Need for Ethanol?*, U.S. DEP'T AGRIC. ECON. RESEARCH SERV. (Dec. 1, 2011), http://www.ers.usda.gov/amber-waves/2011-december/can-brazil-meet-the-world's-growing-need-for-ethanol.aspx#.VS_qI86sTS4 (“As in the U.S., support for consumption of ethanol continues through mandatory blending of ethanol with gasoline”).

¹¹³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-513, BIOFUELS: CHALLENGES TO THE TRANSPORTATION, SALE, AND USE OF

blend requirements have been comparatively more responsive to supply and price considerations, both the RFS and Brazil's blend requirements are periodically adjusted in response to current needs.¹¹⁴

Nevertheless, Brazil's blend requirements have nearly always been more stringent than those mandated by the RFS. Specifically, while Brazil's ethanol blend requirements have demanded that gasoline be comprised of 11–25% ethanol,¹¹⁵ the RFS has not yet required more than a 10–15% concentration due to concerns of damaging older vehicles' engines.¹¹⁶ Additionally, Brazil's blend requirements extend through a greater proportion of the nation's fuel supply than does the RFS. Whereas biofuels are currently mixed into only about 50% of U.S.

INTERMEDIATE ETHANOL BLENDS (2007), at 2–4; *see also* Op-Ed, *Ethanol's Best Kept Secret – The Brazil Mandate*, U.S. ENVIROFUELS LLC (Jan. 9, 2012) (noting that “approximately 50% of Brazil's motor fuel supply is ethanol as a direct result of ethanol's mandated use”).

¹¹⁴ *See e.g.*, Meghan Sapp, *Brazil May Boost Ethanol Blends to Offset Gasoline Imports*, BIOFUELS DIGEST (June 27, 2012) (raising the ethanol blend requirements to reduce gasoline imports). *Compare* Erin Voegele, *Brazil to Increase Ethanol Blend Level to 25 Percent*, ETHANOL PRODUCER MAG. (Mar. 7, 2013), <http://www.ethanolproducer.com/articles/9628/brazil-to-increase-ethanol-blend-level-to-25-percent> (In 2011, “the 25 percent blend mandate was reduced to 20 percent due [to] a poor cane harvest. The blend level was expected to return to 25 percent once sugarcane production recovered”) with *EPA Finalizes Renewable Fuel Standard for 2013; Additional Adjustments Expected in 2014*, U.S. ENERGY INFO. ADMIN, <http://www.eia.gov/todayinenergy/detail.cfm?id=12531> (stating that “[t]he rule sets a 6 million gallon target for cellulosic biofuels use in 2013, less than half the level of the proposed rule issued in February 2013, and far below the 1 billion gallon target specified in the Energy Independence and Security Act of 2007”).

¹¹⁵ Jansen, *supra* note 6, at 24 (discussing the variability in ethanol blend mandates from 11-25%).

¹¹⁶ *E15: Frequently Asked Questions*, ENVTL. PROT. AGENCY, Dec. 15, 2013, <http://www.epa.gov/otaq/regs/fuels/additive/e15/e15-faq.htm> (noting previous gasoline fuels blended at E10).

automobile fuel,¹¹⁷ gasoline-only fuels are no longer sold in Brazil.¹¹⁸

B. Brazil has encouraged car makers to produce and retail FFVs to a much greater extent, which has increased FFVs' popularity with consumers.

Second, Brazil's biofuels policies have been more successful because policymakers have been more aggressive in encouraging the production and sale of FFVs and comparable models than has the U.S. While Brazil has placed immense pressure upon auto makers to develop FFVs and ethanol-powered vehicles, the U.S. has focused its initiatives on increasing vehicle fuel efficiency. As a result, the U.S. auto industry has not been comparably incentivized to produce FFVs and similar designs. In order to increase the number of FFVs and biofuel-operated vehicles on the road, U.S. policymakers would likely need to impose additional demands on carmakers to develop engines suitable for these fuels.

Brazil's strategy has demonstrated efficacy in two separate instances. First, in the 1980s, Brazil gave the auto industry targets as to the number of ethanol-powered vehicles to be retailed, which rapidly increased the sale of these vehicles.¹¹⁹ Second, since 2003, Brazil has

¹¹⁷ Pipeline Safety: Hazardous Liquid Pipelines Transporting Ethanol, Ethanol Blends, and other Biofuels, 72 Fed. Reg. 45002 (Aug. 10, 2007).

¹¹⁸ Barros, *supra* note 10, at 10 (describing fuel offerings as a "75 percent gasoline and 25 percent ethanol blend" as well as a 100 percent ethanol fuel); *see also* *Statistical Yearbook 2011*, AGÊNCIA NACIONAL DO PETRÓLEO, GÁS NATURAL E BIOCMBUSTIVELS Dec. 16, 2013, http://www.brasil-rounds.gov.br/portugues/anuario_estatistico.asp.

¹¹⁹ Cordonnier, *supra* note 16, at 302.

strongly incentivized the production and sale of FFVs, and has looked to the private automobile sector to play a prominent role in increasing FFVs' attractiveness and palatability among consumers.¹²⁰ As mentioned in Section II, FFVs have become extremely popular with consumers, and automobile manufacturers have created a variety of car models for customers to choose from. By utilizing the automobile industry's ability to redesign and develop ethanol-powered vehicles as a way to promote ethanol use, these efforts have helped to further the viability of Brazil's biofuels program.¹²¹ In both instances, Brazil's efforts to force the automobile industry to produce ethanol-powered vehicles resulted in a dramatic increase in their use within a short period of time, which incidentally also promoted ethanol use.¹²²

In contrast, the U.S.'s policies have not comparably pressured domestic carmakers to produce biofuel-powered vehicles, but instead have focused

¹²⁰ See John Wilkinson, *The Emerging Global Biofuels Market*, 32 REVIEW (FERNAND BRAUDEL CENTER) 91, 99 (2009); see also Kenneth Rapoza, *Brazil Auto Makers Drive on the Road to Ethanol*, WALL ST. J. (Sept. 10, 2008) ("Everyone in Brazil wants a flex-fuel car," said Angelo Bressan, a biofuels specialist at the Agriculture Ministry. "The auto makers here have helped push ethanol forward, but it's been the consumers who really made the difference," he said. "If these guys don't make flex-fuel cars, they lose market").

¹²¹ *Id.*

¹²² See *id.* The limited number of FFVs in the road helps to demonstrate this discrepancy. Compare *Flexible Fuel Vehicles: Alternative Fuels Data Center*, U.S. DEP'T ENERGY, http://www.afdc.energy.gov/vehicles/flexible_fuel.html (last visited Dec. 15, 2013) (noting that there are 10.6 million FFVs in the U.S.), with *Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances*, BUREAU TRANSP. STAT., http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/national_transportation_statistics/html/table_01_1.html (last visited Dec. 15, 2013) (providing that, in 2011, there were 253,108,389 registered vehicles in the U.S.)

more so upon increasing vehicle efficiency.¹²³ Accordingly, under current U.S. policy, U.S. carmakers have little incentive to produce FFVs or other biofuel-operated vehicles, though the auto industry has accommodated the government's demands to design engines for increased fuel efficiency.¹²⁴ The auto industry's responsiveness to increased demands for increased fuel efficiency suggests that a comparable approach could be effectively employed to increase the use of biofuels in U.S. vehicles. Thus, to some degree, the design of today's vehicles is the product of choices made by government regulators. For FFVs and biofuel-powered vehicles to be more widely used, the U.S. would likely need to devise regulatory initiatives that demand domestic carmakers produce these vehicles.¹²⁵

Consequently, by pushing automobile manufacturers to produce FFVs and ethanol-powered vehicles, Brazil has fostered their popularity among consumers. In contrast, U.S. policymakers have not comparably demanded that domestic carmakers produce FFVs or other biofuel-operated vehicles.

¹²³ McConnell, *supra* note 70, at 29. *See also infra* Section II.

¹²⁴ *See* Bill Vlasic & Jaclyn Trop, *Vehicle Fuel Efficiency Reaches a High, Nearing Goal for 2016*, N.Y. TIMES, Sept. 10, 2013, at B3. ("The car companies are under pressure to increase fuel efficiency to meet strict federal [CAFE] standards").

¹²⁵ Moreover, if these vehicles are made more available on the market, recent studies have indicated that consumers will become increasingly willing to purchase these vehicles. *See Consumer Research: What Do Consumers Think About Fuel Retailers and the Future?*, ASS'N FOR CONVENIENCE & FUEL RETAILING (2013), http://www.nacs-online.com/YourBusiness/FuelsReports/GasPrices_2013/Pages/What-Do-Consumers-Think.aspx (noting that 46% of consumers who were considering purchasing a vehicle would consider a non-gas vehicle; likewise, 55% of consumers would consider purchasing a flex-fuel vehicle).

C. While Brazil has mandated ethanol's sale at fueling stations, the U.S. has not undertaken sufficient efforts to ensure that consumers have access to affordable biofuel blends.

Third, Brazil's biofuels policies have been more effective than those of the U.S. because policymakers have devised initiatives to ensure that biofuel blends are accessible to consumers. While the Brazilian government has largely spearheaded efforts to install ethanol pumps at fueling stations, the U.S. has been more willing to allow retailers to make this decision. These differing approaches have caused significant disparities in the number of ethanol fueling stations in each nation.

Notably, Brazil has installed mandates that ethanol be retailed at a number of fueling stations since the 1970s, when it first required that ethanol pumps be installed at fueling stations;¹²⁶ currently, nearly all fueling stations in the nation retail ethanol blends.¹²⁷ As a result of these initiatives, Brazilian consumers who own a FFV or ethanol-powered vehicle are able to readily access and purchase ethanol fuels. On the contrary, the U.S.'s policies have not comparably encouraged that ethanol and other biofuels be accessible at fueling stations. The U.S. has further hindered this effort by failing to impose mandates or targets for the sale of biofuels blends.¹²⁸ Because it is seldom cost-effective to outfit a fueling station with ethanol fuel due to uncertain financial

¹²⁶ Cordonnier, *supra* note 16, at 297.

¹²⁷ Barros, *supra* note 10, at 10.

¹²⁸ Christopher Doering, *Ethanol Makers Face Obstacles to Expanding*, USA TODAY (Dec. 8, 2013) (noting that currently, only about 60 fueling stations sell E15, and about 3,200 fueling stations sell E85).

returns, fueling stations are not likely to install ethanol pumps without government support.¹²⁹

The U.S. already has explored using tax incentives through the Alternative Fuel Station Credit, which subsidized the price of installing biofuel infrastructure. Yet current initiatives have been largely insufficient to dramatically increase the number of alternative fueling stations.¹³⁰ Due to a lack of government initiatives, there are presently only 12,888 fueling stations retailing alternative fuels,¹³¹ as compared to the approximately 160,000 gasoline stations in operation in the U.S.¹³² Due to the weak response to previous initiatives, the U.S. would likely need to create additional tax incentives or impose mandates in order to motivate fueling stations to retail biofuel blends.

Additionally, Brazil has undertaken a much more active role in promoting ethanol's sale at fueling stations by encouraging consumers to purchase ethanol fuel when it is cost-effective to do so.¹³³ In Brazil, a relatively simple

¹²⁹ See Michael Hirtzer, *Analysis: High-Ethanol Gas – Not Coming to a Pump Near You*, REUTERS Nov. 27, 2013, <http://www.reuters.com/article/2013/11/27/us-usa-ethanol-e85-analysis-idUSBRE9AQ1AU20131127>.

¹³⁰ See EPA 2005 § 1342 (creating the Alternative Fuel Station Credit).

¹³¹ *Alternative Fuels Data Center*, U.S. DEP'T OF ENERGY, <http://www.afdc.energy.gov/locator/stations/> (last visited Nov. 23, 2013).

¹³² *Access to Alternative Transportation Fuel Stations Varies Across the Lower 48 States*, U.S. ENERGY INFO. ADMIN. (Apr. 30, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=6050>; see GAO-11-513, *supra* note 113, at 13, 25. Demonstrating these infrastructure shortcomings, the U.S. mandated that all government vehicles be transitioned to flexible fuel vehicles (FFVs), yet has been unable to consistently fuel these vehicles.

¹³³ See David Luhnnow & Geraldo Samor, *As Brazil Fills Up on Ethanol, It Weans Off Energy Imports*, WALL. ST. J., (Jan. 9, 2006), available at <http://online.wsj.com/news/articles/SB113676947533241219>.

ratio is employed as a way to indicate to consumers when it is cost-effective to purchase ethanol or vice-versa for their FFVs.¹³⁴ Pursuant to this ratio, consumers are encouraged to purchase ethanol when its cost is 70% of that of gasoline, and revert to conventional gasoline when the cost ratio is higher.¹³⁵

In contrast, in the U.S., the fraction of fueling stations that do retail higher concentrations of ethanol often do not adequately promote these blends or price them competitively. Because biofuels are generally not sold under the conventional producer's brand label, these fuels often do not constitute a major source of revenue for many large producers.¹³⁶ Due to limited marketing, U.S. FFV owners may be unaware of the possible option of choosing a biofuel blend to fuel their vehicles.¹³⁷

Consequently, while Brazil has mandated that fueling stations retail ethanol blends, the U.S. has not undertaken comparable initiatives, which has limited consumer access to biofuels.

¹³⁴ Barros, *supra* note 10, at 32-34

¹³⁵ *Id.* (“The 70 percent ratio between ethanol and gasoline prices is the rule of thumb in determining whether flex car owners will choose to fill up with ethanol (price ratio below 70 percent) or gasoline (price ratio above 70 percent)”).

¹³⁶ GAO-07-713, *supra* note 100, at 30 (According to representatives from BP, Chevron, ConocoPhillips ExxonMobile, and Shell Oil Products, “while no stations are prohibited from selling biofuels, none of the companies offer E85 to their stations as a branded product and none of the companies offer biodiesel except where required to by state mandate”).

¹³⁷ *Id.*

D While Brazil has carefully monitored the price of ethanol, the U.S.'s policies are producer-oriented and often only indirectly influence the consumer price of biofuel blends.

Next, Brazil's policies have been more successful than those of the U.S. because Brazil has been more influential in dictating the price of ethanol, which has enabled it to be cost-competitive in the marketplace. While Brazil has employed several strategies to ensure that the price of ethanol remains below that of gasoline, the U.S.'s policies often only incidentally reduce the consumer price of biofuel blends. Although the U.S. has imposed a number of tax credits and other subsidies targeted at producers, these initiatives generally have not been directly focused upon lowering the consumer price of biofuel blends as compared to gasoline. Because many of the U.S.'s policies have been aimed at reducing input costs for producers, these policies have fallen short because they do not adequately push the cost-savings on to consumers.

As mentioned in Section II, a key reason for ethanol's long-term success in Brazil has been its cost-competitiveness with gasoline.¹³⁸ While Brazil has created a variety of producer-oriented incentives, these policies play a comparatively smaller role within Brazil's ethanol framework. Instead, Brazil's policies have been focused more so upon improving ethanol's viability in the marketplace, and the government has pursued several different options to ensure that ethanol's price remains attractive.¹³⁹ For instance, in the 1970s, the IAA oversaw the price of ethanol; during this time, ethanol's price was subsidized so that its cost was 59% of

¹³⁸ See *infra* Section II.

¹³⁹ McDermott, *supra* note 25, at 163-64.

that of gasoline.¹⁴⁰ The importance of the price subsidy was demonstrated when its repeal in 1990 brought about a rapid decline in ethanol use across the country.¹⁴¹ Today, even though Brazil has not re-installed price subsidies for ethanol, ethanol's price relative to gasoline remains influenced by tax incentives such as the Contribuicao de Intervencao no Dominio Economico ("CIDE"), which imposes higher taxes on gasoline than on ethanol.¹⁴² Consequently, Brazil continues to oversee the price of ethanol as a way of maintaining its viability.

Unlike Brazil, the U.S. has not undertaken comparable efforts to ensure that the consumer price of biofuels is consistently below that of gasoline. Instead, the U.S.'s biofuels initiatives are largely producer-oriented. For instance, many of the United States' incentives, such as the Volumetric Excise Tax Credit, the Small Producer Tax Credit, and the Biodiesel Tax Credit, are designed to reduce the costs paid by producers, but do not directly manipulate how these reductions would be passed on to consumers.¹⁴³ Moreover, the U.S. has no

¹⁴⁰ *Brazilian Ethanol and (Some of) Its Lessons*, U. MINN. DEP'T ECON. (2012), <http://www.econ.umn.edu/~schwe227/teaching.s12/files/slides/18-ethanol6.pdf> (noting ethanol price ceiling at 59% of gasoline prices).

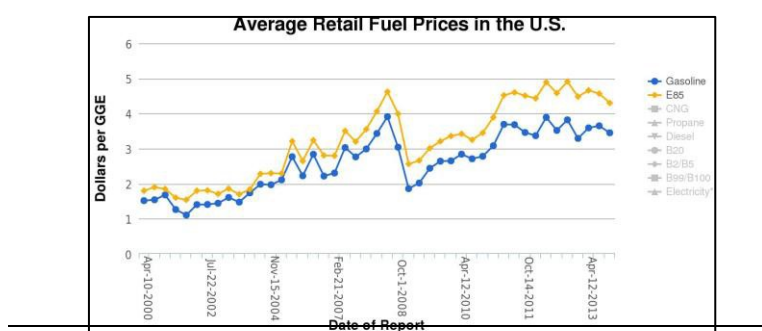
¹⁴¹ Cassuto & Gueiros, *supra* note 9, at 486. In 1990, the IAA was disbanded and ethanol's price was subjected to market forces, which reduced the fuel's competitiveness with gasoline.

¹⁴² *Id.* at 483. Currently, the Agencia Nacional do Petroleo is the primary agency that currently regulates biofuels in Brazil. *See Biofuels*, AGENCIA NACIONAL DO PETROLEO GÁS NATURAL E BIOCMBUSTÍVES (Dec. 12, 2013), <http://www.anp.gov.br/?pg=60467&m=&t1=&t2=&t3=&t4=&ar=&ps=&cachebust=1387565952900> (describing the ANP's involvement in biofuels regulation).

¹⁴³ *See* American Job Creation Act of 2004, Pub. L. No. 108-357, § 301 (creating the Volumetric Ethanol Excise Tax Credit which imposed a 51 cents/gallon tax credit for ethanol blenders); Food, Conservation,

comparable mechanism to ensure that the price of biofuels remains consistently lower than the price of conventional fuels.

Unless biofuel blends become more cost-competitive with conventional fuels, consumers will not be incentivized to purchase these blends. Because biofuels are associated with reduced fuel economy, their price must be below that of gasoline to enable these blends to be competitive.¹⁴⁴ Nonetheless, as demonstrated by the graph below, in the U.S., high-concentration ethanol blends can often be more expensive than gasoline.¹⁴⁵



and Energy Act of 2008, Pub. L. No. 110-234, § 15321 (creating the Credit for Production of Cellulosic Biofuel which imposes a 1.01 dollar/gallon tax credit); American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 302 (creating the Biodiesel Tax Credit which imposes a 0.50 dollar/gallon credit for biodiesel producers). Notably, however, these initiatives are aimed at reducing the inputs costs for producers, yet any price reductions passed on to consumers would be incidental.

¹⁴⁴ *The Great Ethanol Debate*, CONSUMER REPORTS (2011), <http://www.consumerreports.org/cro/2011/01/thegreat-ethanol-debate/index.htm> (noting that “[e]thanol’s lower fuel economy results from its lower energy content compared to gasoline”).

¹⁴⁵ *Fuel Prices: Alternative Fuels Data Center*, U.S. DEP’T ENERGY (Dec. 15, 2013), <http://www.afdc.energy.gov/fuels/prices.html>. *But cf.* CLEAN CITIES ALTERNATIVE FUEL PRICE REPORT, U.S. DEP’T ENERGY 7 (Oct. 2013), (For the month of October, “[o]n average, E85 is about 41 cents lower in price than regular gasoline on a per-gallon basis”).

Therefore, Brazil's policies have been more effective because they are targeted at ensuring that ethanol's price is competitive for consumers, while the U.S.'s policies often only indirectly reduce the costs of biofuel blends in the marketplace.

E. Brazil's policies incorporate comprehensive infrastructure supports, while the U.S.'s initiatives are more modest and rely upon investment from the private sector to improve distribution networks.

Additionally, Brazil's policies have been more successful than those of the U.S. because Brazil has focused comparatively more on creating accommodations to foster ethanol's distribution and sale. While Brazil's government plays an active role in overseeing its ethanol distribution networks, the U.S. has relied to a greater extent upon private sector investments to devise infrastructure accommodations.

Brazil's infrastructure initiatives are fairly expansive and encompass distribution networks throughout the nation. Specifically, Petrobras, an oil company controlled by the state, operates nine ethanol and distribution facilities, which are spread across the country.¹⁴⁶ Similarly, Transpetro, a quasi-state entity, oversees a transport system that includes 44 export terminals and 156 storage facilities to assist in ethanol

¹⁴⁶ ILDO SAUER, BIOFUELS IN BRAZIL: SALES AND LOGISTICS 50 (2009) (providing that "[t]he Petrobras logistics infrastructure plays a key role in domestic ethanol distribution . . . [t]hrough nationwide multimode systems, Petrobras ships, stores and distributes fuels all over Brazil").

distribution.¹⁴⁷ Among other supports, government-funding initiatives have been used to install ethanol storage tanks at intermediate locations from distilleries and at fueling stations.¹⁴⁸

In contrast, the U.S.'s infrastructure supports lack the comprehensive approach evidenced in Brazil's policies. The U.S.'s initiatives have often been sporadic and piecemeal, and much of the assistance provided to biofuel production facilities occurs through other avenues.¹⁴⁹ For instance, funding to install fuel dispensers for high-concentration ethanol blends have often been left to the states and private foundations.¹⁵⁰ Due to the more limited approach, as the U.S.'s current biofuel distribution networks reach their capacity, private investors will likely need to provide funding to expand these networks.

Nonetheless, despite Brazil's investment in infrastructure supports, neither nation has shown an advantage in reducing biofuel transport costs once the fuel leaves a distribution facility. Both nations employ relatively inefficient transport methods, including rail cars, trucks, and barges to transport biofuels.¹⁵¹ In order to reduce transport costs, both the U.S. and Brazil have

¹⁴⁷ Valdes, *supra* note 61, at 14. The system helps to transport ethanol as well as other fuels.

¹⁴⁸ Cordonnier, *supra* note 16, at 297.

¹⁴⁹ Joshua A. Blonz, Shalini P. Vajjhala & Elena Safirova, *Growing Complexities: A Cross-Sector Review of U.S. Biofuels Policies and their Interactions* 31–2 (Dec. 2008), available at <http://ssrn.com/abstract=1368419> (noting that the RFS can increase private investment in infrastructure).

¹⁵⁰ *Id.* at 28–29.

¹⁵¹ See FRED BOSSELMAN ET. AL., ENERGY, ECONOMICS, AND THE ENVIRONMENT 1093 (Robert C. Clark et. al., eds., 3d ed. 2010); see also Valdes, *supra* note 112 (noting that “Brazil faces considerable infrastructure and transportation constraints along its supply chain . . . [t]he bulk of ethanol is transported from processing plants to collection centers and then to ports by truck”).

considered the development of an ethanol pipeline. While the U.S. has not yet begun funding a pipeline, Brazil has already begun construction on an ethanol pipeline, which is scheduled to be completed in 2016.¹⁵² Nonetheless, any cost reductions from building a pipeline would only be realized over the long run,¹⁵³ and thus, Brazil's decision to fund a pipeline may not necessarily indicate that the U.S. should employ a similar strategy.

Consequently, while neither Brazil nor the U.S. has an advantage over the other in devising methods to reduce transport costs, Brazil has undertaken significant efforts to install ethanol storage tanks and create distribution centers, while the U.S. has failed to adequately address many of these infrastructure issues.

F. Although it is viable for Brazil to rely heavily on a single input, the U.S. has been unable to replicate these results with policies centered upon corn ethanol because it lacks a similar advantage in corn production.

Next, Brazil's policies have been comparatively more successful than those of the U.S. because many of its initiatives are centered upon the nation's natural production strengths. Though Brazil was able to achieve considerable success with sugarcane as the key input underpinning its biofuels framework because of its ability

¹⁵² GAO-07-713, *supra* note 100, at 6; 49 C.F.R. pt. 452 (stating that “[a] large pipeline can transport roughly two million barrels of gasoline a day. By way of comparison, 9,375 large semi-truck tankers are required to transport two million barrels of product.”). *See also Valdes*, *supra* note 112 (noting the proposal of a Brazilian ethanol pipeline to be completed by 2016 which will accommodate about 22 billion liters (doubling current transportation capacity) at about one-third the current cost of shipping ethanol by truck”).

¹⁵³ *Id.*

to produce a cheap supply of sugarcane ethanol,¹⁵⁴ the U.S. has not been able to obtain similar results by centering its policies upon the production of corn ethanol.¹⁵⁵

In the U.S., although corn remains the choice input for ethanol production, its increased cultivation has resulted in labor and production barriers, and has reduced the amount of corn available for the food supply.¹⁵⁶

¹⁵⁴ Cordonnier, *supra* note 16, at 311; *See also* Valdes, *supra* note 112 (noting that “[t]he rapid expansion in Brazil’s sugarcane production is the result of a favorable climate, land availability, abundant labor, a pro-ethanol public policy, and research by public agencies to develop higher yielding cane varieties and new planting techniques to increase efficiency”).

¹⁵⁵ Christine L. Crago, Madhu Khanna, Jason Barton, Eduardo Giuliani, & Weber Amaral, *Competitiveness of Brazilian Sugarcane Ethanol Compared to U.S. Corn Ethanol*, ENERGY BIOSCIENCES INST. 1, 4 (2010),

http://www.ageconsearch.umn.edu/bitstream/60895/2/crago_costofcornandsugarcaneethanol_AAEEA.pdf (finding that “on average (for the 2006-2008 period) the domestic production cost of sugarcane ethanol in Brazil is 24% lower than corn ethanol in the U.S.”).

¹⁵⁶ Steven Wallander, Roger Claasses, & Cynthia Nickerson, *The Ethanol Decade: An Expansion of Corn Production, 2000-09*, U.S. DEP’T AGRIC. ECON. RESEARCH SERV. 1, 3 (2011), <http://www.ers.usda.gov/media/121204/eib79.pdf> (stating that “[n]on-ethanol uses of corn have not increased over the past decade, as greater ethanol production has captured a larger share of corn production”). *See also* Colin Carter, Gordon Rausser, & Aaron Smith, *The Effect of the U.S. Ethanol Mandate on Corn Oil Prices*, U.C. DAVIS, DEP’T OF AGRIC. & RESEARCH ECON. 1, 1-3 (2011), <http://www.ourenergypolicy.org/wp-content/uploads/2013/07/The-Effect-oftheUS-Ethanol-Mandate-on-corn-prices-.pdf> (noting that U.S. energy policy now mandates that about 15 percent of global corn production to be converted into ethanol for use); C. Matthew Rendleman & Hosein Shapouri, *New Technologies in Ethanol Production*, U.S. DEP’T AGRIC. (2007), at *i* (stating that “the fraction of annual U.S. corn production used to make ethanol rose from around 1 percent in 1980 to around 20 percent in 2006”); Timothy A. Wise, *The Cost to Developing Countries of U.S. Corn Ethanol Expansion*, 5 (Global Dev. & Env’tl Inst.,

Because the U.S. will increasingly need to source corn from multiple inputs to meet demand without further encroaching upon the corn crop,¹⁵⁷ Brazil's narrower policy focus upon a single feedstock does not constitute a viable approach for the U.S. Due to production barriers associated with corn ethanol, the U.S. would likely need to diversify its sources in order to expand biofuel production significantly. For that reason, this is an aspect where Brazil's policies would provide only limited guidance for the U.S.

In order to help foster the long-run sustainability and cost-competitiveness of biofuels, the U.S. likely must rely upon advanced biofuels to a much greater degree than Brazil has.¹⁵⁸ Advanced biofuels can come from a variety of natural sources. For instance, cellulosic feedstocks include "corn stover, switchgrass, poplar trees, and any other raw material composed primarily of cellulose."¹⁵⁹ Title XV of the Energy Policy Act of 1992 defines cellulosic biomass ethanol as ethanol "derived from any lignocellulosic or hemicellulosic matter" obtained from a renewable source, including wood, plants, grasses, fibers, and animals and other wastes.¹⁶⁰ Additionally, Executive Order 13134 defines renewable biomass as "any organic matter that is

Working Paper No. 1202, 2012) (noting that the poor are strained by increasing agricultural commodity price).

¹⁵⁷ CONG. RES. SERV., RL33928, ETHANOL AND BIOFUELS: AGRICULTURE, INFRASTRUCTURE, AND MARKET CONSTRAINTS RELATED TO EXPANDED PRODUCTION 3, 8 (2007) (describing agricultural and infrastructure barriers to expanded corn ethanol production).

¹⁵⁸ See generally Blonz, et. al., *supra* note 149 (describing mechanisms to reduce costs).

¹⁵⁹ See generally Wallace E. Tyner, *The U.S. Ethanol and Biofuels Boom: Its Origins, Current Status, and Future Prospects*, 58 BIOSCIENCE 646, 649 (2008).

¹⁶⁰ Energy Policy Act § (o)(1)(A)(i)-(viii) (2005).

available on a renewable or recurring basis.”¹⁶¹ Similarly, another promising alternative fuel for use in vehicles is biobutanol, a corn-based isobutanol, which can also be cheaper to produce than either corn-based or cellulosic ethanol.¹⁶²

Nevertheless, there remains considerable uncertainty as to advanced biofuels’ viability as an adequate replacement.¹⁶³ Advanced biofuels are often characterized by significant technological barriers and can be more expensive to produce than corn ethanol.¹⁶⁴ For instance, cellulosic ethanol often has high production costs,¹⁶⁵ and there remain several technical challenges hindering its commercial viability, including reducing the costs of converting biomass into fermentable sugars.¹⁶⁶

Consequently, the U.S.’s policies have been less effective than those in Brazil because the U.S. lacks a

¹⁶¹ Exec. Order No. 13,134, 64 Fed. Reg. 44,639 (Aug. 16, 1999); *see also* Energy Policy Act § 1512(4)(B) (2005).

¹⁶² *See generally* Timothy A. Slating & Jay P. Kesan, *A Legal Analysis of the Effects of the Renewable Fuel Standard (RFS2) and Clean Air Act on the Commercialization of Biobutanol as a Transportation Fuel in the United States*, 4 GCB BIOENERGY 107, 107 (2012).

¹⁶³ *See generally* Jay J. Cheng & Govinda R. Timilsina, *Advanced Biofuels Technologies: Status and Barriers* (Pol’y Research Working Paper No. 5411, 2010), *available at* <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5411>.

¹⁶⁴ *Replacing the Whole Barrel to Reduce U.S. Dependence on Oil*, U.S. DEP’T OF ENERGY 1, 11 (2013), http://www1.eere.energy.gov/bioenergy/pdfs/replacing_barrel_overview.pdf (“Federal investment can significantly accelerate progress in bringing these hydrocarbon biofuels to market”).

¹⁶⁵ Manuel B. Sainz, *Commercial Cellulosic Ethanol: The Role of Plant-Expressed Enzymes*, 45 *IN VITRO CELLULAR & DEVELOPMENTAL BIOLOGY-PLANT* 314, 315 (2009) (noting that “[t]he major economic barrier to viable commercial ethanol production are high production costs, estimated to be between US\$102 and 123 per barrel or more than US\$2.50 per gallon”).

¹⁶⁶ *Id.*

comparable production advantage in producing corn ethanol, though the nation's policies have traditionally emphasized its production.

G. Brazil has played a much more directive role in shaping the biofuels industry, while the U.S. has enabled producers to dictate the market's development.

Brazil's biofuels policies have proven more sustainable because its government has been aggressive in influencing the ethanol industry's formation over time.¹⁶⁷ In contrast, the U.S.'s policies have often granted deference to producers to dictate their supply chain, biofuel retail prices, and related factors.¹⁶⁸ To maintain biofuels' long-run feasibility, the U.S. would likely need to become more engaged through the entire production and sale process.

Though Brazil has also created legislation aimed at reducing input costs for producers,¹⁶⁹ the U.S.'s policies have been more deferential to producers and market participants than Brazil's policies. Many of the U.S.'s initiatives are characterized by a more moderate, market-oriented approach. This disparity is likely a consequence

¹⁶⁷ See Cordonnier, *supra* note 16, at 317 (describing the relationship between the Brazilian government and the market).

¹⁶⁸ See e.g., *What Happened to Biofuels?* ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/technology-quarterly/21584452-energy-technology-making-large-amounts-fuel-organic-matter-has-proved-be?fsrc=scn/tw_ec/what_happened_to_biofuels_ (noting the role of the market in biofuels projects); *USDA Accomplishments 2009-2012*, U.S. DEP'T AGRIC., <http://www.usda.gov/documents/Result-s-Energy.pdf> (last visited Dec. 18, 2013) (outlining a number of biofuel initiatives).

¹⁶⁹ *Id.*

of differing government structures;¹⁷⁰ while Brazil had in place a military dictatorship for many of the years at the beginning of *Pró-Álcool*,¹⁷¹ the U.S.'s policies are created through a democracy.

Additionally, Brazil's policies have been especially comprehensive from their inception, which has enabled the country to play a greater role in shaping the industry. For instance, from the outset of *Pró-Álcool*, the government oversaw numerous production factors, including influencing where ethanol production facilities should be located geographically,¹⁷² and was instrumental in fostering the redevelopment of idle sugar distilleries and the creation of new ethanol production facilities.¹⁷³ Currently, in addition to instilling production mandates, the government also plays a key role in overseeing ethanol distribution networks and spearheading reforms in the market. On the consumer side, Brazil has been assertive in demanding measures to help instill consumer confidence in biofuels through mandatory labeling and quality control at fueling stations.¹⁷⁴ By overseeing nearly every facet of ethanol's production and sale, Brazil has been able to safeguard ethanol's viability.

On the contrary, the U.S.'s policies often do not provide significant oversight of the entire production process. For instance, the Small Ethanol Producer Credit and the Biodiesel Tax Credit are limited in focus upon reducing input costs for producers, yet do not provide extensive guidance as to

¹⁷⁰ See Cassuto & Gueiros, *supra* note 9, at 496 (noting that Brazil's aggressive initiatives during the early years of *Pró-Álcool* were made possible by Brazil's military dictatorship).

¹⁷¹ *Id.*

¹⁷² Decreto No. 76.593 (1975), art. 3.

¹⁷³ Cordonnier, *supra* note 16, at 298.

¹⁷⁴ *Id.* at 297.

how these funds must be spent.¹⁷⁵ Similarly, the VEETC has been heavily criticized for not being sufficiently targeted to its ultimate goal, but was instead though to be subsidizing the efforts of wealthy oil companies.¹⁷⁶

Consequently, the success of some of the U.S.'s biofuels policies has been hampered because they have not been sufficiently directive to ensure that policymakers' intended outcomes are achieved.

¹⁷⁵ See Omnibus Budget Reconciliation Act § 11502 (1998); Job Creation Act § 302 (2004).

¹⁷⁶ See *Let the VEETC Expire*, *supra* note 96.

H. Brazil's ethanol policies have been more sustainable because many of these initiatives are motivated by dual aims, though the U.S.'s biofuels policies have recently incorporated ancillary goals.

Lastly, Brazil's ethanol framework has been viable over time because many of its policies incorporate ancillary goals, such as economic revitalization, which helps sustain support for these programs. In contrast, many of the U.S.'s biofuels policies have traditionally been narrower in focus, which has limited their long-run application. However, recent initiatives such as the Biorefinery Crop Assistance Program ("BCAP") and the Rural Energy for America Program ("REAP") suggest increasing willingness of the U.S. to incorporate dual aims in its policies, which could help to promote the longevity of these biofuels initiatives.¹⁷⁷

As demonstrated in Brazil, biofuels initiatives are often linked with other national issues, such as re-developing low-income areas. For instance, during the early years of *Pró-Álcool*, the Commission and later, the Council, helped determine where ethanol production facilities should be located in an attempt to reduce regional income disparities.¹⁷⁸ Likewise, Brazil provided funding and created projects that helped to promote ethanol production in poor crop areas.¹⁷⁹ More recently, Brazil has undertaken efforts to promote the viability of biodiesel and other crops as a way to spur economic

¹⁷⁷ See Food, Conservation, and Energy Act of 2005, Pub. L. No. 110-246, §9003, 122 Stat. 1651, 2012 (2008) (codified at 7 U.S.C. 8103 (2012)); Food, Conservation, and Energy Act of 2005, Pub. L. No. 110-246, §9007, 122 Stat. 1651, 2007 (2008) (codified at 7 U.S.C. §8107 (2012)).

¹⁷⁸ See Decreto No. 76.593, de 14 de Novembro de 1975, DIARIO OFICIAL DA UNIAO [D.O.U.] de 14.11.1975 (Braz.) (1975), art. 3.

¹⁷⁹ *Id.*, at Art. 5(b) § 1.

development in rural areas.¹⁸⁰ By linking two or more initiatives, Brazil simultaneously increased its GDP and promoted the success of its biofuels program.¹⁸¹

In contrast, many of the U.S.'s biofuels initiatives reflect a narrower focus by only incentivizing a single factor, resulting in reduced support for these initiatives over the long-term. For instance, programs devised to reduce costs for producers have been met with widespread criticism that this funding has not been appropriately distributed and is sometimes provided directly to large producers.¹⁸² Nevertheless, this trend may be changing. The U.S.'s most recent biofuel policies employ more targeted metrics, such as increasing economic development in the Midwest and rural areas and ensuring the profitability of smaller producers and businesses, which can help the nation achieve multiple goals concomitantly.¹⁸³ Accordingly, the U.S.'s biofuels policies may become more sustainable as dual goals are more readily incorporated—a move which could render these initiatives less partisan and divisive.

Overall, Brazil has been more effective than the U.S. at incorporating market forces and consumer preferences into its biofuels policies. Though the U.S. and Brazil share similar motivations for reducing their

¹⁸⁰ *Programa Nacional de Producao e uso do Biodiesel*, MINISTERIO DE MINAS E ENERGIA, *supra* note 64.

¹⁸¹ See Valdez, *supra* note 61, at 4.

¹⁸² See *Let the VEETC Expire*, *supra* note 96, at 4 (“If the VEETC is allowed to expire, taxpayers will save money and big oil companies won’t get paid to consume a few billion gallons more of corn ethanol we don’t need”).

¹⁸³ See e.g., *Rural Energy for America Program Renewable Energy Systems & Energy Efficiency Improvement Loans & Grants Program 101*, U.S. DEP’T AGRIC., <http://www.rd.usda.gov/programs-services/rural-energy-for-america-program-renewable-energy-systems-energy-efficiency> (last visited Mar. 8, 2015).

consumption of foreign oil, Brazil's comprehensive approach spearheaded the long-run viability of its biofuel policies.¹⁸⁴

IV. Recommendations

In order to better integrate biofuels into the U.S. energy framework, the U.S. must take more directive action to shape how the industry forms over time. Though promoting the sustainability of biofuels requires a comprehensive approach, several considerations require specific attention:

A. The U.S. should work to more effectively promote private competition within the biofuel industry in order to expand the competitiveness of advanced biofuels.

Due to increased government support, some corporate entities already show interest in increasing research and investment in advanced biofuels.¹⁸⁵ While early signs have been encouraging, the U.S. should introduce further initiatives aimed at promoting the entrance of new corporate players into the biofuels market; this will spur technological innovation and

¹⁸⁴ Wilkinson, *supra* note 120 (“Comprehensive regulation ensured the attractiveness of this option at a time when the Brazilian automobile market was largely self-sufficient and protected from imports”).

¹⁸⁵ *USDA Putting Big Money Into Advanced Biofuels*, Business Wire, Oct. 1, 2013, available at <http://www.bloomberg.com/bb/newsarchive/abgSiOnlMN5M.html>.

There, Paul Watson of Green Technology Solutions, Inc. noted that “[t]he USDA’s payment program is an extremely positive sign that the need for an alternative fuel source is being taken seriously. . . . It should be encouraging to [the company’s] investors and Americans in general that our government is putting its money where its mouth is when it comes to advanced biofuels.”

lower input prices, which may ultimately reduce prices for consumers.¹⁸⁶

Because the biofuels industry is young and developing, new and transitioning producers can play a key role in shaping the future of renewable energy. Pursuant to the Energy Policy Act of 2005, Section 1501(a), the U.S. Federal Trade Commission (“FTC”) conducts market saturation studies for the ethanol industry.¹⁸⁷ In its 2013 study, the FTC determined that “[t]he level of concentration and the large number of market participants in the U.S. ethanol production industry suggests that exercise of market power to set prices or coordination on prices or output levels is unlikely.”¹⁸⁸ In light of this malleability and relative ease of entry, U.S. policymakers should incentivize interested fuel producers

¹⁸⁶ *Today in Energy: Ethanol Producers Respond to Market Conditions*, U.S. ENERGY INFO. ADMIN. (Mar. 11, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=1031>

(discussing the relationship between profit margins, production, consumption and prices of ethanol). As mentioned in Section II, the creation of the Biofuels Interagency Working Group suggests that some efforts at these initiatives have already begun. *See infra* Section II.

¹⁸⁷ Energy Policy Act of 2005 § 1501(a), 42 U.S.C. 7545.

¹⁸⁸ *2013 Report on Ethanol Market Concentration*, FED. TRADE COMM. (2013), available at <https://www.ftc.gov/sites/default/files/documents/reports/2013-federal-trade-commission-report-Congress-ethanol-market-concentration-november-2013/2013ethanolreport.pdf> (last visited Mar. 8, 2015); *see 2012 Report on Ethanol Market Concentration*, FED. TRADE COMM. (2012), available at <https://www.ftc.gov/sites/default/files/documents/reports/2012-federal-trade-commission-report-Congress-ethanol-market-concentration/2012ethanolreport.pdf> (last visited Mar. 8, 2015); *see also* Michelle Ratton Sanchez Badin and Daniela Helena Godoy, *International Trade Regulatory Challenge for Brazil and Some Lessons from the Promotion of Ethanol* 1, 29 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207894 (discussing mobilization of the private sector) (last visited Mar. 8, 2015).

of all sizes to enter the market, thereby promoting heightened competition within the biofuels industry.

Nonetheless, new producers will not be motivated to enter the biofuels industry unless it is profitable. Although the outcome of tax incentives has not been heavily studied, a study by the Food and Agriculture Policy Research Institute found that ethanol production would likely decline by nearly 80% if it were not incentivized.¹⁸⁹ In order to entice producers to enter the biofuels industry, the U.S. should devise subsidies or tax credits that provide additional benefits to new or converted alternative fuel producers, thereby shifting the focus of current initiatives away from subsidizing existing biofuel producers and instead to increasing market competition. Moreover, the U.S. should also strengthen conversion incentives for farmers seeking to convert their crop to biofuel production, a move increasing access to arable lands.

Consequently, as a way to spur innovation within the industry, tax incentives should be specifically aimed at encouraging the entry of new producers and corporate entities into the biofuels market.

B. The U.S. should promote biofuels' cost-competitiveness and develop a price-ratio formula to help ensure the price-competitiveness of biofuels.

Consumer demand for biofuel is generally surmised to be perfectly or almost-perfectly elastic.¹⁹⁰

¹⁸⁹ BRENT D. YACCOBUCCI, CONG. RESEARCH SERV., RL33290, FUEL ETHANOL: BACKGROUND AND PUBLIC POLICY ISSUES, at 12 (2008) (noting possible production decline of up to 80% without exemption).

¹⁹⁰ John Cobb, *Mitigating the Unintended Consequences of Biofuel Tax Credits*, 49 HARV. J. ON LEGIS. 451, 458

Therefore, consumers' willingness to purchase biofuel blends is a direct function of its price as compared to that of gasoline.¹⁹¹ Although strongly incentivizing the use of alternative fuels is imperative to sustain consumer demand, the burden must ultimately be placed on producers and private investors to engage in research and development initiatives that will help to mitigate the price differential, as well as to design vehicles that can use these fuels more effectively.

However, in the interim, one way to promote the cost-competitiveness of alternative fuels is through creating a price-ratio formula that ensures that biofuels prices remain consistently below gasoline prices. Pursuant to this price-ratio formula, ethanol or a comparable blend would be subsidized so that its cost would be fixed to a certain proportion below that of conventional fuels. Though this may artificially reduce the price of biofuels for consumers, lowering the costs below that of gasoline is necessary to offset the loss of fuel economy associated with these blends. In this way, consumers whose vehicles can run on a biofuel blend will not be incentivized to instead choose a conventional fuel.

(2012) (providing that “in the long term consumers and motor vehicle fuel suppliers are likely to be relatively indifferent between relying on gasoline and biofuels. Therefore, the long-term demand for biofuels is likely quite elastic, at least in ranges where it is priced competitively with gasoline.”).

¹⁹¹ *Id.* See generally Robert Z. Lawrence, *How Good Politics Results in Bad Policy: The Case of Biofuel Mandates* (Harv. Kennedy School Faculty Research, Working Paper, RWP10-044, 2010) (providing that ethanol use is also correlated to oil prices; if oil prices drop substantially, this could impair effort to convert to ethanol in the absence of stringent federal requirements).

C. The U.S. should mandate that a certain number of FFVs are sold in the nation per year.

Like Brazil, the U.S. could require that a certain number of ethanol-powered vehicles or FFVs be sold annually, or strongly promote their sale. FFVs are already available for sale in the U.S., though accessibility, price, and access to fueling stations remain impediments to their widespread use.¹⁹² By requiring flex-fuel engines on a number of new vehicles, many of the barriers hindering the expansion of alternative energy shall be reduced, and mass-production and geographic dispersion will increase their affordability and accessibility.¹⁹³ Specifically, the U.S. government, which already owns a large stake in the auto industry, should heavily incentivize domestic automobile makers to increase efforts to re-design vehicles that can more effectively operate on biofuels.¹⁹⁴ These initiatives could be tied into existing policies targeting the ailing domestic automobile industry and could be viewed as an additional way for the auto industry to adapt and become more competitive with foreign manufacturers.¹⁹⁵

¹⁹² See GAO-09-446, *supra* note 106, at 122 (comparing ethanol transport costs as 13 to 18 cents per gallon as compared to 3 to 5 cents per gallon of gasoline).

¹⁹³ See Lytle, *supra* note 111, at 694–95.

¹⁹⁴ See *Examining the State of the Domestic Automobile Industry: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. 2nd Sess. 1–3 (Nov. 18, 2008) (statement of Chairman Christopher J. Dodd) (stating that “the Big Three [auto manufacturers] . . . derided hybrid vehicles as making ‘no economic sense.’ They have dismissed the threat of global warming, the role played by their products in creating it, and the strong desire of the American people to do something to stop it. The prices of GM and Ford shares have declined steadily and have now reached historic lows. In short, the auto makers have failed to adapt to change . . .”).

¹⁹⁵ Remarks on the United States Automobile Industry, 2009 Daily Comp. Pres. Doc. 738 (Jun. 1, 2009) (There, President Obama stated

Similarly, an important—albeit somewhat ancillary—consideration is meeting consumer demand by providing a greater selection of attractive biofuel-powered vehicles to choose from. Correspondingly, adequate consumer demand will incentivize automobile manufacturers to respond by creating new models that appeal to consumers.¹⁹⁶ In Brazil, FFVs have grown extensively in popularity,¹⁹⁷ and as of 2010, there were 59 models of FFVs produced by 9 different auto manufacturers.¹⁹⁸ Thus, as demonstrated by their success in Brazil, FFVs need not necessarily restrict a consumer's ability to purchase a vehicle that suits his or her tastes.

Especially in light of the current technological barriers associated with the “blend wall,” relying predominately upon the RFS is likely to be insufficient to dramatically increase use of biofuels.¹⁹⁹ Therefore, developing targets or incentivizing the sale of FFVs may be yet another way to improve the cost-competitiveness of biofuels, while simultaneously encouraging

that “I decided [] that if GM and Chrysler and their stakeholders were willing to sacrifice for their companies’ survival and success, if they were willing to take the difficult but necessary steps to restructure and make themselves stronger, leaner, and more competitive, then the United States Government would stand behind them”). Accordingly, pushing the industry to redevelop vehicles that can more effectively operate on biofuels could be a way to simultaneously help to promote the revitalization and competitiveness of the domestic auto industry.

¹⁹⁶ *See Id.*

¹⁹⁷ *See* Wilkinson, *supra* note 120, at 99-100 (discussing Brazil’s ethanol policy, the author notes that the turning point occurred when FFVs were introduced, “which in the five years since 2003 have soared from zero to over 80% of total car sales.” One notable factor is that “differently from the previous ethanol program, choice of fuel can now be made at the petrol pump and not, more irrevocably, at the moment of purchase”).

¹⁹⁸ McDermott et al., *supra* note 25.

¹⁹⁹ Blonz, Vejjhala, & Safirova, *supra* note 149.

innovation within the domestic automobile industry.²⁰⁰ By giving customers the ability to decide which fuel to use depending upon the relative price of ethanol compared to gasoline, FFVs can support consumer preferences while reducing gasoline consumption.²⁰¹

D. The U.S. should work to increase consumer awareness of biofuels.

Due to limited marketing initiatives, U.S. consumers often lack awareness of the option to purchase biofuels or biofuel-powered vehicles.²⁰² One way to promote consumer awareness of alternative fuels is to require oil producers and retailers to sell biofuel blends alongside conventional gasoline products and market these products comparably. Furthermore, policymakers could demand that a certain fixed percentage of a large fuel company's revenue or total sales be derived from retailing biofuel blends, and impose penalties if these targets are not met.

Coupled with increased marketing efforts, large oil producers, which also own a significant number of fueling stations in the U.S., should be required to employ initiatives that will help to prevent consumers

²⁰⁰ GAO-07-713, *supra* note 100, at 7.

²⁰¹ See McDermott et al., *supra* note 25.

²⁰² Amanda Peterka, *Survey Shows Low Consumer Awareness of E15*, GOVERNORS' BIOFUELS COALITION (2013), <http://www.governorsbiofuelscoalition.org/?p=631>

9 (citing a 2012 study by the National Association of Convenience Stores). Pursuant to the study, "[o]nly 26 percent of surveyed fuel consumers were aware of E15. After survey takers described E15 to consumers, 59 percent, or three out of five consumers, said they would consider purchasing the fuel if it were the same price as gasoline. Three out of five of those consumers, though, had primary vehicles with model years for which it's illegal to fuel up with E15."

from “misfueling” their vehicles.²⁰³ Correspondingly, stringent labeling requirements should be imposed at fueling stations in order to help avoid damage to older vehicles that cannot operate on higher biofuel concentrations.²⁰⁴ Though some efforts at mandating the use of these labels to prevent “misfueling” are already underway, these policies will become increasingly important as a variety of different biofuel blends begin to appear on the market.²⁰⁵ Even more, further labeling requirements may have the ancillary effect of promoting consumer awareness of, and likely consumer interest in, biofuels.

E. The U.S. should bolster infrastructure supports and expand geographic locations of biofuel production facilities.

Currently, most U.S. biofuel production is concentrated in the Midwest and is undertaken by a small number of producers, which has reduced its efficacy and viability outside of the region.²⁰⁶ Because the

²⁰³ See GAO-11-513, *supra* note 113, at 30 (“Because the EPA has only allowed E15 for use in model year 2001 and new automobiles, representatives from several industry associations stated that consumers may not be aware of the distinction between approved and unapproved engines, or they may be confused about which fuel to use”); see also Automobile Fuel Ratings, Certification and Posting, 75 Fed. Reg. 12,470 (Mar. 16, 2010) (to be codified at 16 C.F.R. pt. 306) (proposing labeling for ethanol blends as a way to reduce consumer confusion).

²⁰⁴ GAO-11-513, *supra* note 113, at 30.

²⁰⁵ *Id.* Because only a small percentage of U.S. cars are currently powered predominately by biofuels, this initiative will need to be developed concomitant to other policies, such as increasing the number of FFVs or predominately ethanol-powered vehicles on the road.

²⁰⁶ Annette Hester, *A Strategy Brief on U.S. Ethanol Markets and Policies*, CENTRE FOR INT’L GOVERNANCE INNOVATION 1, 2 (2007) (stating that “data from the Renewable Fuels Association shows that

transport expenses for ethanol and other biofuels are relatively costly, incentivizing the development of new biofuel production facilities on the East and West Coasts, where a significant number of potential consumers reside, will help to reduce biofuels' price- markup over conventional fuels.²⁰⁷ Since high transport costs have been a major factor reducing the cost-competitiveness of biofuels,²⁰⁸ increasing geographic dispersion of production facilities, and thereby reducing the distances traveled, will help to lower these costs until reduced-cost transport options become available.

In order to intertwine this initiative with promoting economic development in rural areas, these biofuel production facilities could be located in rural locations on the Coasts, such as in South Carolina and Oregon. Moreover, expanding ethanol production facilities geographically can also help to buffer supply shocks caused by unfavorable weather conditions that sharply diminish the fuel crop.²⁰⁹ Therefore, as the industry expands, increasing geographic dispersion of biofuel production facilities need not necessarily detract from the initiatives focused upon promoting growth of the biofuels industry in the Midwest, and can help to spur economic growth in other areas.

Simultaneously, policymakers should strive to foster increased trade relationships between the U.S. and Brazil, as well as with other international producers, to

the top ten producers account for almost 50% of total production. Archer Daniels Midland (ADM) alone accounts for 20% of this capacity”).

²⁰⁷ See BOSSELMAN ET. AL., *supra* note 151, at 1093.

²⁰⁸ *Id.*

²⁰⁹ See Joseph Cooper, *Agricultural Commodity Support and Biofuels Policy*, RESOURCES FOR THE FUT. (July 18, 2011), <http://www.rff.org/Publications/WPC/Pages/Agricultural-Commodity-Support-and-Biofuels-Policy.aspx> (noting the problems associated with price shocks).

help prevent crises during times of shortage.²¹⁰ Although the U.S. has begun importing biofuels from other nations, policymakers remain cautious due to concerns over protecting the nascent biofuel industry. Nevertheless, as biofuels are progressively incorporated into the nation's energy framework, this interdependence will become more important and can serve as another way to help reduce the nation's dependence on foreign oil.

Furthermore, as demonstrated recently, forging a stronger relationship with ethanol-producing nations need not exclusively result in increased imports into the U.S. For instance, in 2011, Brazil was faced with a sharp decline in sugarcane ethanol availability. However, Brazil maintained its relatively high ethanol blend requirement, and was unable to produce enough ethanol to meet demand.²¹¹ As a result, Brazil chose to import ethanol from the U.S., even though ethanol produced in the U.S. is typically more expensive than Brazil's sugarcane ethanol.²¹² Consequently, strengthening trade relationships for alternative fuels need not be one-sided, and may ultimately benefit the U.S.

²¹⁰ See *Energy Analysis: International Trade of Biofuels*, NAT'L RENEWABLE ENERGY LAB., U.S. DEP'T ENERGY (2013) (describing biofuels trade).

²¹¹ See Isis Almeida & Tony Dreibus, *Brazil to Become Net Importer of U.S. Ethanol, Czarnikow Says*, BLOOMBERG BUSINESSWEEK, Nov. 22, 2011, available at <http://www.businessweek.com/news/2011-11-22/brazil-to-become-net-importer-of-u-s-ethanol-czarnikow-says.html>.

²¹² *Id.*

F. The U.S. should increase the regulatory authority of its agencies to play an active role in overseeing the nation's biofuels initiatives.

As demonstrated by the success of DOE's Clean Energy Program, enabling government agencies to play a much more directive role can help to ensure that current funding initiatives are effective at increasing biofuels' viability.²¹³ Accordingly, federal agencies such as EPA and USDA should undertake a more active approach to ensure that the aims of these programs and funding initiatives are met.²¹⁴ For example, because USDA has already begun undertaking a substantial investment through the Advanced Biofuel Payment Program,

²¹³ See *Clean Cities Goals*, *supra* note 81. The DOE has a number of successful biofuel programs, which demonstrates that a more active role by federal agencies can be viable and need not encroach upon the authority of producers. For instance, DOE has created almost 100 "Clean Cities Coalitions," which help to promote biofuels on a local level. See *Coalitions*, U.S. DEP'T ENERGY (Dec. 17, 2013), <http://www1.eere.energy.gov/cleancities/coalitions.html>. Similarly, pursuant to the "Clean Cities National Parks Initiative," DOE works with national parks to increase use of biofuel-powered vehicles in parks. See *Clean Cities National Parks Initiative*, U.S. DEP'T ENERGY (Dec. 17, 2013) http://www1.eere.energy.gov/cleancities/national_parks.html. Although these and similar initiatives by DOE have been largely successful, additional agencies could devise additional biofuel programs without overlapping upon DOE's authority.

²¹⁴ See *id.* Expanding upon previous efforts, agencies could work more closely with local governments to convert public transportation and other city machinery to operate on biofuel blends, especially in cities that lack sufficient funding to foster this transition. Agencies could also help to promote consumer awareness of biofuels through partnerships with local organizations and community groups. Moreover, agencies could take a much more active role in ensuring that biofuel pumps are installed at fueling stations by working with station operators to help ensure that appropriate infrastructure supports, such as storage tanks, are available.

engaging in additional oversight of the biofuels industry is merely another way to help ensure its efficacy.²¹⁵

Currently, federal agencies employ many efforts that are reactive and research-oriented, while enabling producers to shape the biofuels market. For instance, USDA employees presently analyze market data for biofuel feedstocks and other inputs, and they conduct some outreach and educational initiative.²¹⁶ Nonetheless, in tandem with existing initiatives, USDA could influence the market by helping to link retailers with suppliers. USDA could engage in additional oversight over producers as well. Although USDA has already begun some of these efforts, by bolstering these initiatives, the agency can ensure that federal funds are effectively utilized.²¹⁷

Instead of continuing to allow the biofuels market to be producer-led, increasing the authority of federal agencies can help to promote biofuels' long-run viability. Because the U.S. has already undertaken a significant investment to support biofuels cultivation through payments programs and conversion incentives,

²¹⁵ *USDA Announces Support for Producers of Advanced Biofuel*, U.S. DEP'T AGRIC. (Sept. 12, 2013), <http://usda.gov/wps/portal/usda/usdahome?contentid=2013/09/0177.xml>. There, USDA notes that the payments are part of its efforts to "support the research, investment and infrastructure necessary to build a strong biofuels industry that creates job and broadens the range of feedstocks used to promote renewable fuel." Accordingly, enabling agencies to play a more directive role in shaping the industry will help to ensure that these aims are achieved.

²¹⁶ *Biofuel Feedstock & Coproduct Market Data*, U.S. DEP'T AGRIC. ECON. RES. SERV. (Dec. 17, 2013), <http://www.ers.usda.gov/topics/farm-economy/bioenergy/biofuel-feedstock-coproduct-market-data.aspx>.

²¹⁷ See e.g., *Rural Development: Technical Assistance*, U.S. DEP'T AGRIC., (Dec. 17, 2013), http://www.rurdev.usda.gov/Subject_RD (outlining technical assistance endeavors).

granting federal agencies increased regulatory authority may help to increase the efficacy of these initiatives.

V. Conclusion

To conclude, Brazil's ethanol framework demonstrates that increased use of ethanol and similar biofuels can be a viable route for nations seeking to reduce their reliance on foreign oil. As in Brazil, gasoline and alternative fuels can be simultaneously utilized to propel the U.S.'s automobiles and machinery. In this transition, the U.S. must shift the thrust of its policies from production-side factors to promoting consumer and market demand for biofuels. Thus, perhaps Brazil's largest contribution to renewable energy is to foster awareness that a number of elements determine whether an alternative fuels policy will be viable, yet nonetheless demonstrates that the increased use of biofuels can be a sustainable option for the U.S.

**APPENDIX A: SUMMARY OF ISSUES AND
RECOMMENDATIONS EXPLANATION**

COMPARING U.S. AND BRAZILIAN POLICIES

1. Brazil's ethanol-blend mandates have nearly always been more stringent than the U.S.'s RFS, and biofuels are mixed into a greater proportion of Brazil's conventional fuel supply.
2. Brazil has encouraged carmakers to produce and retail FFVs to much greater extent, which has increased FFVs' popularity with consumers.
3. While Brazil has mandated ethanol's sale at fueling stations, the U.S. has not undertaken sufficient efforts to ensure that consumers have access to biofuel blends.
4. While Brazil has carefully monitored the price of ethanol, the U.S.'s policies are producer-oriented and often only indirectly influence the consumer price of affordable biofuel blends.
5. Brazil's policies incorporate comprehensive infrastructure supports, while the U.S.'s initiatives are more modest and rely upon investment from the private sector to improve distribution networks.
6. Though it is viable for Brazil to rely heavily on a single input, the U.S. has been unable to replicate these results with policies centered upon corn ethanol because it lacks a similar advantage in corn production.

7. Brazil has played a much more directive role in shaping the biofuels industry, while the U.S. has enabled producers to dictate the market's development.
8. Brazil's ethanol policies have been more sustainable because many of these initiatives are motivated by dual aims, though the U.S.'s biofuels policies have recently incorporated ancillary goals.

RECOMMENDATIONS

1. The U.S. should work to more effectively promote private competition within the biofuel industry in order to expand the competitiveness of advanced biofuels.
2. The U.S. should promote biofuels' cost-competitiveness and develop a price-ratio formula to help ensure the price-competitiveness of biofuels.
3. The U.S. should mandate that a certain number of FFVs are sold in the nation per year. The U.S. should work to increase consumer awareness of biofuels.
4. The U.S. should bolster infrastructure supports and expand geographic locations of biofuel production facilities.
5. The U.S. should increase the authority of its agencies to play an active role in overseeing the nation's biofuel initiatives.

IF IT AIN'T BROKE, BREAK IT – ¹
**HOW THE TENNESSEE GENERAL ASSEMBLY DISMANTLED
AND DESTROYED TENNESSEE'S UNIQUELY EXCELLENT
JUDICIAL SYSTEM**

By: Penny J. White²

“The concentrating [of all government power] in the same hands is precisely the definition of despotic government. . . . If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual. . . . The time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.”³

I. Introduction⁴

In Tennessee, the wolf has entered the fold. The Tennessee General Assembly has assumed judicial power by reasserting its role as the “preeminent” branch of government and reclaiming its historic dominance over the

¹ The title is taken from the common phrase, “if it ain’t broke, don’t fix it,” popularized by Bert Lance, White House Director of the Office of Management and Budget under President Jimmy Carter.

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³ GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 451 (1969) (quoting Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 120-21 (1784)).

⁴ I am grateful to Professor Judy Cornett for her insight and ingenuity; to Jacob Feuer whose enthusiasm and acumen inspired me; and to Jason Collver, Cassie Kamp, Benjamin Lemly, Patrick Morrison, Brianna Powell, and David Samples, students at the University of Tennessee College of Law who provided excellent research assistance.

state judiciary.⁵ This unfortunate development has led me to write this article for a variety of reasons. For future generations, I wish to chronicle the events that led to the dismantling of Tennessee's unique, high-quality judicial system.⁶ In this way, I seek to archive essential information for those who trumpet the important role that fair courts play in our society. I hope to inspire vigilance, triggering watchful eyes as the new judiciary unfolds; and perhaps, I also aspire to encourage efforts to draw the teeth and talons before more damage is done.

II. Evolution of a Model Judicial Selection, Evaluation, and Retention System-a/k/a Tennessee's Judicial System Was Not Broken.

The early Tennesseans gave the legislative branch the power to control the creation, composition, and jurisdiction of the courts.⁷ Following North Carolina's lead,⁸ the first Tennessee Constitution, adopted in 1796, provided for three separate branches of government and granted judicial power to the courts, but left entirely to the

⁵ N. Houston Parks, *Judicial Selection – the Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 619 (1977) (noting that Tennessee's first constitution "resembl[ed] other early state constitutions, [and] made the popularly elected legislature, or general assembly, preeminent").

⁶ I am using the phrase "judicial system" in this article to refer to the method by which judges are selected initially for the bench and the means by which their continued service is determined.

⁷ For a complete discussion of the history of the Tennessee judicial branch, see Parks, *supra* note 5, at 617-34; see also Thomas R. Van Dervort, *The Changing Court System*, in TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 55-64 (John R. Vile & Mark Byrnes eds., 1998).

⁸ Tennessee was viewed as the "daughter of North Carolina," which led her "quite naturally" to adopt the "judicial system of the Mother State." SAMUEL C. WILLIAMS, PHASES OF THE HISTORY OF THE SUPREME COURT OF TENNESSEE 5 (1944).

legislature whether to create courts at all.⁹ Notably, Tennessee's first Constitution referred to "superior" and "inferior" courts, but did not require the legislature to create any courts.¹⁰ Although the legislature did create courts "from time to time," as the Constitution provided,¹¹ it was more than a decade before the legislature created a court of last resort and even then, the legislature retained the power to abolish the Tennessee Supreme Court until 1835.¹² Only with the passage of Tennessee's 1834 Constitution did the Tennessee Supreme Court gain constitutional status, sufficient to forbid its abolition by the legislature.¹³

This legislative preeminence in Tennessee was consistent with the model in place in most states during the early days of the Nation.¹⁴ But this legislative dominance

⁹ JOSHUA W. CALDWELL, *STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE* 149 (2d ed. 1907).

¹⁰ The 1796 Constitution provided that "[t]he judicial power of the state shall be vested in such superior and inferior courts of law and equity as the legislature shall, from time to time, direct and establish." TENN. CONST. art. V, § 1 (1796).

¹¹ *Id.*

¹² The Tennessee Supreme Court was created in 1809, but was not given appellate jurisdiction until 1819. That appellate jurisdiction did not become exclusive until 1834. WILLIAMS, *supra* note 8, at 75-76.

¹³ *Id.* at 76-77. The 1834 Constitution vested judicial power in "one Supreme Court [and] in such Inferior Courts as the Legislature shall from time to time ordain and establish." TENN. CONST. art. VI, § 1 (1834).

¹⁴ Despite the separation of powers provided for in Article III, Section 1 of the United States Constitution, the framers had mixed feelings about the implications of the separation of powers doctrine, in general, and about what would come to be known as judicial independence, in particular. John Adams, for example, believed "that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both . . ." 4 THE WORKS OF JOHN ADAMS 198 (C. Adams, ed. 1851). Others, including Thomas Jefferson, occasionally, held an altogether different view of the role of the courts. In a letter to Edmund Pendleton written just eight years before the quote that introduces this article, Jefferson

was short-lived, due in part to the public's growing "fear of legislative despotism" and the resulting threat to individual freedom.¹⁵ Additionally, with the establishment of the power of judicial review¹⁶ came the realization that courts would assume prominence as guardians of individual sovereignty and, thus, should be more accountable to the public.¹⁷

Over the course of the next two centuries, states detached their judiciaries from legislative control by removing judges from legislative appointment and adopting a variety of other selection methods for state court judges. Initially, most states moved to partisan elections believing that judges who were accountable to the voters would be more independent. This idea was prompted by the principles of Jacksonian democracy and the emergence of the populist movement.¹⁸ But "by the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption."¹⁹ The growth of a more urban and industrialized society had complicated

advocated that "mercy [should] be the character of the law-giver, but . . . the judge [should] be a mere machine." Letter to Edmund Pendleton, Document 9 (Aug. 26, 1776) in *THE PAPERS OF THOMAS JEFFERSON* (J. Boyd, ed. 1950). Initially, according to historian and scholar Gordon Wood, "[t]he Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it." WOOD, *supra* note 3, at 161.

¹⁵ *Id.* at 453-54. As Wood explains, this fear was brought about by legislative overreaching and the public's reaction to the effect that this abuse of power had on the judicial function. *Id.*

¹⁶ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁷ Parks, *supra* note 5, at 622-625 (stating that the "single most significant manifestation of the changing conception of the judicial function was the emergence of the doctrine of judicial review."). *Id.* at 622.

¹⁸ *Id.* at 624-25.

¹⁹ Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1994).

the law, demanding that judges be skilled and intelligent, rather than partisan and political.

Some states turned to nonpartisan elections to solve the issues of incompetence and political cronyism,²⁰ but other states, prompted by professional organizations, tinkered with creating judicial selection and retention methods that would insulate judges more completely from the political aspects of the electoral process.²¹ By 1990, almost half of the states had adopted a new model – a so-called merit selection system – as the selection method for state judges.²² Under merit selection systems, a broad-based commission comprised of diverse and representative individuals screens and evaluates candidates for judicial office. Following a rigorous application and vetting process, the commission nominates the most qualified candidates to the appointing authority, generally the governor, who makes the judicial appointment. Tennessee joined the group of states opting for merit over politics and adopted the Tennessee Plan, a merit-based selection system for appellate court judges in 1971.²³

²⁰ F. Andrew Hanssen, *Learning about Judicial Independence, Institutional Changes in State Courts*, 33 J. LEGAL. STUD. 431, 442 (2004) (noting that by 1930, twelve states had adopted nonpartisan elections as their method of judicial selection).

²¹ Parks, *supra* note 5, at 632.

²² Charles Gardner Geyh, *Methods of Judicial Selection & Their Impact on Judicial Independence*, 2008 DAEDALUS 88-89 (2008) in Paul J. De Muniz & Phillip Schradle, *A Modest Proposal for Selection of Oregon Judges*, 75 ALB. L. REV. 1759 (2012) (Professor Geyh also refers to this statistic in the background papers for “The Debate Over Judicial Elections and State Court Judicial Selection,” a 2007 conference sponsored by the National Center for State Courts and the Sandra Day O’Connor Project on the State of the Judiciary. The background papers are on file in the author’s archives.).

²³ For all of the versions of Tennessee’s judicial selection, evaluation, and retention statutes, other than the current version, I will cite to the original public chapter number in order to avoid confusion. 1971 Tenn. Pub. Acts, ch. 198 (codified at TENN. CODE ANN. § 17-701). Trial judges in Tennessee continued to be chosen in popular elections. I use

Despite this progressive step by Tennessee's 1971 bipartisan General Assembly,²⁴ the Tennessee Plan became the spoils of a highly partisan battle between a Republican governor and a Democratic legislature in 1974, leading to the repeal of the Plan as it applied to the Tennessee Supreme Court.²⁵ Over the next twenty years, judicial reform in Tennessee would arguably fail miserably (when a cumbersome 1500-word amendment to the judicial article was rejected by the voters in the 1977 Limited Constitutional Convention²⁶) and succeed beyond all expectations when, in 1994, another bipartisan General Assembly²⁷ provided that all judicial vacancies would be filled by merit-based appointments. This returned the Tennessee Supreme Court to retention elections and marked the first time in Tennessee's history that the appointment of trial judges had been removed from a system of pure political patronage.²⁸

Under the 1994 Tennessee Plan, the Governor was required to fill judicial vacancies from a list of three

the phrase "the Tennessee Plan" and the phrase "Tennessee's judicial selection, evaluation, and retention system" to designate the manner of judicial selection, evaluation, and retention set out in the 1971 and 1994 statutes.

²⁴ The 87th Tennessee General Assembly consisted of 20 Democrat, 12 Republican, and 1 American Independent Senators, <http://www.tn.gov/tsla/history/misc/tga-senate3.pdf>, and 56 Democrats and 43 Republicans Representatives, <http://www.capitol.tn.gov/house/archives/87GA/Members/Members.htm>.

²⁵ Van Dervort, *supra* note 7, at 62; Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 510-12 (2008).

²⁶ See White & Reddick, *supra* note 25, at 515-19.

²⁷ The 98th General Assembly consisted of 19 Democrat and 14 Republican Senators, <http://www.tn.gov/tsla/history/misc/tga-senate3.pdf>, and 64 Democrat and 35 Republican Representatives, <http://www.capitol.tn.gov/house/archives/98GA/Members/Members.htm>

²⁸ Van Dervort, *supra* note 7, at 64.

nominees provided by the Judicial Selection Commission (JSC).²⁹ By statute, the JSC's membership was required to reflect diversity.³⁰ Trial judges appointed under the Tennessee Plan held their seats until the next general election, at which time they ran in popular elections. But appellate judges appointed under the Tennessee Plan ran in retention elections, thus returning Tennessee's appellate courts to a full merit-based selection and retention system.³¹ In addition to adopting merit-based selection and retention for appellate court judges, the General Assembly added a unique dimension to the selection system, adopting a judicial performance evaluation system that was new to Tennessee and unique in the Nation.³²

Despite the increased use of and support for merit-based judicial selection systems, critics expressed concerns about the retention aspects of merit-based systems. In all but a very few states,³³ judges selected via a merit-based

²⁹ The Tennessee Judicial Selection Commission consisted of 15 members, appointed by the Speaker of the House and Senate from recommendations made by the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the District Attorneys General Conference, the Tennessee Defense Lawyers Association, and the Tennessee Association of Criminal Defense Lawyers. 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-102).

³⁰*Id.* (including requirements that the Commission "approximate the population of the state with respect to race and gender;" include representation "from the dominant ethnic minority population;" that the Speakers reject any list that did not "reflect the diversity of the state's population;" and requiring the nominating groups and speakers to "intend to select a commission diverse as to race and gender"). See Van Devort, *supra* note 7, at 64-65

³¹ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §§ 17-4-101 & -102); Van Devort, *supra* note 7, at 64.

³² White & Reddick, *supra* note 25, at 519; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-101 (1994)).

³³ Only Rhode Island appoints state court judges for life; judges in New Hampshire, New Jersey, and Massachusetts serve until age 70. http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state.

selection system were reviewed periodically by the electorate who voted whether the judges should be retained in office. Opponents of merit-based systems charged that retention elections did not entice voter interest and that those who did vote did not have sufficient information about incumbent judges to enable them to cast informed votes on retention.³⁴ At its core, this criticism was based on the presumption that party labels provided relevant information to voters about candidates,³⁵ a presumption that is fallacious when applied to judges.

In order to address the criticisms and confront the fallaciousness head on, a small minority of merit-selection states began to experiment with methods of evaluating judicial performance³⁶ for the purpose of providing voters with relevant information about judges' performance and

³⁴ See generally James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 97 (2013).

³⁵ See generally Scott Ashworth & Ethan Bueno de Mesquita, *Informative Party labels with Institutional and Electoral Variation*, 20 JOURNAL OF THEORETICAL POLITICS 251, 251 (2008) (citing studies that support the proposition that in traditional elections "party labels provide voters with information about candidates"). To prove low voter interest, critics of merit selection rely upon ballot roll-off percentages. Because judicial races are often at the bottom of the ballot, the phenomenon of ballot roll off results in voters not casting a vote in those races. The percentage of ballot roll off is calculated by determining the number of voters who cast ballots but who did not complete their ballots by voting in each contest. Critics cited ballot roll-off percentages as proof of low voter interest. See Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L. REV. 1375, 1377 (2001) (discussing various complaints about retention elections).

³⁶ For more than a century, bar groups and associations had polled members as a means of evaluating judicial performance, but bar poll results were (and are) regarded largely as assessing a judge's popularity and not as a meaningful measurement of judicial performance. JAMES H. GUTERMAN & ERROL E. MEDINGER, *IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES* 2 (1977).

identifying areas in which judges needed to improve.³⁷ By providing voters with objective, relevant information about judges' performance, voters could cast informed ballots. Thus, judicial performance evaluations, though scarcely used, were a "key component of efforts to make judicial elections more meaningful contests."³⁸

As states experimented with judicial performance evaluations for self-improvement, the American Bar Association (ABA) drafted and adopted guidelines to objectify judicial evaluations. The *Guidelines for Evaluation of Judicial Performance*, consists of concrete principles and explanatory commentary concerning the adoption and implementation of a judicial performance system.³⁹ While the adoption of the ABA Guidelines prompted more states to adopt performance guidelines for judicial self-improvement, the number of states that utilized judicial performance as a means of informing the electorate about judicial qualifications remained very small.

The early pioneers in the use of judicial performance evaluations were New Jersey, Colorado, and Alaska, but Tennessee, which adopted its program in 1994, was not far behind. Moreover, unlike many of the pioneers, Tennessee's judicial performance evaluation program (JPE) included the dual purposes of promoting voter awareness and self-improvement from the outset. While other programs focused exclusively on identifying areas for judicial self-improvement during the first decade of the programs' existence, Tennessee's JPE contained a

³⁷ Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255, 261-70 (1981); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1064-66 (2002).

³⁸ Andersen, *supra* note 35, at 1375.

³⁹ ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985) (hereinafter "GUIDELINES").

robust voter awareness and self-improvement component from the very start.⁴⁰

Thus, the 98th Tennessee General Assembly added Tennessee to that very short list of states willing to devote state resources to assure that an informed electorate made judicial retention decisions. The Tennessee Plan incorporated a rigorous performance evaluation program that had been developed and scrutinized by members of the bench and the bar⁴¹ and that placed Tennessee in the forefront. With the adoption of the Tennessee Plan, the Tennessee Municipal League, for example, proudly boasted that Tennessee became the “only state with a judicial evaluation program this expansive, and only one of eight states with a program.”⁴²

From its inception, Tennessee’s expansive JPE embraced multiple vital objectives: assuring a “responsive and respected appellate judiciary,”⁴³ providing a means of improving the quality of justice by improving individual

⁴⁰ See White, *supra* note 37, at 1066-67. Both a lack of resources and a lack of support led some states to use judicial performance evaluations exclusively for judicial self-improvement.

⁴¹ Justice Bill Koch, who was at the time a Court of Appeals Judge, and I chaired the committee appointed by the Tennessee Supreme Court and the Tennessee Judicial Conference to study and determine whether to propose a judicial performance evaluation system for Tennessee’s judges. The committee, consisting of lawyers and judges, worked for months reviewing the few judicial performance evaluation programs in existence, consulting with experts, and drafting proposals. To my knowledge, the significant amount of energy, resources, and relationship capital invested to propose and ultimately adopt Tennessee’s JPE has not been documented. My archives (and I am sure the archives of Justice Koch and others) contain reams of evidence documenting the amount of work involved as well as the degree of difficulty encountered in proposing and gaining acceptance of JPE by Tennessee’s lawyers, judges, and legislators.

⁴² Tennessee Municipal League, *Town and Country*, July 17, 1995 (quoted in Van Dervort, *supra* note 7, at 63).

⁴³ TENN. SUP. CT. R. 27, § 1.01.

judge's judicial skills,⁴⁴ and promoting "informed retention decisions."⁴⁵ By connecting JPE with the Tennessee Plan's broad-based selection system and retention elections, the General Assembly and the courts worked hand in hand to select a qualified judiciary, to improve judicial performance, and to "aid the public in evaluating the performance of [incumbent appellate] judges."⁴⁶ In addition to acknowledging the acute importance of an exceptional appellate judiciary, the implementation of JPE alleviated accountability concerns voiced by some critics of retention elections⁴⁷ by providing an evaluative process "based on a well-defined set of non-political performance criteria."⁴⁸

Tennessee's JPE not only met, but exceeded the recommended standards for judicial evaluation programs.⁴⁹

⁴⁴ *Id.* at §§ 1.02 & 1.03.

⁴⁵ *Id.* at § 1.04. "In addition to its primary purpose of self-improvement, the JPEP must provide information that will enable the Judicial Performance Evaluation Commission to perform objective evaluations and to issue fair and accurate reports concerning each appellate judge's performance."

⁴⁶ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-201). The Tennessee Plan did not change the method of election for Tennessee's trial judges; thus, JPE's voter awareness goal affected only incumbent appellate judges.

⁴⁷ *See* Bopp, *supra* note 34, at 97 (stating that "[t]he primary pitfall is that merit selection lacks any strong accountability mechanism since retention elections are a weak substitute for popular elections."); Andersen, *supra* note 35, at 1377 (noting that "[r]etention elections provide accountability in theory, but in practice they can suffer from the same lack of publicity and voter interest as competitive judicial elections often do.").

⁴⁸ Andersen, *supra* note 35, at 1389.

⁴⁹ Generally, the ABA GUIDELINES, *supra* note 39, are considered the model for judicial evaluation programs. For a discussion of the specifics of effective evaluation programs, *see* Andersen, *supra* note 35; *see also* Kevin M. Esterling & Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States – A Report with Recommendations* (1998), available at <http://www.Judicial>

The program had official status⁵⁰ and was sanctioned by both statute and Supreme Court Rule.⁵¹ Despite this linkage, JPE retained institutional independence from both the legislature and the judiciary.⁵² The program's well-defined goals and objectives⁵³ were broad and comprehensive in scope,⁵⁴ but the overarching program objectives were complemented with precise rules and procedures.⁵⁵

Tennessee's JPE utilized professionally-designed survey instruments to solicit views from a variety of court users, including jurors, lawyers, litigants, and other judges. But evaluation also took into account non-survey information acquired through public comments, personal interviews, observations, and caseload and workload

selection.us/uploads/documents/Exec_Summ_Jud_Ret_Eval_4C67B5A81A9B3.pdf.

⁵⁰ Andersen, *supra* note 35, at 1376.

⁵¹ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-201 (1994)); TENN. SUP. CT. R. 27.

⁵² See GUIDELINES, *supra* note 39, at 1-2 (noting that a “judicial evaluation program should be structured and implemented so as not to impair the independence of the judiciary”); 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(a)(3) (1994) (providing that information collected for purposes of evaluating judges shall be confidential); TENN. SUP. CT. R. 27, § 2.04 (stating that the “Judicial Performance Evaluation Commission . . . shall be considered independent of the Administrative Office of the Courts”); TENN. SUP. CT. R. 27, §§ 6.02 & 6.03 (providing for limited disclosure of “[a]ll records and information obtained and maintained by the Judicial Performance Evaluation Commission concerning the performance of individual judges”); TENN. SUP. CT. R. 27, § 6.04 (providing that “all information, questionnaires, notes, memoranda or data” shall be in admissible as evidence and not discoverable in any action or by any board or tribunal); TENN. SUP. CT. R. 27, § 6.05 (providing for the destruction of records six months after a judge's death or retirement).

⁵³ GUIDELINES, *supra* note 39, at 1-1; *see* text accompanying notes 43-48 *supra*.

⁵⁴ Andersen, *supra* note 35, at 1377-79.

⁵⁵ TENN. SUP. CT. R. 27, §§ 4 & 5.

statistics.⁵⁶ The program evaluated judges based upon “clear, measurable performance standards,”⁵⁷ utilizing questionnaires that assessed specific relevant criteria, such as integrity, knowledge and understanding of the law, ability to communicate, preparation and attentiveness, service to the profession and the public, and effectiveness in working with others.⁵⁸ The final evaluation reports were disseminated by print media⁵⁹ and, ultimately, were available electronically,⁶⁰ allowing the public easy access to the evaluation results and assuring that the results provided a useful and meaningful voter information tool.⁶¹

Tennessee’s JPE was administered by the Judicial Performance Evaluation Commission (hereafter JPEC), comprised of lawyers, judges, and lay persons appointed by various professional organizations and office holders.⁶²

⁵⁶ GUIDELINES, *supra* note 39, at 4.1 – 4.3. See TENN. SUP. CT. R. 27, §§ 5.02 & 5.04; Tennessee Appellate Judges Evaluation Reports are presently available at <http://www.tsc.state.tn.us/boards-commissions/boards-commissions/judicial-performance-evaluation-commission>.

⁵⁷ Esterling & Sampson, *supra* note 49, at xix.

⁵⁸ GUIDELINES, *supra* note 39, at 3-1 – 3-8; TENN. SUP. CT. R. 27, § 3. I have previously discussed the relationship of these performance criteria to the qualities of good judges. See Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 657-661 (2009).

⁵⁹ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(c) (1994)).

⁶⁰ See *supra* note 56.

⁶¹ As the Institute for the Advancement of the Legal System has noted “[a] commitment to public judicial performance evaluation involves a concomitant commitment to assuring that the results are widely known” INSTITUTE FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., *TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION* 10 (2006), available at http://iaals.du.edu/imag/wygwam/documents/publications/TCQ_Blueprint_JPE2006.pdf (hereafter “TRANSPARENT COURTHOUSE”).

⁶² GUIDELINES, *supra* note 39, at 2-2 & Commentary; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(b)(1)-(4)).

Commissioners' terms were staggered and limited.⁶³ Similarly, the JPEC's structure and composition mirrored suggested standards.⁶⁴

III. Tennessee's Model Judicial Selection, Evaluation, and Retention System Worked

Thus, in 1994, Tennessee had a model and respected judicial selection, evaluation, and retention system for its appellate court judges. More importantly, the system worked. It produced a highly qualified, diverse appellate bench, whose members adjudicated cases both fairly and efficiently. In short, the Tennessee judicial selection, evaluation, and retention system was not broken.

A. Tennessee's judicial selection, evaluation, and retention system met the goals set by the legislature.

The respect for the Tennessee Plan was well-deserved. When the Plan was adopted, the General Assembly outlined four specific and noble goals: selecting the best qualified judges, bringing greater racial and gender diversity to the bench, insulating judges from political pressure and influence, and enhancing the prestige of and public respect for the courts.⁶⁵ Between 1994 and 2010, the Tennessee Plan met each of these laudable goals.

(1994) (providing that the Judicial Council and the Speakers of the House and Senate would appoint attorneys, judges, and non-attorneys to the JPEC).

⁶³ Andersen, *supra* note 35, at 1383; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201 (b)(7) & (8) (1994)).

⁶⁴ TRANSPARENT COURTHOUSE, *supra* note 61, at 8.

⁶⁵ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101 to 102) (2009).

1. The Tennessee Plan produced a highly qualified, diverse appellate bench.

In a judicial selection system based on merit, judicial vacancies are publicized. Applicants are required to provide detailed information about their personal and professional background, work experiences, education, abilities, and achievements. After viewing these relevant qualifications, a diverse selection commission nominates the most qualified applicants to the appointing authority. The Tennessee Plan embraced each of these important aspects of merit selection.⁶⁶

The clarity and pertinence of the selection process attracted qualified applicants. In particular, those lacking political connections⁶⁷ were still able to compete for a

⁶⁶ See text accompanying *supra* notes 29-31.

⁶⁷ I am well aware that many qualified applicants fell victim to politics at its worst on occasion, when the JSC “stacked the deck” with its nominees. In writing about the design and potential of the Tennessee Plan and contrasting its value relative to the value of our current system, I am not suggesting that the Tennessee Plan always worked perfectly or apolitically. One example of imperfect operation occurred in 2006. The JSC submitted a slate of three nominees to Governor Phil Bredesen to fill a vacancy on the Tennessee Supreme Court. The slate included Davidson County Chancellor Richard Dinkins, who is an African American, and attorneys J. Houston Gordon and George T. “Buck” Lewis. Chancellor Dinkins withdrew from consideration, prompting the Governor to request a new slate of nominees reflecting diversity. The JSC asked the Governor to clarify his rejection and ultimately submitted a second slate, which included J. Houston Gordon and two others. The Governor then filed a declaratory judgment action against the JSC alleging that the second slate was invalid because it included a previously rejected nominee. Gordon and Lewis were allowed to intervene in the lawsuit. Following trial proceedings, and pursuant to its reach-down prerogative, the Tennessee Supreme Court concluded that the JSC could not include on a subsequent slate of nominees an individual who had been included on a rejected slate. *Bredesen v. Tennessee Judicial Selection Commission*, 214 S.W.3d 419 (Tenn. 2007).

nomination based on their qualifications.⁶⁸ Knowing that the JSC was largely comprised of experienced lawyers who knew the essential qualities of a good judge encouraged qualified candidates who possessed the necessary intellect, temperament, and judgment to serve. Additionally, those experienced lawyer JSC members were well-positioned to evaluate and predict suitability for the bench.

Admittedly, determining the quality of an appellate judge is no easy task. An appellate court's caseload is predominantly determined by litigants and their lawyers, not the judges.⁶⁹ But one measurement of appellate efficiency is the length of time it takes an appellate court to conclude a case after the case is heard. This measurement is sometimes referred to as the case-disposition or clearance rate. National organizations have promoted time guidelines to encourage the expeditious disposition of cases.⁷⁰ Tennessee appellate courts have long adhered to case processing deadlines, have a clear enforcement

⁶⁸ While measuring whether merit selection systems in and of themselves produce more qualified judges is a difficult proposition, studies uniformly show meaningful differences between appointed and elected judges.

⁶⁹ Parties have an automatic right to appeal trial court decisions to the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. Only the Tennessee Supreme Court has "control" over the size of its docket because its appellate jurisdiction is largely discretionary, but even the Supreme Court is required to hear certain kinds of cases. *See generally* TENN. R. APP. 9-12 (outlining the methods of appeal in Tennessee); TENN. CODE ANN. § 39-13-206 (2014 Repl.) (establishing the Supreme Court's mandatory review of capital cases).

⁷⁰ The American Bar Association and the National Center for State Courts, for example, have promoted time standards for appellate courts. *See* National Center for State Courts, Appellate Court Performance Measures (2011), *available at* http://www.courttools.org/~media/Microsites/Files/CourTools/courttools_appellate_measure2_Time_To_Disposition.ashx.

mechanism,⁷¹ and regularly have impressive case-clearance rates.⁷²

In addition to evaluations based on a courts' clearance rate, some nonprofit organizations evaluate state appellate courts based on other factors, usually reflective of the groups' ideology. One example is an evaluation conducted by the Center for Public Integrity,⁷³ Global Integrity,⁷⁴ and Public Radio International,⁷⁵ which ranked the integrity of state institutions based upon their transparency, accountability, and corruption risk.⁷⁶

⁷¹ TENN. SUP. CT. R. 11 (setting out mechanism for collecting court statistics, deadlines for rendering decisions, and procedure for prompting a dilatory judge).

⁷² The annual statistics for Tennessee's appellate courts are compiled in annual reports, which are posted on the website for the Tennessee Administrative Office of the Courts. The most recent annual report, covering fiscal year 2012-13, may be viewed at http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_fy2013.pdf. In 2012-13, during a time of upheaval and uncertainty about the tenure of appellate judges, Tennessee's appellate courts averaged a clearance rate that exceeded 100 percent.

⁷³ The Center for Public Integrity, according to its website, is a nonpartisan, nonprofit investigative news organization whose mission is to "serve democracy by revealing abuses of power, corruption and betrayal of public trust by powerful public and private institutions, using the tools of investigative journalism." <http://www.publicintegrity.org/>.

⁷⁴ According to its website, Global Integrity "champions transparent and accountable government around the world by producing innovative research and technologies that inform, connect, and empower civic, private, and public reformers seeking more open societies." <https://www.globalintegrity.org/about/mission/>.

⁷⁵ Public Radio International is a global nonprofit media company whose mission is to "serve audiences as a distinctive content source for information, insights and cultural experiences essential to living in our diverse, interconnected world." <http://www.pri.org/about-pri>.

⁷⁶ Tennessee's corruption risk report card can be viewed at <http://www.stateintegrity.org/tennessee>.

Although the state of Tennessee fared poorly overall, the score received for judicial accountability was among the state's highest score and ranked Tennessee favorably based upon the transparency of judicial selection, the integrity of the judiciary, and the accountability of judges for their actions.⁷⁷

In addition to producing a highly qualified and effective appellate bench, the Tennessee Plan produced a significantly more diverse appellate bench.⁷⁸ The increase in diversity under the Tennessee Plan was consistent with the findings of national studies showing that racial and gender diversity is more likely to occur through an appointed system⁷⁹ and that women are significantly more likely to be appointed, rather than elected, to state supreme courts.⁸⁰

Under the Tennessee Plan, membership on the JSC was required to reflect the state's diversity; the Speakers were required to reject nomination lists that did not reflect

⁷⁷ Tennessee's judicial accountability report can be viewed at http://www.stateintegrity.org/tennessee_survey_judicial_accountability. At the other extreme, it may be worth noting that the Tennessee court system has never made the list of so-called "judicial hellholes," catalogued by the American Tort Reform Foundation in annual reports. According to its website, the American Tort Reform Foundation (ATRF) is a nonprofit corporation whose primary purpose is to "educate the general public about how the American civil justice system operates; the role of tort law in the civil justice system; and the impact of tort law on the private, public and business sectors of society." *available at* <http://www.judicialhellholes.org/about/>. The ATRF defines judicial hellholes as "places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits." *Id.*

⁷⁸ See TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK (1994-2014).

⁷⁹ Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments*, 27 JUST. SYS. J. 1, 7 (2006)

⁸⁰ Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 504 (2002).

diversity.⁸¹ The presence of a diverse selection body encouraged more diversity among applicants and ultimately enhanced the likelihood that minority candidates and women would be appointed.⁸² Although the number of racial minorities serving as appellate judges in Tennessee remains distressingly low, the number more than tripled under the Tennessee Plan.⁸³ Similarly, Tennessee's female appellate judges increased nearly ten-fold.⁸⁴ Thus, the Tennessee Plan yielded the state's most diverse appellate judiciary, clearly advancing the legislature's stated purpose of bringing more racial and gender diversity to the bench.⁸⁵

2. The Tennessee Plan insulated judges from political pressure and thereby enhanced the prestige of and public respect for the courts.

⁸¹ See *supra* notes 29-30.

⁸² Research supports the conclusion that demographically diverse nominating commissions attract more diverse candidates and select more diverse nominees. Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report* in RESEARCH ON JUDICIAL SELECTION 1999 (American Judicature Society 2000 ed.).

⁸³ See Margaret L. Behm & Candi Henry, *Judicial Selection in Tennessee: Deciding the Decider*, 1 BELMONT L. REV. 143,176 (2014) (stating that in 23 years under the Tennessee Plan, "appointments through April 2013 were sixty-nine percent men and thirty-one percent women. Nine percent of those appointed were members of minority groups.") These totals include trial and appellate level appointments.

⁸⁴ In 1992, Tennessee had two female appellate judges. Eight additional women have been appointed to the appellate bench since 1992. See *supra* note 78. Prior to 1996, the Tennessee Supreme Court had never had more than a single female member; since 2008, it has had three female members, making it one of four states with a majority of women on its highest court. The others three are North Carolina, Ohio, and Wisconsin. http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state.

⁸⁵ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101 to 102) (1994).

After the Tennessee Plan became fully operational in 1998, forty-one appellate judges were evaluated and subsequently retained in office in the years 2000, 2006, 2008, 2010, and 2012.⁸⁶ During a decade in which spending in judicial races skyrocketed and special interest groups battered judicial candidates with negative, nasty campaigns,⁸⁷ no Tennessee judge was targeted for opposition or required to raise more than nominal campaign funds. The unique evaluation component of the Tennessee Plan provided voters with pertinent, apolitical information about the judges, filling the vacuum often occupied by special interest groups' misleading campaign ads.⁸⁸ Tennessee's appellate bench avoided the trend that plagued so many state judiciaries and remained largely insulated

⁸⁶ See generally <http://www.tsc.state.tn.us/boards-commissions/boards-commissions/judicial-performance-evaluation-commission>. In 1998, Chief Justice Adolpho Birch, Jr., was retained on the Tennessee Supreme Court, but the Commission's webpage does not include his evaluation. Although the Tennessee Plan was operational at the time, I have been unable to determine whether the JPC evaluated or disseminated Chief Justice Birch's evaluation. In 2000, 5 judges were evaluated and retained; in 2006, 27 judges were evaluated and retained; in 2008, 5 judges were evaluated and retained; and in both 2010 and 2012, 2 judges were evaluated and retained.

⁸⁷ Since 2000, the Brennan Center for Justice has produced annual reports that catalogue the trends in judicial elections. The reports are available on the Center's website at <http://www.justiceatstake.org/resources/the-new-politics-of-judicial-elections/>. The 2000-2009 report summarizes the trend: Campaign fundraising more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009. Three of the last five Supreme Court election cycles topped \$45 million. All but two of the 22 states with contestable Supreme Court elections had their costliest-ever contests in the 2000-2009 decade. Available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

⁸⁸ See White, *supra* note 58 (discussing how relevant evaluation information replaces irrelevant campaign advertising as meaningful voter cues).

from political pressure. As studies show, a fortunate byproduct of apolitical courts is enhanced public respect for the judiciary.⁸⁹

3. The Tennessee Plan gave meaningful information to allow voters to cast informed ballots in retention races.

Beginning in 2000,⁹⁰ the JEC evaluated every appellate judge who sought election to fill either an unexpired or full term.⁹¹ In evaluating each judge, the JEC considered the application submitted by the judge to the JSC; the judge's self-report form and formal interview with the JEC; the results of survey questionnaires; the judge's caseload and workload statistics; and public input. The final evaluation was based on criteria pertinent to the task of judging and included an assessment of the judge's integrity; knowledge and understanding of the law; ability to communicate; preparation and attentiveness; service to the profession; and effectiveness in working with other judges and with court personnel.⁹² The evaluation report included a summary of the judge's legal education, experience, and service to the profession; the survey results; the JEC's impressions of the judge's experience and performance; the JEC's recommendation regarding retention; and, if desired, the judge's written response.⁹³ The evaluation report was published in newspapers and

⁸⁹ The Brennan Center's 2000-2009 summary report on pages 77-87 cites numerous studies on these issues. http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

⁹⁰ *See supra* note 86.

⁹¹ The reports are available on the website of the Administrative Office of the Courts at www.tsc.state.tn.us/sites/default/files/docs/judeval.pdf.

⁹² TENN. SUP. Ct. R. 27.

⁹³ *See supra* note 86.

made available on the Administrative Office of the Courts website, accomplishing the legislature's stated purpose of promoting "informed retention decisions" and assuring a "responsive" appellate judiciary.⁹⁴

IV. The Dismantling of Tennessee's Model Judicial Selection, Evaluation, and Retention System-a/k/a They Broke It.

A. Introduction

Through a series of calculated legislative actions, the Tennessee General Assembly dismantled Tennessee's unique judicial selection, evaluation, and retention system and replaced the system with one that is dominated by and dependent upon the legislature. Tennessee's 21st century judiciary is reminiscent of its 18th century judiciary,⁹⁵ controlled by the legislative branch and susceptible to the corruption that accompanies the "concentrating [of all government power] in the same hands."⁹⁶ The modification and repeal of statutes outlining the mechanisms for judicial selection, evaluation, and retention spawned the adoption of a constitutional amendment that ultimately retains gubernatorial appointment and retention elections for appellate judges, but critically alters the judicial selection system and entirely removes the system for judicial performance evaluation. By eliminating two of the three essential components of the Tennessee Plan, the

⁹⁴ See text accompanying *supra* notes 43, 45.

⁹⁵ TENN. CONST. art. V, § 1 (1796) (giving legislature the power to determine whether to create courts); TENN. CONST. art. V, § 2 (1796) (giving legislature the power to elect judges); TENN. CONST. art. IV (giving legislature the power to impeach judges); TENN. CONST. art. VI, § 3 (giving legislature the power to elect judges); TENN. CONST. art. VI, § 6 (1834) (giving legislature the power to impeach judges).

⁹⁶ See *supra* note 3.

legislature has produced a judicial system accountable only to politicians.

The adoption of the constitutional amendment replacing Tennessee's judicial selection, evaluation, and retention system was preceded by a clever, if disingenuous campaign. Backing the amendment was an impressive array of former and current governors, legislators, judges, and popular citizens. They argued that Tennesseans were limited to two choices. They could adopt the amendment and preserve retention elections (albeit by placing the courts under legislative control), or they could submit the courts to partisan elections. The far better choice — retaining the Tennessee Plan with its unique selection and evaluation components — was clouded with the persistent, yet preposterous claim⁹⁷ that the Plan, adopted by the legislature and utilized to appoint every appellate judge in the last twenty years, was unconstitutional.⁹⁸

B. The Beginning of the End of the Tennessee Plan

That Tennessee's unique judicial selection, evaluation and retention system was in danger of being dismantled became readily apparent in early 2008.

⁹⁷ Courts consistently have upheld the constitutionality of the Tennessee Plan. The predecessor to the 1994 Tennessee Plan was upheld in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973). The 1994 Plan was upheld in *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996) and *Hooker v. Haslam*, 437 S.W.3d 409 (Tenn. 2014). Other cases endorsing the constitutionality of the Tennessee Plan include *Hooker v. Andersen*, 12 Fed. Appx. 323 (6th Cir. 2001); *Hooker v. All Members of Tenn. Supreme Court*, No. 3-02-0787 (M.D. Tenn. July 28, 2003); *Johnson v. Bredesen*, 356 Fed. Appx. 781 (6th Cir. 2009); and *Delaney v. Thompson*, 982 S.W.2d 857 (Tenn. 1998).

⁹⁸ The basis for my characterization of the constitutional challenge to the Tennessee Plan as preposterous is detailed elsewhere and will not be repeated here. *See White & Reddick, supra* note 25; *see also Behm, supra* note 83.

Although the legislature had tinkered with the size and composition of the JSC and the JEC in 2001,⁹⁹ a more pervasive threat arose in 2008 by the operation of Tennessee's Governmental Entity Review Law ("TGERL").¹⁰⁰ This law provides for the periodic review of all state government entities "to ensure that regulation was beneficial rather than detrimental to the public interest."¹⁰¹ A legislative committee evaluates the "quality, efficiency, and success of [governmental entities and] programs"¹⁰² in light of legislative mandates and recommends continuation of "successful and efficient entities that are beneficial to the citizens" and elimination of inactive, duplicative, and "ineffective, inefficient, unnecessary or undesirable entities."¹⁰³ Following this so-called "sunset review," the committee proposes legislation to terminate or continue

⁹⁹ In 2001, the General Assembly increased the size of the JSC from 15-17 members. 2001 Tenn. Pub. Acts, ch. 459 (codified at TENN. CODE ANN. § 17-4-102(a) (2001)). More important than the increase in size, however, was the implicit change in mindset concerning who should vet judicial candidates. The two new members of the JSC were required to be lawyers, but the Speakers were not required to receive input or recommendations from bar organizations. 2001 Tenn. Pub. Acts, ch. 459 (codified at TENN. CODE ANN. § 17-4-102(b) (2001)). By removing the organized bar, the legislature began to assert greater control over the judicial selection process. As discussed at text accompany *infra* notes 124-126, the General Assembly completed the removal of lawyers from the selection process in 2009 when it eliminated altogether the requirement that the Speakers appoint JSC members from lists provided by bar organizations. 2009 Tenn. Pub. Acts, ch. 517 (codified at TENN. CODE ANN. § 17-4-102(a)&(b) (2009)).

¹⁰⁰ TENN. CODE ANN. §§ 4-29-101, -236 (2011 Repl.) (as amended).

¹⁰¹ TENN. CODE ANN. § 4-29-102(a) (2011 Repl.) (as amended).

¹⁰² TENN. CODE ANN. § 4-29-105(1) (2011 Repl.) (as amended).

¹⁰³ TENN. CODE ANN. §§ 4-29-105(2)-(5) (2011 Repl.) (as amended).

entities.¹⁰⁴ A terminated entity has one year to wind up its affairs, before it permanently expires.¹⁰⁵

Both the JSC and JEC were scheduled to terminate under the terms of the TGERL in 2008. Although the process of sunset review was routine and ordinary, the circumstances surrounding the sunset review and subsequent winding-up of the affairs of the JSC and JEC were anything but conventional.

When the General Assembly adjourned on May 21, 2008, without providing for the continued existence of the JSC and JEC,¹⁰⁶ the two Commissions terminated¹⁰⁷ and began the one-year wind-up, setting the course for both to expire completely on June 30, 2009.¹⁰⁸ Although this situation was troubling, no appellate judges were on the August 2008 ballot for retention, so the failure to provide for the continued existence of the JSC and JEC did not create an immediate crisis. Presumably, the General Assembly would address the issue when it reconvened in January 2009.

During the 2009 legislative session, numerous bills were introduced in reaction to the scheduled expiration of

¹⁰⁴ TENN. CODE ANN. §§ 4-29-107, -108 (2011 Repl.) (as amended).

¹⁰⁵ TENN. CODE ANN. § 4-29-112 (2011 Repl.) (as amended). This process is referred to both as winding up the affairs and winding down the entity. *Compare id. with* Tn. Att’y Gen. Op. 09-43, 2009 WL 837837 (March 26, 2009). The term “terminate” refers to the date on which the entity sunsets and the term “expire” refers to the date one year later, after the entity’s wind-up year. The term “sunset” and “terminate” are used interchangeably here. Thus, an entity terminates (or sunsets), winds up, and then, expires.

¹⁰⁶ A number of statutes designate the sunset date for various governmental entities, but the legislature routinely repeals or transfers subsections of the statutes, which has the effect of changing the date of the entity’s termination and expiration. *See generally* Tenn. Code Ann. §§ 4-29-230, 238 (2011 Repl. & 2014 Supp.)

¹⁰⁷ TENN. CODE ANN. §§ 4-29-229(a)(46) & (47) (2011 Repl.) (as amended).

¹⁰⁸ *Id.*

the JSC and the JEC. Some bills proposed partisan elections, while others altered the existing retention system. None of the judicial selection proposals included the unique selection and evaluation components of the existing Tennessee Plan. Ultimately, the 106th General Assembly failed to adopt a new judicial selection system; however, the overall tenor of the proposals and debate suggested that the legislature intended to allow the permanent expiration of the JSC and the JEC the following year.¹⁰⁹

By early 2009 concern about the effect of the permanent expiration of the JSC and JEC was mounting. Leaders in the Senate and House asked the Attorney General to offer an opinion on the legal effect of the expiration of the JSC and JEC. That opinion, released in late March of 2009, advised that if both Commissions permanently expired, no appellate judges could be elected in either 2010 (when two appellate judges were scheduled to be on the ballot)¹¹⁰ or in 2014 (when all twenty-nine appellate judges would be on the ballot seeking retention for a new eight-year term).¹¹¹ Additionally, no vacancies in appellate judgeships occurring after July 1, 2009, the final wind-up date for both Commissions, could be filled.¹¹²

Perhaps the Attorney General's Opinion prompted the legislature's next step. A few days before adjourning the 2009 session, the legislature passed comprehensive legislation that altered many aspects of the Tennessee Plan.¹¹³ In the abstract, the 2009 Act seemed peculiar, but when viewed with the advantage of time and perspective, the 2009 legislation was obviously the beginning of the end

¹⁰⁹ See generally H.B. 0173, 0958, 1017, 107th Gen. Assembly, Reg. Sess. (Tenn. 2012).

¹¹⁰ Chief Justice Sharon Lee and Court of Appeals Judge John W. McClarty were both scheduled for retention votes on August 5, 2010.

¹¹¹ Tn. Att'y Gen. Op. 09-43, 2009 WL 837837 (March 26, 2009).

¹¹² *Id.*

¹¹³ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. §§17-4-101 to 108) (2009).

of the Tennessee Plan. The new legislation signaled a fundamental shift in the legislature's attitude toward the courts.

C. The 2009 Legislation

This fundamental shift was evident from the opening sentences of the 2009 legislation. There, the General Assembly modified its statement of legislative purpose, likely revealing more than it intended and exposing a new view of the role of the courts. This revision in the underlying purpose of the Tennessee Plan now seems prescient.¹¹⁴ Whereas, the original purpose of the Tennessee Plan was to “insulate the judges . . . from political influence and pressure [and to] eliminate[e] the necessity of political activities,” in order to make the courts “nonpolitical,”¹¹⁵ the General Assembly's newly stated purpose dismissed the importance of an apolitical judiciary. Now, the purpose underlying judicial selection was not to totally remove judges from politics, but only to “[b]etter” insulate judges, to minimize, but not eliminate political activity, and to make the courts only “less political.”¹¹⁶

In harmony with this more political view of judicial selection and retention, the General Assembly also modified the ballot language for retention elections in 2009.¹¹⁷ As was true in other retention states, Tennessee voters previously responded “yes” or “no” to the question whether a judge “should be elected and retained in office,” but the new ballot language required voters to choose “to

¹¹⁴ See Appendix 1.

¹¹⁵ 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(a) (1994)).

¹¹⁶ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(a) (2009)).

¹¹⁷ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).

retain” or “to replace” the judge.¹¹⁸ The JEC, renamed the Judicial Performance Evaluation Commission (JPEC),¹¹⁹ would now recommend judges for retention or replacement, rather than recommending for or against retention.¹²⁰

The 2009 legislation included many changes to the selection process that were consistent with this jaded view of the courts. For example, when the Tennessee Plan was adopted, the advice and counsel of lawyers concerning judicial selection was viewed as essential to the mission of “finding and appointing the best qualified persons available for service.”¹²¹ Specifically, the legislature noted that due to their “experience and observation,” lawyers were “familiar with the best qualities and characteristics of judges.”¹²² To capitalize on this legal expertise, membership on the JSC and the JEC consisted largely of lawyers, nominated by four state-wide lawyer organizations.¹²³ But in 2009, along with the change in the

¹¹⁸ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).

¹¹⁹ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-115(b)(2) (2009)).

¹²⁰ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-115(b)(1) (2009)). If a judge was not retained, the statute allowed the governor to bypass the appointment process and fill the vacancy by direct appointment. 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-113 (2009)).

¹²¹ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(a) (2009)).

¹²² 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b) (2009)).

¹²³ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a)(1)-(4) (2009) (requiring nominees for the JSC to be submitted by the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorney General Conference, and the Tennessee Association of Criminal Defense Lawyers)); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b) (2009) (requiring selection of commission members from lists submitted by bar groups); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE

name of both Commissions,¹²⁴ the legislature changed the selection process for Commission members, giving the Speakers of the Senate and the House the exclusive power to appoint the members of both Commissions.¹²⁵ The previous provisions requiring the Speakers to appoint from a list of lawyers submitted by bar organizations was deleted.¹²⁶

The 2009 legislation also omitted another significant provision relevant to the composition of the Commissions – the provision that required the Speakers to reject entire lists of nominees that did not “reflect the diversity of the state’s population.”¹²⁷ Coupled with the deletion of that diversity initiative was the relaxation of another provision also aimed at assuring diversity. Under the original statute creating the Tennessee Plan, the

ANN. § 17-4-201(b) (2009) (requiring that the JEC consist of members appointed from lists submitted by the bar groups).

¹²⁴ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a) (2009) (changing the name of the Judicial Selection Commission to the Judicial Nominating Commission); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b) (changing the name of the Judicial Evaluation Commission and program to the Judicial Performance Evaluation Commission and program).

¹²⁵ See *supra* note 99 for details concerning an earlier change in the provisions related to Commission members.

¹²⁶ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b)(6) (2009) (noting that “[i]n appointing attorneys to the commission, the speakers shall receive, but shall not be bound by, recommendations from any interested person or organization”).

¹²⁷ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b)(2) (2009)). The 1994 Act provided, “[i]f the nominees do not reflect the diversity of the state’s population, the speaker *shall reject* the entire list of a group and require the group to resubmit its nominees.” 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(b)(2) (1994) (emphasis added). To effectuate this requirement, the groups were required to “include background data” about each nominee. 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(c) (1994)). This provision was also eliminated in 2009.

Speakers were required to appoint commission members “who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender.”¹²⁸ This provision was replaced with one that required only that the Speakers make appointments with a “conscious intention of selecting a body that reflects diversity.”¹²⁹ Only geographic diversity was still required. The Speakers were required to appoint at least four Commissioners, and were prohibited from appointing more than seven from the same grand division of the state.¹³⁰

The changes in the composition and role of the JSC, now called the Judicial Nominating Commission (JNC), mirrored the changes in the composition and role of the JEC, now the JPEC. Judicial evaluation had not been a simple sell in Tennessee. Judges were resistant to the new idea initially, but were consoled, perhaps, by the fact that judges, who were familiar with the tasks of judging and the essential qualities of good judges, were involved in each step of the process - from designing and refining the evaluation system to actually participating in the evaluations.

When JPE was initially adopted, the Supreme Court retained authority over the details of the program. The original JPC, for example, included twelve members, six of whom were judges appointed by the Judicial Council (JC).¹³¹ But in 2009, the same year the JC was scheduled

¹²⁸ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b)(3) (2009)).

¹²⁹ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(c) (2009)). In addition to race and gender, the Speakers were required to make appointments with a “conscious intention of selecting a body that” represented “rural as well as urban centers.”

¹³⁰ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a)(1)-(2), (4) (2009)).

¹³¹ Since its creation in 1943, the Judicial Council had made recommendations to the General Assembly “for changes in rules, procedures or methods of administration, or upon any other matter

to expire, the membership of the JPEC decreased to nine members, with the JC's appointing authority cut in half.¹³² A year later, after the JC had terminated and was winding up its affairs, the General Assembly eliminated input from the Judicial Council, assumed the role of appointing all of the members of the JPEC, and again, decreased the number of judges on the JPEC, this time from five to three.¹³³ The 2009 legislation advanced politics as the core component of judicial selection and evaluation, greatly decreased the opportunity for input from the legal profession, and removed entirely diversity requirements.

Initially, perhaps because both the JSC and JEC were replaced with different but similar Commissions that began their operations immediately, the actual termination of the JSC and the JEC on June 30, 2009 seemed innocuous. Revealing in hindsight was the short life given to both of the replacement Commissions. Both the JNC and the JPEC were scheduled to sunset a mere two years after their creation, on June 30, 2012.¹³⁴

With the new statutory mechanism in place, two appellate judges, who were appointed to fill unexpired terms, filed qualifying petitions to seek retention in the

pertaining to the judicial system.” TENN. CODE ANN. § 16-21-107(a)(2) (2014 Supp.) Each year the Judicial Council made an annual state of the judiciary report to the executive, legislative, and judicial branches; made recommendations about legislation affecting the judiciary; and assisted in allocating and reallocating scarce judicial resources. *Id.* at 107(a)(3)(A)&(B) (2014 Supp.) (noting Judicial Council's duty to report annually and to recommend “creation or reallocation” of judicial, prosecutorial, and public defender positions). The Judicial Council expired on June 30, 2009, and terminated completely following its wind-up on June 30, 2010. Tenn. Code Ann. § 4-29-230(a)(32) (2011 Repl.)

¹³² 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b)(1) (2009)).

¹³³ 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).

¹³⁴ TENN. CODE ANN. §§ 4-29-233(a)(15) & (16) (2011 Repl.)

August 5, 2010, election.¹³⁵ The new JPEC evaluated the judges and reported its findings to the general public as required by law.¹³⁶ The voters in the 2010 election applied the new ballot language and overwhelmingly voted to retain, rather than replace, the two appellate judges.¹³⁷ The looming crisis, foreshadowed by the Attorney General's 2009 opinion, had been avoided for at least temporarily.

Between 2009 and 2012, the JNC nominated candidates and the Governor filled four judicial vacancies with three men and one woman, all of whom would join other incumbent judges to stand for retention election in August 2010.¹³⁸

D. The End of the Tennessee Plan and the Adoption of Amendment Two

Meanwhile, however, the General Assembly continued to flirt with various proposals that offered additional revisions to Tennessee's system. A potpourri of options were proposed, but none passed, leaving the 2009 Act virtually intact. While the JNC and JPEC had continued to operate, both were nearing their impending sunset dates. In 2012, days before adjournment, the General Assembly pardoned the JPEC, extending its life for an

¹³⁵ The two judges were Justice Sharon G. Lee, appointed to the Tennessee Supreme Court in October 2008, and Judge John Westley McClarty, appointed to the Tennessee Court of Appeals in January 2009.

¹³⁶ The 2010 report is available at http://www.tsc.state.tn.us/sites/default/files/docs/jpec_evaluations_2010.pdf.

¹³⁷ The election results are available at <http://www.tn.gov/sos/election/results/2010-08/CCState%20General.pdf>.

¹³⁸ In 2010 Justice Sharon Lee was appointed to the Tennessee Supreme Court; her seat on the Court of Appeals was filled by Judge John McClarty. In 2012 Judge (now Justice) Jeffrey Bivins and Judge Roger Page were named to the Tennessee Court of Criminal Appeals.

additional year.¹³⁹ This meant that the JPEC would expire on June 30, 2012, and terminate completely on June 30, 2013, approximately five weeks before the 2014 election. The legislature offered no similar reprieve for the JNC, allowing it to expire on June 30, 2012. But before adjournment, the legislature approved Senate Joint Resolution (SJR) 710, filed just three weeks earlier.

SJR 710, which would come to be known as “Amendment 2,”¹⁴⁰ proposed an amendment to Article VI, Section 3 of the Tennessee Constitution. Article VI, Section 2 provided for the selection of Tennessee’s Supreme Court justices by the “qualified voters of the State.”¹⁴¹ Pursuant to its legislative power, the legislature had adopted the Tennessee Plan as the means of judicial selection in 1994; now the legislature was proposing an amendment that would replace Tennessee’s model selection, evaluation, and retention system with a gubernatorial appointment -legislative confirmation judicial selection system.

In Tennessee, proposed constitutional amendments must be approved by increasing majorities of both houses in two consecutive General Assemblies before being placed on the ballot during a gubernatorial election.¹⁴² SJR 710 swiftly passed both the House and the Senate and was signed by both Speakers on April 30, 2012, one day before

¹³⁹ TENN. CODE ANN. § 4-29-333(a)(16); TENN. CODE ANN. § 4-29-334(37) (2014 Repl.).

¹⁴⁰ This designation was as a result of its being the second of four constitutional amendments which ultimately were placed before the Tennessee voters in November 2014.

¹⁴¹ TENN. CONST. art. VI, § 3.

¹⁴² TENN. CONST. art. XI, § 3; *see State ex rel. Cohen v. Darnell*, 885 S.W.2d 61 (Tenn. 1994) (noting that amendment procedure was added to the 1834 Constitution and has remained essentially the same since enactment in 1835).

the adjournment of the 107th Session of the General Assembly.¹⁴³

The legislature's swift action on SJR 701 made it clear why the JPEC was given another year of operation and the JNC was not. The legislature intended to complete the elimination of the Tennessee Plan. By allowing the statutory selection mechanism to terminate, the legislature created its own calamity. Because Tennessee had no judicial selection or appointment mechanism after the JNC terminated, it was unclear how judges who retired or died after 2012 would be replaced. Additionally, the August 2014 retention election (at which time all appellate judges would be on the ballot) was a mere two years away. Each judge had to be evaluated by the JPEC before the election. While the JPEC could do preliminary evaluations for the judges standing for retention, it too was set to terminate completely before the August 2014 election. Even presuming completion of the evaluation reports, no mechanism existed for filling the seats of those judges who were not retained.

This time it was the Governor's office that asked the Attorney General for advice. Did the Governor retain authority to appoint judges now that the JNC no longer existed to provide the list of nominees to the Governor? Ironically, and almost certainly unintentionally, the General Assembly had provided an easy answer in a provision of the 2009 legislation. A "failsafe" provision, not a part of the original Tennessee Plan but included in the 2009 revisions, gave the Governor the power of appointment notwithstanding the demise of the JNC.¹⁴⁴

The failsafe provision, codified in Tennessee Code Annotated Section 17-4-113(a), was included to assure that a judicial vacancy did not linger due to the failure of the JNC to act in a timely manner. The provision authorized

¹⁴³ See Appendix 1; *infra* note 174

¹⁴⁴ Tenn. Op. Att'y Gen. 13-76, 2013 WL 5669872 (Oct. 9, 2013).

the Governor to fill vacancies after sixty days if the JNC failed to provide a list of nominees within that time period.¹⁴⁵ Although the JNC no longer existed, the Attorney General concluded that the failsafe provision “evidenced a separate intent to ensure that judicial vacancies are filled in a timely manner and recognized that the need for a functioning judiciary carries a greater priority than the JNC’s advisory role.”¹⁴⁶ Thus, the statute “empower[ed] the Governor to fill judicial vacancies in *all* circumstances in which the JNC fails to act, including when the JNC has been terminated and therefore cannot act.”¹⁴⁷ As a result, the Governor retained the statutory authority to fill judicial vacancies even after the JNC ceased to exist.¹⁴⁸

Within a week of the Attorney General’s opinion confirming the Governor’s power, the Governor signed an Executive Order that distributed his power in a fashion similar to what had existed prior to the JNC’s termination. In Executive Order 34, the Governor validated the role that lawyers had played in the judicial selection process over the last forty years¹⁴⁹ and emphasized the importance of the division of power between the branches of government.¹⁵⁰ To assist in the judicial appointment process, the Governor appointed a new Commission, the Governor’s Commission for Judicial Appointments (CJA), to “select” and “certify” the names of the three persons deemed “best and most

¹⁴⁵ TENN. CODE ANN. § 17-4-113(a) (2009 Repl.).

¹⁴⁶ Tenn. Att’y Gen. Op. 13-76, 2013 WL 5669872, *3 (Oct. 9, 2013).

¹⁴⁷ *Id.* at *4.

¹⁴⁸ *Id.* at *5.

¹⁴⁹ Exec. Order No. 34 (Oct. 16, 2013), *available at* <https://www.tn.gov/sos/pub/execorders/exec-orders-haslam-34.pdf> (noting that “for over forty years, Governors of the State of Tennessee have been assisted in their search for highly qualified judicial nominees by a commission composed of distinguished attorneys and laypersons”).

¹⁵⁰ *Id.* (noting in the preamble that the Executive Order’s purpose includes “sustain[ing] the third and equal branch of government and its continued operation”).

qualified” to fill a judicial vacancy.¹⁵¹ Existing JNC members were appointed to serve on the CJA, along with six additional members. Executive Order 34 detailed the process that the CJA would follow in making its recommendations to the Governor,¹⁵² as well as the process the Governor would follow in making the appointment.¹⁵³ A subsequent Executive Order, No. 38, amended Executive Order 34 with regard to particularized circumstances.¹⁵⁴

Executive Order 34 is commendable in its establishment of a transparent and orderly judicial selection process. The process was followed in the appointment of four appellate judges and numerous trial judges after the expiration of the JNC.¹⁵⁵ But any executive order is potentially fleeting. An executive order exists at the whim and with the mercy of the executive. Even with its positive aspects, Executive Order 34 left much uncertainty as to the future of Tennessee’s judicial selection process.

When the 108th General Assembly convened in January 2014—the first General Assembly in decades to include a Republican supermajority— many hoped that the legislature would debate and adopt a more permanent selection process for Tennessee’s judges, but other than approving the second resolution (SJR 2) necessary to place Amendment 2 on the November 14 ballot, the legislature took no other action related to the selection, evaluation, or

¹⁵¹ *Id.* at 4(j).

¹⁵² *Id.* at (3), (4).

¹⁵³ *Id.* at (5).

¹⁵⁴ Exec. Order No. 38 (June 9, 2014) (providing for appointment without CJA nomination when trial court candidates, running for a vacated seat, have won primary elections and have no opposition in the general election and providing that the Governor may request the CJA to assist in filling vacancies on the Workers’ Compensation Appeals Board), *available at* <http://www.tn.gov/sos/pub/execorders/exec-orders-haslam38.pdf>.

¹⁵⁵ *See* Appendix 1. *But see* text following note 171 *infra*.

retention of Tennessee's judges.¹⁵⁶ This meant that most of the details about how Amendment 2's so-called Founding Father's Plan would work remained unknown. Amendment 2 clearly provided that judges would be appointed by the Governor, confirmed by the legislature, and retained by the voters,¹⁵⁷ but the remaining details of the selection and retention system was left entirely to legislative discretion by the amendment's provision that the authorized the legislature was authorized to "prescribe [the necessary] provisions" to carry out the amendment.¹⁵⁸

¹⁵⁶ Senate Joint Resolution 2. As required by Article XI, Section 3, SJR 2 was the second resolution "entered" on the House and Senate journals. TENN. CONST. art. XI, § 3.

¹⁵⁷ The Amendment provided:

Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session. The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.

TENN. CONST. art. VI, Section 3 (2014).

¹⁵⁸ *Id.*

But when the time came for the vote on Amendment 2, the legislature had not proscribed *any* provisions. No proposals set out the specifics of the selection and confirmation process; no legislative study group was tasked with seeking input or vetting options. Voters who went to the polls in November 2014 were being asked to give the legislature a proverbial blank check.

Among the blanks that the legislature had not filled were the particulars of the legislative confirmation process. For example, what percentages were required for the legislature to confirm a governor's judicial appointment? Would a simple majority of both houses confirm an appointment? What process would be followed if a nominee failed to acquire the required percentage in one house or both houses? Similar uncertainty remained about the public's retention vote. Would judges be retained in office if a majority of the voters cast "retain" votes, or would the legislature ultimately require a higher percentage, as some members had proposed in earlier legislation? Although Tennessee, and most retention states, generally required a simple majority for retention, the amendment arguably gave the legislature the authority to decide that issue.

What happened when a judicial vacancy occurred during legislative recess, often encompassing two-thirds of the year? Although the amendment imposed a time limit on legislative confirmation, the time period began to run on the "convening date of the next legislative session" for recess appointments. If a vacancy occurred in May, shortly after recess, would the legislature have until March of the following year to confirm the appointment?

The amount of uncertainty and ambiguity that surrounded the proposed amendment led one commentator to conclude that Tennesseans were being asked to "buy a

pig in a poke.”¹⁵⁹ But despite the many uncertainties and the wealth of unanswered question raised by Amendment 2’s ambiguity, Tennessee presently had no mechanism for judicial selection. Was the passage of Amendment 2 the only way out of this calamity?

That was the clear message of many proponents. Governors, former governors, current and former legislators, judges, bar leaders, politicians and virtually everyone, it seemed, undaunted by the lack of detail, joined forces and funds to encourage the voters to approve the amendment.¹⁶⁰ Some Supreme Court justices joined in, combined their voices with those who had sought to oust them three months earlier,¹⁶¹ and endorsed the amendment as the best selection and retention system for Tennessee.¹⁶²

Those who supported Amendment 2 marketed the amendment in a number of clever ways. The most modest strategy was to characterize the amendment as simply constitutionalizing the Tennessee Plan.¹⁶³ That

¹⁵⁹ Frank Cagle, “Pig in a Poke: There are no Rules in Place for Confirming Judges Under Amendment Two,” METRO PULSE (Sept. 10, 2014), available at <http://www.metropulse.com/stories/pig-in-a-poke-there-are-no-rules-in-place-for-confirming-judges-under-amendment-two>).

¹⁶⁰ More than a million dollars was spent to advance the passage of Amendment 2 in November 2014.

¹⁶¹ The concerted effort to remove three Tennessee Supreme Court justices failed, thankfully, but not until in excess of one million dollars was spent on advertising and marketing.

¹⁶² Johnathan O. Steen, *I Say YES on 2*, 2014 TENN. BAR. J. 3 (Oct. 2014) (stating that “Amendment 2 is also strongly supported by leaders in the judiciary, including Chief Justice Sharon Lee and Justices Wade, Clark, Bivins and Kirby, and many other appellate and trial court judges.”); *Newly Installed Tennessee Supreme Court Justice to Campaign for Constitutional Amendment*, THE REPUBLIC (Aug. 14, 2014) (referring to Justice Bivins who was not a target of the August 2014 ouster campaign).

¹⁶³ Former Governor Phil Bredesen and former U.S. Senator Fred Thompson co-wrote an editorial that stated that passing the amendment

characterization was wrong in both of its assertions. First, although often used as a stooge, the constitutionality of the Tennessee Plan had been resolved repeatedly since 1994.¹⁶⁴ Secondly, the selection process under Amendment 2 was not comparable to the selection, evaluation, and retention process under the Tennessee Plan.¹⁶⁵ Amendment 2 replaced the Tennessee Plan's broad-based selection process with a purely political process. It eliminated entirely judicial performance evaluations, which were based on objective criteria and were intended to inform the electorate's vote. Amendment 2 gave the legislature the prerogative to apply its own criteria, including one based purely on politics.¹⁶⁶

One of the most ironic deceptions used by some proponents was the assertion that passage of the amendment would "keep the influence of special interest money away from our judges and out of our state." Tennesseans had just witnessed the most expensive judicial race in the state's history waged by three justices fighting for retention, the very type of system that the Founding

would "put an end to the questions [of constitutionality] and will help ensure we get the most qualified, diverse, fair and impartial judges that Tennesseans want and deserve." *Vote Yes on 2*, THE TENNESSEAN (April 29, 2014), available at <http://www.tennessean.com/story/opinion/contributors/2014/04/29/vote-yes-best-path-judicial-selection/8427555/>.

¹⁶⁴ See *supra* note 97.

¹⁶⁵ See *supra* notes 27-65 and accompanying text.

¹⁶⁶ Some organizations who supported Amendment 2 claimed that they possessed additional information about the process the legislature ultimately would adopt. On its website, the Tennessee Bar Association, for example, asserted that "[a]s the Tennessee Judicial Selection Amendment *is expected to be implemented*, the system will give us a way to select the best possible candidate because the system will have independence; provide expert guidance; be made up of a diverse group; have transparency; be completely informed as to the qualifications of the candidates; be deliberate; and will result in a list of the best qualified candidates being recommended to the governor." <http://www.tba.org/info/amendment-2-to-the-tennessee-constitution>.

Fathers' Plan embraced.¹⁶⁷ Those claiming that retention elections would inoculate against expensive campaigns waged by special interest groups were undoubtedly aware that special interest money had infiltrated many retention elections in recent years.¹⁶⁸

But by far the most troubling aspects of this pro Amendment 2 marketing message was its adoption and assertion of an ultimatum: adopt the amendment or subject appellate judges to expensive, contested, popular elections. The assertion was based on the threat by some legislators to enact popular elections in the event the amendment failed. Their threat was premised on the same straw man, the indefensible assertion that the Tennessee Plan was unconstitutional. The validity of the assertion depended completely on the willingness – and the ability – of those legislators to make good on their threat. As commentators noted, this strategy constructed a disingenuous choice: pass Amendment 2 or succumb to popular judicial elections.¹⁶⁹

Despite the absence of details and the presence of deception, the Tennessee voters overwhelmingly approved

¹⁶⁷ According to the Justice at Stake the amount raised and spent neared two million dollars, with the justices raising more than one million, the Tennessee Forum investing almost half a million, and out-of-state groups including the Republican State Leadership and the State Government Leadership Foundation spending another quarter of a million dollars. http://www.justiceatstake.org/newsroom/press-releases/16824/?tv_spending_surges_past_14_million_in_hardfought_tennessee_judicial_race&show=news&newsID=18890.

¹⁶⁸ See *supra* note 89.

¹⁶⁹ Judy Cornett, *Why I Oppose Proposed Amendment 2 to the Tennessee Constitution*, Presentation to Hamilton Burnett Chapter American Inns of Court (Aug. 18, 2014) (available in author's office) (noting that the "dichotomy between Amendment 2 and contested popular elections has been used to blackmail those who oppose contested popular elections into supporting a plan that gives the General Assembly unprecedented power in selecting appellate judges and contains no real safeguards against abuse of either the appointment power or the confirmation power.").

Amendment 2, placing Tennessee in the majority of states who give the legislature a veto power over judicial appointments and with the majority of states who fail to provide voters with meaningful information to inform their retention votes. The following day, through another Executive Order, the Governor reaffirmed his commitment to a more precise judicial selection process.¹⁷⁰ Like the process outlined in the two previous Executive Orders, the judicial selection process under Executive Order 41 closely resembles the selection process under the Tennessee Plan.¹⁷¹ But despite an acceptable nomination process, the gubernatorial appointments have not reflected the diversity accomplished by the Tennessee Plan, and the percentage of female judges and judges of color in Tennessee is steadily declining.

Additionally, as is true of all executive orders, Executive Order 41 is as easy to alter as it is to dissolve.¹⁷² It clearly does not bind future governors or the General

¹⁷⁰ Executive Order 41 (Nov. 6, 2014), *available at* <http://www.tn.gov/sos/pub/execorders/exec-orders-haslam41.pdf>. Executive Order 41 established the Governor's Commission for Judicial Appointments (JAC), replacing the CJA (established by Executive Order 34). The JAC, which consists of 11 members, 8 of whom are required to be attorneys, nominates three persons deemed "best and most qualified" to fill judicial vacancies.

¹⁷¹ Under Executive Order 41, the JAC accepts applications, conducts public interviews and hearings, and deliberates privately, before nominating the three "best and most qualified" persons to fill judicial vacancies.

¹⁷² The power to issue executive orders is not addressed explicitly in either the Tennessee Constitution, statutes, or case law. Article III, Section 10 provides that governors "shall take care that the laws be faithfully executed," so presumably, based upon that Section and the inherent power of the executive to enforce the law, Tennessee governors have regularly issued executive orders. For example, the Tennessee State Library and Archives, for example, has archived and microfilmed hundreds of executive orders dating back to 1953. *See* <http://tennessee.gov/tsla/history/state/recordgroups/findingaids/rg95.pdf>.

Assembly and, because of its transient nature, it does not actually even bind the current governor.¹⁷³

V. Politics First

With the passage of Amendment 2, the public entrusted the General Assembly to complete the task of defining the details of judicial selection in Tennessee. Because of the general nature of Amendment 2, the passage of Amendment 2 gave the legislature virtually unchecked power to define the confirmation and retention process. But, ultimately, the General Assembly failed to complete the task and instead, became embroiled in a political struggle that once again put a premium on political power.

Senate Bill 1 was filed for introduction on November 5, 2014, before the 109th General Assembly convened. Senate Bill 1¹⁷⁴ created a 14-member “special, continuing committee of the General Assembly, (JCC),¹⁷⁵ which would investigate, interview, and vote on appointees, before filing a joint resolution recommending confirmation

¹⁷³ The question whether a potential candidate, for example, could seek judicial enforcement of an executive order seems to be an open question in Tennessee although in other jurisdictions some scholars have suggested that a cause of action may be available to force compliance with an executive order. See Stephen Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO WASH. L. REV. 659, 664 (1987) (citing *Meat Packers Ass’n v. Butz*, 526 F.2d 228 (8th Cir. 1975) (suggesting that a cause of action exists when the order is authorized and evidences an intent, explicitly or implicitly, to create a private right of action)).

¹⁷⁴ Senate Bill 1 can be viewed at <http://www.capitol.tn.gov/Bills/109/Bill/SB0001.pdf>.

¹⁷⁵ Section 9(b) of Senate Bill 1 provided that “[t]he political composition of the judicial confirmation committee shall reflect as nearly as possible the same ratio of members from each of the two (2) major political parties as the parties are represented in the respective houses.”

or rejection of the governor's judicial appointee. The JCC was required to convene "at least one" public "meeting"¹⁷⁶ and was allowed to conduct "additional interviews" with, and independent investigations of, the appointee.¹⁷⁷ The members of the JCC, "with each house voting separately," would vote to determine whether the respective house confirmed or rejected the appointee¹⁷⁸ and then would file a joint resolution reflecting the recommendation, which would be voted on by the respective houses.¹⁷⁹

Within days of convening, the Senate passed Senate Bill 1 on first and second reading and referred the bill to the

¹⁷⁶ Section 10(b)(1) provided that the JCC "shall convene at least one (1) meeting of the judicial confirmation committee." Although subsection (2) of Section 10(b) provided that "[a]ny citizen shall be entitled to attend the meeting and express in writing the citizen's approval of, or objections to, the governor's appointee," nothing specifies whether the appointee would also be in attendance. An additional uncertainty was raised by Section 10(b)(4)(A), which provided that "[a]fter one (1) public hearing, the judicial confirmation committee may hold such additional interviews with the appointee as it deems necessary . . ." It is unclear whether this "public hearing" is the same as or in addition to the "meeting," which the public is entitled to attend, referenced in Section 10(b)(1) & (2).

¹⁷⁷ Section 10(b)(4)(A) provided that the JCC "may make independent investigation and inquiry to determine the qualifications of the appointee for the judicial vacancy." *See also* Section 10(b)(4)(B) (providing that the JCC may request that the Tennessee Bureau of Investigation "perform appropriate financial and criminal background investigations and inquiries of a *prospective* appointee") (emphasis added). The use of the phrase "prospective appointee" presumably is intended to refer to the governor's appointee, which is the phrase used throughout the remainder of the legislation.

¹⁷⁸ Section 10(b)(1) provided that "[t]he judicial confirmation committee shall vote with each house voting separately and shall determine by a majority vote of the committee members of that house present and voting whether that house recommends confirmation or rejection of the governor's appointee."

¹⁷⁹ Section 10(c)(1) provided that a member of the JCC of each house "shall file a joint resolution reflecting the recommendation of the member's house."

Senate Judiciary Committee. Ultimately, the Senate passed an amended version of Senate Bill 1, which significantly altered the confirmation process and removed any provision for public input.¹⁸⁰ Under the amended version, the General Assembly was required to meet in joint session for the purpose of voting either to confirm or reject the appointee, who was required to receive a majority vote from both houses to be confirmed.¹⁸¹

The House version of the bill, House Bill 142, generated a series of amendments, also impacting the confirmation process. Multiple House amendments offered various mechanisms for tabulating the votes of each house,¹⁸² with the common theme being to secure House

¹⁸⁰ The amended legislation allowed the “chair of any standing committee of the general assembly to which a notice of appointment . . . [was] referred” to request an investigation or, “in accordance with the rules of the applicable house[, to] conduct a hearing, vote to recommend confirmation or rejection of the appointee, and submit a written report of the action taken” Amendment 2 to Senate Bill 1, Section 10 (b) & (c). Senate Bill 1, as amended by Senate Amendment 2, may be viewed at <http://www.capitol.tn.gov/Bills/109/Amend/SA0435.pdf>. Amendment 2 also created a separate Trial Court Vacancy Commission, consisting of ten legislators and one attorney, created to submit nominees for trial court vacancies to the governor. Section 17 of Senate Bill 1, as amended by Amendment 2.

¹⁸¹ Section (10)(d) of Senate Bill 1, as amended by Amendment 2, provided that “[t]he governor’s appointee shall be confirmed if both houses vote to confirm the appointee by a majority of all the members to which each house is entitled”

¹⁸² House Amendment 2 to House Bill 142, referred to as House Amendment 452, provided that the votes of each house would be tabulated separately and that confirmation would occur if an appointee received a majority vote from both houses. Amendment 2 may be viewed at <http://www.capitol.tn.gov/Bills/109/Amend/HA0452.pdf>. Amendments 3 and 4 (House Amendments 470 and 482) created tabulation systems by which each house member’s vote equaled one point, while each senator’s vote equaled three points. “A tabulation of one hundred (100) points to “confirm” result[ed] in the appointee being confirmed by the general assembly. Amendment 3 can be viewed at

supremacy. The version eventually adopted by the House did so, by providing that confirmation or rejection would be determined by a majority vote of the general assembly meeting in joint session.¹⁸³ Unsurprisingly, the Senate rejected the House's approach and the House refused to recede.¹⁸⁴ A report generated by the Senate Conference Committee failed to receive a majority vote, leaving the state with nothing but Executive Order 41 to define the details of its judicial selection, confirmation, and retention process.

VI. Conclusion

When the 109th General Assembly convened on January 13, 2015, the legislators, like their frontier ancestors, had the power to control, in large part, the composition and, thus, the quality of Tennessee's appellate bench. With the adoption of Amendment 2, the public entrusted the legislature with the most essential task of designing a confirmation process that would assure a high-quality appellate judiciary and a retention process that

<http://www.capitol.tn.gov/Bills/109/Amend/HA0470.pdf>. Amendment 4 can be viewed at <http://www.capitol.tn.gov/Bills/109/Amend/HA0482.pdf>.

¹⁸³ The House adopted Amendments 6 and 7. Amendment 6 (House Amendment 519) provided that “[a] majority of votes, to which the general assembly is entitled, cast in the affirmative shall confirm the appointee.” Amendment 6 can be viewed at <http://www.capitol.tn.gov/Bills/109/Amend/HA0519.pdf>. Amendment 7 (House Amendment 520) altered the language of Senate Amendment 2. *See supra* note 182. By authorizing the standing committee to which a notice of appointment has been referred, rather than the chair of the committee, to conduct a hearing, vote to recommend or reject, and submit a written report on the appointee. Amendment 7 may be viewed at <http://www.capitol.tn.gov/Bills/109/Amend/HA0520.pdf>.

¹⁸⁴ The House and Senate Conference Committee recommended that the House Amendments 6 and 7, *supra* note 183, be deleted.

would allow meaningful voter input. But rather than complete the task, and despite the fact that a single party controlled both houses,¹⁸⁵ the House and Senate engaged in an intra-party squabble and, in the end, promoted political dominance over public trust on a matter of extreme importance.

If we as Tennesseans value a fair and independent judiciary, if we truly desire to “keep the influence . . . away from our judges and out of our state,” then we must demand that our General Assembly take seriously the trust we have placed in them with our adoption of Amendment 2. We must require that they adopt a confirmation process that includes public input and maintains the judiciary as a separate and independent branch of government as well as a retention process that provides a meaningful basis upon which voters may exercise their right to vote. Otherwise, we too will suffer the tyranny that befalls those governments in which all government power is concentrated in the same hands.

¹⁸⁵ In 2014, Tennessee Republicans expanded the supermajorities in both the House and the Senate, holding a 28-5 majority in the Senate and a 73-26 majority in the House. The supermajority was acquired in November 2012, making the 108th General Assembly the first since the 90th General Assembly to have both houses controlled by one party.

POLICY NOTE

**THE TROUBLING CASE(S) OF NONCITIZENS:
IMMIGRATION ENFORCEMENT THROUGH THE CRIMINAL
JUSTICE SYSTEM AND THE EFFECT ON FAMILIES¹**

By: Juan C. Quevedo

I. Introduction

Close your eyes and imagine yourself a homeless mother, moving from one place to another every six months. Imagine how you would feel, alone with no friends or family to ask for help. You—in this imaginary world—are “undocumented” to people, and no matter how much you try, no one is reaching out to help you.² Instead, your first name becomes “illegal” and your last name becomes “alien.” Worse still, the United States government is enacting laws designed to separate you from your family, because you are a scapegoat for both local and national problems.

Now open your eyes and realize that your imagination is the reality of millions of noncitizens living in the shadows of American society. Nearly 40 million United States residents were born abroad.³ About 11

¹ This paper was presented at the *5th National Conference of Immigration to the U.S. South: Immigration Reform and Beyond?* on October 25, 2014 at the University of Florida.

² Although I use the term “undocumented” in the introduction, I will use the term “noncitizen” for the remainder of this article. The term noncitizen includes anyone not a U.S. citizen, such as immigrants (persons granted the right to permanently reside in the U.S.), nonimmigrants (persons granted the right to temporarily reside in the U.S.) and undocumented immigrants (persons that either lost their immigration status, by overstaying their visa, or persons that entered the U.S. without inspection).

³ United States Census Bureau, <http://www.census.gov/population/foreign/files/cps2012/2012T1.pdf> (last visited Aug. 30, 2014).

million of them are undocumented.⁴ The federal government has greatly escalated the rate at which it removes noncitizens from the U.S.⁵ For example, United States Immigration and Customs Enforcement (“ICE”) removes about 400 thousand noncitizens per year, or about 1,000 per day.⁶

Despite the large number of noncitizens removed, federal courts have held that it is not the government’s role to remove every noncitizen. For example, in *Kang v. United States*, Jinyu Kang, a citizen of China, fled to the United States and sought asylum.⁷ After finding that the record “compels the conclusion that if Kang is removed to China it is more likely ... that she will be beaten, suffocated, deprived of sleep, shocked with electrical current, and/or forced to stand for long periods of time,” the court granted Kang Convention Against Torture (“CAT”) relief.⁸ In doing so, the court noted that the government’s role is to “seek justice rather than victory,” and the court was in “distress” when the government failed to live up to that duty in this case.⁹ And the problem, according to Jill E. Family, a professor at Widener University School of

⁴ Pew Research Hispanic Trends Project, <http://pewhispanic.org/files/reports/133.pdf#page=24> (last visited Aug. 30, 2014).

⁵ Removal proceedings include deportation and exclusion. After the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, both, deportation and exclusion proceedings were combined into one unified proceeding now known as “removal.” See IIRAIRA, Pub. L. 104-208 (1996); 8 U.S.C. § 1229(a)(2)-(3) (defining “removal proceedings” as the procedure for determining whether a noncitizen may be excluded from the United States under 8 U.S.C. § 1182(a) or, whether the noncitizen may be deported under 8 U.S.C. § 1227(a)).

⁶ U.S. Immigration and Customs Enforcement, *ERO Annual Report*, <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

⁷ *Kang v. United States*, 611 F.3d 157, 167 (3d Cir. 2010).

⁸ *Id.*

⁹ *Id.*

Law, is that “the government views as a victory a denial of relief accompanied by a removal order; in other words, a ‘guilty’ verdict.”¹⁰

Further, numerous courts of appeals have held that “family unification is one the highest goals of American immigration law [and policy].”¹¹ For example, in *Mufti v. Gonzalez*, Farzan Mufti, a lawful permanent resident of the United States, attempted to cross the U.S.-Canada border with his noncitizen wife.¹² U.S. Customs and Border Protection detained Mr. Mufti.¹³ And the immigration court denied Mr. Mufti’s admission into the United States.¹⁴ The Board of Immigration Appeals affirmed.¹⁵ In reversing the immigration court’s decision, the United States Court of Appeals for the Sixth Circuit noted that “family unification [is] the cornerstone of American immigration law and policy American immigration law [is] based upon a desire for pursuing the time-honored American tradition of encouraging family unity.”¹⁶

¹⁰ Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 556 (2011) (citing the U.S. Immigration and Customs Enforcement, ICE Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety 28 (2008)).

¹¹ *Mufti v. Gonzalez*, 174 F. App’x 303, 306 (6th Cir. 2006); *see also* *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) (discussing that “[i]t is consistent with Congress’s remedial purposes . . . to interpret the statute’s ambiguity . . . in a manner that will keep families intact.”); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996) (discussing that “[v]arious provisions of the INA reflect Congress’s intent to prevent the unwarranted separation of parents from their children.”); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (discussing that “[t]he [INA] was indented to keep families together and should be construed in favor of family units.”).

¹² *Id.* at 304.

¹³ *Id.*

¹⁴ *Id.* at 304-05.

¹⁵ *Id.*

¹⁶ *Id.* at 306.

Therefore, against the backdrop of justice and family unity, the purpose of this paper is to outline how the federal government has unreasonably turned the criminal justice system into an immigration removal system by sharing information between ICE and law enforcement agencies (“LEAs”). Residing in America is a privilege; a privilege extended to some, and not to others. Accordingly, Congress originally did not extend the privilege to noncitizens convicted of three crimes: murder, illicit trafficking in firearms, and drug trafficking.¹⁷ The list, however, now includes twenty-eight offenses.¹⁸ We now have a system that is unreasonable because it removes noncitizens that pose no danger to American society. Congress has strayed so far from the original intent of the U.S. removal system. The government now removes people that have lived in the United States most of their lives, have U.S. citizen family members, but lack a way to become legal residents or citizens of the United States. And although the cornerstone of American immigration law and policy is family unification, the sharing of information between ICE and LEAs has had an adverse effect on both noncitizen and mix-status families.

Therefore, in this paper, I endeavor to provide a critique on how the criminal and immigration system are working together to remove noncitizens that pose no danger to American society, separating families along the way. Part I will discuss how ICE shares information with LEAs. Part II will discuss the expansion of the “aggravated felony” definition and the lack of clarity on determining when a crime involves moral turpitude. Part III will discuss the lack of proportionality in immigration law. Finally, part IV will discuss the effects on both noncitizen and mix-status families.

¹⁷ Cesar Cuauhtemoc & Garcia Hernandez, *Creating Crimigration*, 2013 BYU L. REV. 1457, 1468 (2013).

¹⁸ 8 U.S.C. § 1101(a)(43)(A)-(U) (2014).

II. Secure Communities

In appropriations legislation for 2008, the U.S. Congress appropriated \$200 million “to improve and modernize efforts to identify noncitizens convicted of a crime, sentenced to imprisonment, and who may be [remov]able, and remove them from the U.S. once they are judged [remov]able.”¹⁹ To accomplish the goal set out in 2008, Congress directed the secretary of the Department of Homeland Security (“DHS”) to develop a plan to “presents a strategy for [ICE] to identify every criminal noncitizen, at the prison, jail, or correctional institution in which they are held.”²⁰ As a result, Secure Communities (“S-COM”)—a comprehensive plan to identify and remove criminal noncitizens—was born.²¹ At its core, S-COM is a “data-sharing scheme that cross references biometric data, such as fingerprints obtained at the booking of an arrested individual, between ICE, the Federal Bureau of Investigations (“FBI”), states, and localities.”²²

Before S-COM, many law enforcement agencies (“LEAs”) did not determine an individual’s immigration status because the FBI’s Criminal Justice Information Service Division’s (“CJIS”) Integrated Automated Identification System (“IAFIS”)²³ and ICE’s Automated Biometric Identification System (“IDENT”) could not

¹⁹ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2050-51 (2007).

²⁰ *Id.*

²¹ U.S. Immigration and Customs Enforcement, *Secure Communities Quarterly Report*, http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy101stquarter.pdf.

²² Anil Kalhan, *The Second Wave of Global Privacy Protection: Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105 (2013).

²³ This database contains records of over 100 million people. See Cuauhtemoc, *supra* note 17.

exchange data.²⁴ For example, “when [LEAs] made an arrest and booked a[n individual] into custody, the agency submits the [individual]’s biographic and biometric information to the CJIS/IAFIS to determine the [individual’s] criminal history.”²⁵ Then, to determine an individual’s immigration status, the LEA had to manually submit biographical information to ICE’s Law Enforcement Support Center (“LESC”).²⁶

Through S-COM, however, CJIS/IAFIS automatically forwards both biographic and biometric information to IDENT. ICE provides the following description of the process:

1. When a[n individual] is arrested and booked into custody, the arresting LEA sends the [individual’s] fingerprints and associated biographical information to the appropriate State Identification Bureau (“SIB”) [(e.g., the Tennessee Bureau of Investigation)];
2. The SIB then sends the fingerprints and associated biographical information to CJIS/IAFIS;
3. CJIS electronically [forwards the individual’s] biometric and biographic information to IDENT to determine if there is a fingerprint match;²⁷

²⁴ “Despite having come online in 1994, the IDENT database is quite large. By late 2013, IDENT held records on approximately 150 million subjects and was growing at a rate of ten million entries per year.” Cuauhtemoc, *supra* note 17.

²⁵ U.S. Immigration and Customs Enforcement, *supra* note 12, at 2.

²⁶ *Id.*

²⁷ When used in the immigration detainer context, a “match” usually means an alert that a person is potentially removable from the United States. This might be because the ICE database lists a prior immigration law violation or because it lists the person as lacking

4. [If there is a match] with data in IDENT, CJIS generates and sends an Immigration Alien Query (“IAQ”) to the LESC;
5. The LESC queries law enforcement and immigration databases²⁸ to make an initial immigration status determination and generates and Immigration Alien Response (“IAR”) to prioritize enforcement actions;²⁹
6. The LESC sends the IAR to CJIS, which routes it to the appropriate [SIB] to send to the originating LEA. The LESC also sends the IAR to the local ICE field office, which [lodges immigration detainees].^{30 31}

Therefore, S-COM “shifted to a system of universal and automated screening such that *every single person* arrested

United States citizenship. In the criminal law enforcement context, “match” usually means a prior conviction.

²⁸ U.S. Immigration and Customs Enforcement, *Secure Communities: Monthly Statistics through August 31, 2014: IDENT/IAFIS Interoperability*, http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf

(describing that the LESC queries the Student & Exchange Visitor Information System (“SEVIS”); U.S. Visitor and Immigration Status); and the National Crime and Information Center database.

²⁹ *Id.* (describing ICE’s three tier priority system; Level 1 includes convictions of “aggravated felonies,” or two or more crimes punishable by more than one year, commonly known as “felonies”; Level 2 includes convictions of offenses punishable by less than one year, commonly referred to as “misdemeanors”; and level 3 includes convictions of all other offenses. ICE also prioritizes the removal of individuals that entered the United States without inspection, or have violated their visa).

³⁰ An immigration detainer is a notice to law enforcement agencies to hold a noncitizen for up to forty-eight hours, not including weekends or holidays.

³¹ U.S. Immigration and Customs Enforcement, *supra* note 12, at 2.

by a local law enforcement official *anywhere in the country* [is] screened by the federal government for immigration status and [removal] eligibility.”³² A match with data in IDENT, however, is not required for an individual to come to the attention of the LESC. According to Anil Kalhan, professor of law at Drexel University School of Law, “even where there is no match, but the individual has an unknown or non-U.S. place of birth [IDENT] automatically flags the [individual’s] record and notifies the LESC. . . .”³³

LEAs also cannot avoid sharing information with ICE, or “choose to have the fingerprints it submits to the [CJIS/IAFIS] processed only for criminal history checks.”³⁴ As mentioned above, under S-COM, once a LEA forwards the fingerprints and associated biographical information of an individual to the appropriate SIB, the information is automatically forwarded to IDENT. LEAs can, however, choose not to send fingerprints to the CJIS/IAFIS. But “from a practical standpoint, LEAs have no choice but to . . . forward[] arrestees’ fingerprints to the [CJIS/IAFIS] in order to obtain information that is critically important for crime-fighting purposes.”³⁵ In this sense, ICE “extracts identification and criminal history information from state and local law enforcement agencies when they routinely transmit that information to the FBI for purposes that are unrelated to civil immigration enforcement . . .”³⁶

³² Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities,”* J.L & ECON (2014).

³³ Kalhan, *supra* note 22, at 1.

³⁴ U.S. Immigration and Customs Enforcement, *Protecting the Homeland*, <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

³⁵ Kalhan, *supra* note 22, at n.115.

³⁶ *Id.*

A. Problems for Noncitizens

S-COM allows LEAs to assume an indirect immigration-policing role. S-COM empowers police “to arrests individuals for the very purpose of booking them and having their immigration status screened-without regard to whether that arrest leads to any criminal prosecution.”³⁷ For example, “[e]vidence to date suggests that in some jurisdictions, this is precisely what has happened, as police officers have, disproportionately “target[ed] Lat[in Americans] for minor violations and pretextual arrests with the actual goal of initiating immigration checks through the S-COM system, rather than for prosecution.”³⁸ Even DHS’s own Office of Civil Rights and Civil Liberties (“CRCL”) identified criminal arrests that served as a pretext for an immigration investigation.³⁹

S-COM also creates other problems for noncitizens that come in contact with the criminal justice system. Through S-COM, ICE often detects noncitizens during the jail booking process or while awaiting trial (custody incident to arrest). And “[t]hese presumptively [removable] noncitizens will face removal proceedings regardless of the outcome of their criminal cases...”⁴⁰ As a result, noncitizens “often believe it futile and not worth the cost to contest minor criminal charges while detained, even if they are innocent, have strong defenses, or were arrested through racial profiling or other constitutional rights violations.”⁴¹

³⁷ *Id.*

³⁸ *Id.*

³⁹ Maureen A. Sweeney, *Shadow Immigration Enforcement and its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 251 (2014) (Discussing that because of this pretext, the CRCL prepared a training video for local officers on how to avoid racial profiling).

⁴⁰ Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

⁴¹ *Id.*

S-COM, therefore, influences the plea-bargain incentives of noncitizens that ICE has not detected but cannot make bail; “[t]hose who cannot make bail often must choose between any plea that offers an end to detention [and allows them to return to their family], and detection by ICE if they . . . defend against their charges.”⁴² And “[b]ecause prosecutors often make plea offers at the defendant’s first appearance . . . , noncitizens willing to take the deal may be able to exit the system without ICE detection.”⁴³ Nonetheless, accepting a plea to avoid ICE detection may trigger removal proceedings.⁴⁴

Despite the immigration consequences of accepting a plea bargain, noncitizens do take pleas motivated by avoiding ICE detection. In *People v. Cristache*, for example, the court found that the defendant, a noncitizen, received effective assistance of counsel where his counsel advised him to plead guilty rather than proceed to trial.⁴⁵ The court noted that defense counsel negotiated “a disposition [that] conditionally guaranteed that defendant would have remained ‘out of jail’—i.e., Rikers Island—where ICE agents routinely engage in a concerted effort to identify criminal noncitizens for [removal].”⁴⁶ In addition, the court noted that remaining out of jail, as the plea negotiated by counsel anticipated, reduces the risk of removal (or the risk of detection for removal).⁴⁷ Thus, the court concluded that defense counsel “effectively placed defendant in the best position to avoid actual [removal].”⁴⁸

Noncitizen’s strategies to avoid ICE detection do not always work. For example, some noncitizen defendants

⁴² *Id.*

⁴³ *Id.*

⁴⁴ For a discussion on how accepting a guilty plea triggers removal proceedings see Part II.

⁴⁵ *People v. Cristache*, 29 Misc. 3d 720 (Crim. Ct. 2010).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

agree to probation to avoid time⁴⁹ are still detected by ICE because “[p]robation and parole officers at both state and federal levels are frequently in communication with ICE.”⁵⁰ And because ICE’s priorities are subject to change, there are often nationwide “sweeps” at state probation offices.⁵¹ In addition, probation or parole officers have the discretion to report an individual to ICE.⁵²

B. Other Ways Noncitizens Come In Contact With “ICE”

Other than S-COM, there are many other ways sharing a person’s information with ICE can trigger removal proceedings. For example, submitting an application for adjustment of status may trigger removal proceedings. Currently, “background checks (through biometrics procedure) are concluded for almost every immigration application.⁵³ When a noncitizen applies for adjustment of status, an applicant for an immigration benefit receives notice to report to a DHS substation for “biometrics,” which includes fingerprinting and photos, as well as a name check. As a result, applying for naturalization and adjustment of status guarantees the bringing of old convictions to light and, if applicable, the commencement of adverse action (i.e., removal proceedings and possible detention).⁵⁴

ICE also detects noncitizens while serving a prison sentence. When a noncitizen “is serving a prison sentence,

⁴⁹ Cade, *supra* note 40, at 1.

⁵⁰ MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS, 168 (Richard J. Link ed., 5th ed. 2014).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

ICE will lodge a detainer,⁵⁵ and often interview the person while in custody to obtain facts and information, and later serve a notice to appear in immigration court (“NTA”).⁵⁶ This process is often done through the Criminal Alien Program (“CAP”).⁵⁷ And where ICE has not detected a noncitizen, “[i]t is not unheard of for a prison official to communicate with ICE if the institution is poised to release a non-American citizen and, for whatever reason, [ICE has not placed an immigration detainer].”⁵⁸

III. How Shared Data Affects Noncitizens

ICE receives data concerning removable noncitizens via S-COM. But what type of data does ICE receive, and how is this data used to determine whether a person is eligible for removal from the United States? Title 8 of the U.S. Code subjects noncitizens to removal for convictions of an “aggravated felony,”⁵⁹ which includes some misdemeanors.⁶⁰ Title 8 of the U.S. Code also subjects immigrants to removal for convictions of a “crime of moral turpitude.”⁶¹

⁵⁵ “According to 8 CFR § 287.7(d), a law enforcement agency may hold a non-American citizen for up to 48 hours, not including Saturdays, Sundays, and holidays, pursuant to an ICE detainer. By regulation, after 48 hours, if ICE does not assume custody, the individual should be released.”

⁵⁶ KRAMER, *supra* note 50.

⁵⁷ U.S.C. Immigration and Customs Enforcement, *Criminal Alien Program*, <http://www.ice.gov/criminal-alien-program> (CAP “provides ICE-wide direction and support in the biometric and biographic identification, arrest, and removal of priority [noncitizens] who are incarcerated within federal, state, and local prisons and jails”).

⁵⁸ *Id.*

⁵⁹ 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

⁶⁰ *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (holding that petty theft with a one-year suspended sentence, a misdemeanor under New York law, is an aggravated felony for immigration purposes).

⁶¹ 8 U.S.C. § 1227(a)(2)(A)(i) (2008).

A. The “Aggravated Felony”

The Anti-Drug Abuse Act of 1988 added the “aggravated felony” into the world of immigration law and provided that a conviction of an “aggravated felony” would result in removal proceedings.⁶² At that time, only three crimes were aggravated felonies: murder, illicit trafficking in firearms, and drug trafficking.⁶³ The list now includes twenty-eight offenses.⁶⁴ Some even create sub categories.⁶⁵

Two years after the creation of the “aggravated felony” definition, Congress expanded the aggravated felony definition to include “any crime of violence.”⁶⁶ And four years later, Congress added non-violent crimes such as theft (including receipt of stolen property), trafficking in fraudulent documents, fraud, and tax evasion to the “aggravated felony” definition.⁶⁷ Congress designed these additions to make “a major stride toward expediting the removal of criminal noncitizens”⁶⁸

But in 1996, Congress enacted two public laws that have gained notoriety because of the expansion of the “aggravated felony” definition. First, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996 to include more non-violent crimes as aggravated

⁶² Anti-Drug Abuse Act of 1988, 102 Stat. 4181, 4469-70.

⁶³ Cesar Cuauhtemoc Garcia Hernandez, *Creating Crimigration*, 2013 BYU L. REV. 1457, 1468 (2013).

⁶⁴ 8 U.S.C. § 1101(a)(43)(A)-(U) (2014).

⁶⁵ 8 U.S.C. § 1101(a)(43)(F) (2014) (providing that the aggravated felony deportability ground now includes “any crime of violence”).

⁶⁶ 18 U.S.C. § 16 (2006). (defining a “crime of violence” as an offense that includes as an element either the use or threatened use of physical force against the person or property of another, or a felony offense that involves the “substantial risk” of such force”).

⁶⁷ Immigration and Nationality Technical Corrections of 1993, 108 Stat. 4305, 4320-22 (1993).

⁶⁸ 140 Cong. Rec. H11291-01 (1994) (statement of Rep. Betty McCollum).

felonies.⁶⁹ Among those are forgery, counterfeiting, prostitution, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, bribery of witness, and offenses related to skipping bail.⁷⁰ Opposing the 1996 amendment, Patsy Mink, member of the U.S. House of Representatives for the state of the Hawaii testified: “I regret that [the House is using the AEDPA] . . . as a vehicle to advance anti-immigrant attitudes. This bill increases the number of criminal activities that [trigger removal proceedings]. Most of the additional offenses require no link to terrorism.”⁷¹ In contrast, Lamar Smith, a member of the U.S. House of Representatives of Texas testifies that: “the U.S. removes too few criminal noncitizens today. The [removal] process can be years in length. [The AEDPA] streamlines the [removal] process by eliminating frivolous challenges to [removal] orders; expanding the list of aggravated felonies [that trigger removal proceedings]; and closing the gap between the end of a noncitizen’s criminal sentence and the date the [U.S. removes the noncitizen] from the United States.”⁷²

Second, Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”)⁷³ redefined the term “conviction” to mean: “where the judge or jury has found the [noncitizen] has . . . admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen]’s liberty . . .”⁷⁴ Therefore, the

⁶⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 440, § 242(a)(2), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1252 (2006)).

⁷⁰ 8 U.S.C. § 1252 (2006).

⁷¹ 142 Cong. Rec. E645-04, 1996 WL 200107 (1996) (statement of Rep. Patsy Mink).

⁷² 142 Cong. Rec. H3605-04, 1996 WL 185581 (1996) (statement of Rep. Lamar Smith).

⁷³ IIRIRA Pub. L. No. 104-208, § 321. 110 Stat. 3008, 3009-627.

⁷⁴ *Id.* (codified in 8 U.S.C. 1101(a)(48)(A)(2014)).

commission—rather than conviction—of such an offense is sufficient to constitute a conviction under immigration law. Furthermore, punishment can include Alford pleas,⁷⁵ probation,⁷⁶ house arrest,⁷⁷ community service, anger management, drug/substance abuse programs, fines, and restitution.⁷⁸ In addition, IIRIRA reduced the term of imprisonment from five years to one. Therefore, crimes of violence, theft offenses, and offenses relating to bribery for which the term of imprisonment is at least one year constitute “aggravated felonies.”

In practice, the “aggravated felony” removes many noncitizens from the U.S. for crimes that are neither “aggravated” nor “felonies.” For example, a year of probation with a suspended sentence for pulling hair is an aggravated felony.⁷⁹ Mary Anne Gehris, who arrived to the United States at the age of one, pulled another woman’s hair in a quarrel over a man.⁸⁰ Gehris was twenty-one

⁷⁵ An “*Alford* plea is ‘an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest. *United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (describing that “[a]n *Alford* plea is a guilty,” and thus is included as a conviction” of an “aggravated felony” under 8 U.S.C. § 1101(a)(48)(A) (2014).

⁷⁶ *Gil v. Ashcroft*, 335 F.3d 574, 576 (7th Cir. 2003) (describing that “probation satisfies part (ii) [of 8 U.S.C. § 1101(a)(48)(A)], so [the petitioner] has been ‘convicted’ even though ‘adjudication of guilt has been withheld’”).

⁷⁷ *McKenzie v. Attorney General of the United States*, 452 F. App’x 88 (3d Cir. 2011) (describing that petitioner was convicted of an aggravated felony because her sentence to house arrest without electronic monitoring constituted imprisonment under 8 U.S.C. § 1101(a)(43)(B) (2014).

⁷⁸ *De Vega v. Gonzales*, 503 F.3d 45 (1st Cir. 2007) (describing that restitution constitutes punishment and thus, constitutes a “conviction” under 8 U.S.C. § 1101(a)(48)(A) (2014).

⁷⁹ Anthony Lewis, *This Got Me in Some Kind of Whirlwind*, N.Y. TIMES, Jan. 8, 2000 at A13.

⁸⁰ *Id.*

when the incident occurred.⁸¹ Later, Gehris pleaded guilty to a charge of misdemeanor battery, and received a suspended one-year-jail sentence.⁸² Thirteen years later, at age thirty-four, Gehris sought to become a United States citizen.⁸³ But after honestly answering the questions on her citizenship application, the government initiated removal proceedings against her.⁸⁴ Under the AEDPA and IIRAIRA, minor misdemeanors, are retroactively defined as an “aggravated felony,” a ground for removal.⁸⁵ In other words, “Gehris is removable for having committed a misdemeanor in 1988 that Congress redefined in 1996 as an ‘aggravated felony’ for immigration purposes.”⁸⁶

Stories like Gehris’ are not uncommon. This is in part due to the fact that some aggravated felonies include crimes that are neither “aggravated” or “felonies” under criminal law.⁸⁷ For example, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held as aggravated felonies.⁸⁸

Lastly, aggravated felonies trigger mandatory detention, removal proceedings without the possibility of almost all forms of discretionary relief, including asylum,⁸⁹

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Lea McDermid, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 742 (2001) (citing INA 101(a)(43)).

⁸⁶ *Id.*

⁸⁷ Andrew Moore, *Criminal Deportation, Post-Conviction Relief And The Lost Cause Of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 673-75 (2008).

⁸⁸ Brief for Asian American Justice Center et al., as amici curiae supporting petitioner at 8-9, *Padilla v. Kentucky*, 130 S. Ct. 1473-75 (2010).

⁸⁹ 8 U.S.C. § 1158(b)(2)(B) (2009) (describing that a conviction of an aggravated felony bars a refugee from applying for asylum); *see* 8

the cancellation of removal,⁹⁰ and it bars the immigrant's return to the United States for life.⁹¹ The latter is particularly troubling because American immigration law has one goal: family unity.⁹² Yet, as in the case of Mrs. Gheris, the U.S. removes noncitizens for minor misdemeanors that are considered aggravated felonies under immigration law. Worse still, after the ten year ban, "[f]amily members who are eligible for visas must wait up to 20 years to reunite with their family in the United States."⁹³ Thus, a person can wait up to 30 years. If that

U.S.C. § 1158 (2009) (describing asylum as the process that allows refugees to apply to live and work in the United States); *see also* 8 U.S.C. § 1101(A)(42) (2014) (defining refugee is any person who is outside any country of such person's nationality and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); *see also* 8 U.S.C. §1231(b)(3) (2014) (describing that the Attorney General of the United States may not remove a noncitizen if that person is eligible for relief under the United Nations Convention Against Torture).

⁹⁰ 8 U.S.C. §1229b(a)(3) (2008) (describing that the Attorney General of the United States may cancel removal in the case of a noncitizen that is excludable or deportable but only if that person has not been convicted of an aggravated felony).

⁹¹ 8 U.S.C. § 1182(a)(9)(A)(i) (2013) ("any [noncitizen] . . . who again seeks admission . . . at any time in the case of an [noncitizen] convicted of an aggravated felony is inadmissible").

⁹² In support of the Immigration Act of 1990, Hamilton Fish, a member of the U.S. House of Representatives stated that "family unification [is] the cornerstone of American law and policy." 136 CONG. REC. H12358-03 (1990).

⁹³ Immigration Policy Center, *Focusing on the Solutions: Key Principles of Comprehensive Immigration Reform*, http://www.immigrationpolicy.org/sites/default/files/docs/Solutions_Paper_032310.pdf#page=18.

person decides to enter without inspection, that person is subject to imprisonment of a maximum of 20 years.⁹⁴

B. The Crime of Moral Turpitude

According to Juliet Stumpf, professor of law at Lewis & Clark Law School, “[b]efore the mid-1980’s, removal of noncitizens for criminal offenses was largely limited to convictions for serious ‘crimes of moral turpitude,’ drug trafficking, and certain weapons offenses. Now a crime of moral turpitude carrying a potential sentence of one year is a removable offense.”⁹⁵

Section 1227(a)(2)(A)(i) of Title 8 of the U.S. Code provides removal of individuals convicted of crimes involving moral turpitude.⁹⁶ Under current law, a noncitizen convicted of a crime involving moral turpitude committed within five years (or ten years for “Green Card” holders) after the date of admission, and who is convicted of a crime and incarcerated at least one year, is removable.⁹⁷ Residing in the United States for five years, however, does not prevent removal for a person convicted of at least two crimes involving moral turpitude.⁹⁸

Although section 1227(a)(2)(A) may sound effective in theory, it is difficult to apply in practice. At the root of the problem is the fact that determining what is a crime of moral turpitude is no simple task, because Congress has never defined the term “crime of moral turpitude.” And “[f]or more than a century, the government has [remov]ed millions of [noncitizens for

⁹⁴ 8 U.S.C. § 1326(b)(2) (describing that if removal was subsequent to conviction for an aggravated felony, the maximum term of imprisonment is 20 years).

⁹⁵ Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1723 (2011).

⁹⁶ 8 U.S.C. 1227(a)(2)(A) (2008).

⁹⁷ 8 U.S.C. §1227(a)(2)(A)(i) (2008).

⁹⁸ 8 U.S.C. § 1227(a)(2)(A)(ii) (2008).

convictions of] crime[s] involving moral turpitude, [and] it has done this without any statutory definition of what constitutes a crime involving moral turpitude.” The only guidance comes from federal court and Board of Immigration Appeals (“BIA”) decisions. For example, one BIA decision states that a crime of moral turpitude

Refers generally to conduct which is inherently base, vile, or depraved, and contrary to the rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act that is per se reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.⁹⁹

Therefore, because Congress has not defined what crime of “moral turpitude” means, both, immigration and federal courts lack objective criteria necessary to determine what crimes involve moral turpitude.¹⁰⁰ This lack of objectivity, thus, leads courts to hold that minor crimes involve moral turpitude. For example, courts have held that the following relatively minor offenses are crimes involving moral turpitude for immigration purposes: issuing bad checks, attempted bribery, disorderly conduct (loitering for lewd soliciting), false statement (on firearm application or passport application), forgery mail fraud,

⁹⁹ In re Fualuaau, 21 I. & N. Dec. 475, 477 (BIA 1996).

¹⁰⁰ McDermid, *supra* note 85, at 216.

mayhem, possession of stolen mail, receiving stolen property, and petty theft.¹⁰¹ Theft of services has also been held to involve moral turpitude. For example, in *Mojica v. Reno*, the court classified turnstile jumping in the New York City subway system, a misdemeanor offense, as a theft of services conviction, and therefore, crime involving moral turpitude.¹⁰² Another court stated that “it is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.”¹⁰³

C. S-COM Statistics

Evidence indicates that via S-COM and the expansion of crimes that trigger removal proceedings, ICE has removed 375,031 noncitizens.¹⁰⁴ A recent study by ICE found that since the creation of S-COM, five percent, or 2,162,636 people, of all interoperability transmission have resulted in IDENT matches.¹⁰⁵ Of these matches, twenty-eight percent of them identified noncitizens charged or convicted of an aggravated felony.¹⁰⁶ The other seventy-two percent of the IDENT matches resulted in the identification of noncitizens charged or convicted of a crime other than an aggravated felony.¹⁰⁷ Of these numbers, ICE removed 375,031 noncitizens from the United States. Thirty-two percent had “aggravated felony”

¹⁰¹ *Id.* at 775.

¹⁰² *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

¹⁰³ *In re Scarpulla*, 15 I. & N. Dec. 139, 140-41 (BIA 1974).

¹⁰⁴ U.S. Immigration and Customs Enforcement, *Secure Communities: Monthly Statistics through August 31, 2014: IDENT/IAFIS Interoperability*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 1, 2, <http://www.ice.gov/doclib/f> oia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf (describing that the LESC queries the Student & Exchange Visitor Information System (“SEVIS”); U.S. Visitor and Immigration Status).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

convictions, or two or more crimes punishable by more than one year.¹⁰⁸ Twenty percent had convictions of any felony or three or more offenses punishable by less than one year, commonly known as misdemeanors.¹⁰⁹ The remaining 48 percent had either no criminal conviction or convictions of the lowest level misdemeanor.¹¹⁰

ICE's "report containing these numbers is [full of] ominous yet cryptic references to 'convicted criminals'"¹¹¹ An analysis of the convictions proves that most of the "criminal aliens" are not exactly the "worst of the worst" or a danger to American society.¹¹² Furthermore, as outlined above, even the highest priority on ICE's list are not necessarily violent or dangerous.

IV. Lack of Proportionality

The formal proceedings (known as "removal proceedings") that the United States utilizes to remove a noncitizen from the United States or exclude him or her from lawful admission are not proportional. According to Juliet Stumpf, professor of law at Lewis & Clark Law School, immigration law makes use of removal as an "on-off switch," rather than employing a graduated sanctions scheme found in criminal penology.¹¹³ Therefore, "[r]egardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One*, IMMIGRATION POLICY CENTER 1, (2014), <http://www.immigrationpolicy.org/just-facts/misplaced-priorities-most-immigrants-deported-ice-2013-were-threat-no-one>.

¹¹² *Id.*

¹¹³ Stumpf, *supra* note 95, at 1690.

consequence.”¹¹⁴ For example, “[a] college student with a student visa who works an hour over the maximum mandated by law is removable from the United States for violating the terms of her visa to the same extent that a serial killer on a tourist visa is removable as an ‘aggravated felon.’”¹¹⁵

In contrast, “[c]riminal punishment reflects the principle of proportionality, such that less serious crimes result in milder punishment and vice versa.”¹¹⁶ For example, in *Weems v. United States*,¹¹⁷ the court convicted the defendant for falsifying a public document and sentenced him to 15 years of “*cadena temporal*,” a form of imprisonment that included hard labor in chains and permanent civil disabilities.¹¹⁸ The Court, however, noted that, “it is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense,”¹¹⁹ and held the sentence violated the Eight Amendment of the U.S. Constitution.

Removal, however, is not a form of criminal punishment. Instead, removal constitutes a civil remedy aimed at excluding unwanted noncitizens.¹²⁰ Despite this characterization, many immigration violations now constitute crimes. For example, unlawfully reentering the United States after removal carries a penalty of ten or twenty year imprisonment.¹²¹ As a result, “[a]s recently as 2011 there were more federal criminal immigration cases . . . than prosecutions for violent crimes, drug offenses, or

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i) and 8 U.S.C. § 1227(a)(2)(A)(iii) (2008)).

¹¹⁶ *Id.* at 1691.

¹¹⁷ *Weems v. United States*, 217 U.S. 349 (1910).

¹¹⁸ *Id.* at 364.

¹¹⁹ *Id.* at 367.

¹²⁰ *Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950).

¹²¹ 8 U.S.C. § 1326(b) (2012).

any other type of federal crime.”¹²² Not surprisingly, Immigration Customs Enforcement (“ICE”) now operates the largest detention system in the country.¹²³

Consequences exist for violating our immigration laws. But other consequences are often in addition to removal, and not alternatives. Under our immigration laws, removal remains the baseline sanction.¹²⁴ Some of the other sanctions available for immigration violations include: (1) incarceration,¹²⁵ (2) fines,¹²⁶ and (3) bars to reentry.¹²⁷ Like a criminal defendant on trial for his liberty, immigrants face high stakes in removal proceedings. According to the Supreme Court of the United States, removal may result in the loss of “all that

¹²² Hernandez, *supra* note 17, at 1473.

¹²³ Dr. Dora Schriro, *Immigration Detention Overview and Recommendation*, UNITED STATES DEPARTMENT OF HOMELAND SECURITY 1, 2 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (last visited Aug. 30, 2014).

¹²⁴ See Stumpf, *supra* note 95, at 1691.

¹²⁵ 8 U.S.C. § 1325(a) (2012) (providing that improperly entering the United States may result in criminal fine or imprisonment for up to six months, or both, for the first offense).

¹²⁶ 8 U.S.C. § 1324(c) (2012) (imposing civil penalties for fraudulent immigration documents); 8 U.S.C. § 1325(b) (2012) (imposing a civil penalty upon a noncitizen apprehended while entering the United States at a time or place other than as designed by immigration officers); 8 U.S.C. 1325(c) (2012) (imposing a fine of up to \$ 250,000 for entering into a sham marriage to evade immigration laws).

¹²⁷ 8 U.S.C. § 1182(a)(9)(B)(i)(I) (what year statute is being cited?) (applying a three-year bar to reentry to a noncitizen who has accrued more than 180 days but less than one year of unlawful presence and who voluntarily departed prior to the commencement of removal proceedings); 8 U.S.C. 1182 (a)(6)(G) (what year statute is being cited?) (applying a five-year bar to reentry to a noncitizen who violates the terms of a student visa); 8 U.S.C. § 1182(a)(9) (what year statute is being cited?) (creating five-year and ten-year bars for unlawful presence and reentry after a previous removal or departure under a removal order).

makes life worth living.”¹²⁸ The Court also recognizes that removal “may result also in loss of both property and life.”¹²⁹

In response to the harsh immigration consequences of contact with the criminal justice system, “the Supreme Court recognized that [removal] ‘is now virtually inevitable for a vast number of noncitizens convicted of crimes’— so much so that a defendant’s right to the effective assistance of counsel in a criminal case can be violated if her lawyer fails to advise her about the likelihood that a guilty plea could get her expelled.”¹³⁰

The *Padilla v. Kentucky*¹³¹ decision, wherein the United States Supreme Court decided that criminal defense attorneys must advise noncitizen clients about the immigration consequences of accepting a guilty plea, is a step in the right direction because convictions of either an aggravated felony or a crime of moral turpitude subjects a noncitizen to removal. Further, once hauled into immigration court, noncitizens do not receive the constitutional protections found in the criminal justice system.¹³² Some absent constitutional protections include: the right to trial by a court established under Article III of the Constitution,¹³³ the right to counsel at government expense,¹³⁴ the right to not incriminate oneself,¹³⁵ and protection against retroactive changes in the law.¹³⁶

¹²⁸ *Ng. Fung Ho. v. White*, 259 U.S. 276, 285 (1922).

¹²⁹ *Id.*

¹³⁰ David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 176-77 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010)).

¹³¹ *Padilla*, 559 U.S. at 360.

¹³² *Fong Yue Ting*, 149 U.S. 698, 730 (1893) (holding that noncitizens facing deportation were not entitled to the constitutional safeguards protecting criminal defendants).

¹³³ U.S. CONST. art. III, § 2, cl. 3 (what is the date of the code edition cited?); *Knauff*, 338 U.S. at 543-44.

¹³⁴ *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing removal proceedings as a labyrinth character of modern immigration law—a

V. Effect on Families

In 2011, the Chief Justice Earl Warren Institute on Law and Policy (the “Institute”) conducted a study of data provide by the federal government to the National Day Labor Organization pursuant to a Freedom of Information Act lawsuit.¹³⁷ The study based its findings on a random national sample of 375 individuals who S-COM identified via IDENT.¹³⁸

A. U.S. Citizens

ICE acknowledges that that there might be IDENT matches for U.S. citizens.¹³⁹ ICE, however, has never

maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike).

¹³⁵ U.S. CONST. amend. V; *United States v. Balsys*, 524 U.S. 666, 671 (1998) (noting that the “risk that [a resident alien’s] testimony might subject him to deportation is not a sufficient ground for asserting [the fifth amendment] privilege [against self-incrimination], given the civil character of a deportation proceeding”).

¹³⁶ *Perez v. Elwood*, 294 F.3d 552, 557 (3d Cir. 2002) (stating that an argument derived from the ex post facto clause is not available to petitioner because deportation is a civil proceeding).

¹³⁷ Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities By the Numbers: An Analysis of Demographics and Due Process*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY 1, 2 (2011), available at <http://ccrjustice.org/files/4-8-11%20Sampling%20Stipulation.pdf>.

¹³⁸ *Id.* at 4.

¹³⁹ *Communities: Monthly Statistics through September 30, 2013*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 1, 58 (2013), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2013-to-date.pdf (describing the two types of U.S. citizens that appear in the IDENT database. The first are U.S. citizens are have active warrants provide by CJIS, adopted children from abroad, or have participated in DHS’s trusted traveler program. The

published any data indicating the number or percentage of U.S. citizens it apprehends through S-COM. According to the Institute, U.S. citizen matches should never result in the apprehension of those individuals because the government cannot remove U.S. citizens.¹⁴⁰ The Institute, however, estimates that ICE has apprehended approximately 3,600 U.S. citizens from the beginning of the program to April 2011.¹⁴¹

S-COM is also responsible for removing U.S. citizens. For example, S-COM removed Mark Lyttle to Mexico; he was subsequently sent to Honduras, Nicaragua and Guatemala.¹⁴² Lyttle was serving a sentence for a misdemeanor assault when ICE served him with a Notice to Appear in immigration court.¹⁴³ The notice stated that Lyttle was “not a U.S. citizen but rather a native [of] Mexico and deemed him [removable] pursuant to 8 U.S.C § 1227(a)(2)(A)(iii) as a noncitizen who is convicted of an aggravated felony.”¹⁴⁴ To Lyttle’s surprise, he was faced with removal proceedings, despite his status as a U.S. citizen.¹⁴⁵ Once in Mexico, Mexico removed Lyttle to Honduras. Thereafter, Honduras sent Lyttle to Nicaragua and then to Guatemala.¹⁴⁶

Many noncitizens identified for removal also had U.S. citizen family members. The Institute found that thirty-nine percent of the people identified for removal had U.S. citizen family members.¹⁴⁷ Thirty-seven percent had a U.S. citizen child and five percent had a U.S. citizen

second are U.S. citizens who were not U.S. citizens when prints were collected).

¹⁴⁰ Kohli, *supra* note 137, at 4.

¹⁴¹ *Id.*

¹⁴² Lyttle v. United States, 867 F. Supp.2d 1256, 1266 (M.D. Ga. 2012).

¹⁴³ *Id.* at 1269-70.

¹⁴⁴ *Id.* at 1270.

¹⁴⁵ *Id.* at 1272.

¹⁴⁶ *See id.* at 1273.

¹⁴⁷ Kohli, *supra* note 137, at 5.

spouse.¹⁴⁸ These numbers are alarming because the more noncitizens the U.S. places in removal proceedings, the more families encounter adverse effects.¹⁴⁹ Researchers note that, “[t]he implications of growing up in an [mix status] family span a variety of developmental contexts . . . including psychological well-being, mental health, physical health, education, and employment.”¹⁵⁰ In total, S-COM affected approximately 88,000 families with U.S. citizen members from its inception through April 2011.¹⁵¹

B. Non-U.S. Citizens

Discrepancies exist between the demographics of those detected by S-COM. For example, although research shows that 57% of noncitizens in the U.S. are male, “93% of the sample arrested through S-COM . . . [are] males.”¹⁵² According to Maureen A. Sweeney, professor of law at the University of Maryland Francis King Carey School of Law, “[e]ven assuming that men may be more likely to commit crime than women, this number far surpasses the 75% of arrests tracked by the FBI nationwide that involve men.”¹⁵³ Similarly, Latin Americans are disproportionately impacted by S-COM. For example, although 77% of noncitizens are from Latin American countries, 93% of noncitizens identified by S-COM are Latin American.¹⁵⁴

Families

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 5.

¹⁵⁰ Carola Suárez-Orozco, et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 462 (2011), available at <http://her.hepg.org/content/g23x203763783m75/?p=0aca47a0575b4334aa31d64350701086&pi=2>.

¹⁵¹ Kohli, *supra* note 137, at 5.

¹⁵² Sweeney, *supra* note 39, at 249.

¹⁵³ *Id.*

¹⁵⁴ Kohli, *supra* note 135, at 5-6.

Removing noncitizen from the U.S. has devastating effects on families. Removing noncitizen males, for example, leaves single mothers struggling to make ends meet.¹⁵⁵ In addition, the “tenuous legal status of many [mother]s left behind adds a double burden on these [mother]s to provide for their families while also raising their children.”¹⁵⁶ And this burden often leaves women—more so than men—in vulnerable conditions. For example, according to American Progress, “[t]he poverty rate for single-mother families is 40.7 percent, compared to just 24.2 percent for single-father families.”¹⁵⁷

Removing noncitizens from the U.S. also leaves many of their children in foster care. According to Race Forward, approximately 5.5 million children in the U.S. have a noncitizen parent.¹⁵⁸ About 4.5 million of these children are U.S. citizens.¹⁵⁹ Although it is not clear how many children are currently in foster care, in 2012 at least 5,100 such children lived in foster care, and more than 15,000 children could face similar circumstances by 2017.¹⁶⁰

Although removals create many single-parent households and leave children in foster care, an equally likely scenario is that the U.S. citizen child or other family member “self-deports.” This is possible because many persons live in mix-status families. According to Dreby,

¹⁵⁵ See Joanna Dreby, *How Today’s Immigration Enforcement Policies Impact Children, Families, and Communities: A View From the Ground* 1, 5 (2012), <http://cdn.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 9-10.

¹⁵⁸ Seth Freed Wesler, *The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CENTER 1, 10 (2011), <https://www.raceforward.org/research/reports/shattered-families>.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.* at 6.

16.6 million people live with at least one noncitizen family member in 2012.¹⁶¹ Therefore, many U.S. citizen children “self-deport” to reunite with their families. According to the Pew Hispanic Center, about 300,000 U.S. children have migrated to Mexico since to 2005 for this purpose.¹⁶²

VI. Conclusion

Implicit in the creation of S-COM is the belief that noncitizens commit more crimes than native-born people. This belief is not new; “first [it was the] Irish and Chinese immigrants, then Italians and others from southern and eastern Europe, and today Mexicans and others from Latin America.”¹⁶³ However, the belief that noncitizens commit more crimes than native-born citizens is erroneous, as “academic research generally finds that immigrants are no more prone (and may be less prone) to engage in crime than native-born people.”¹⁶⁴ Despite the evidence, Congress cranked up the machine (“S-COM”) designed to keep the logs (“noncitizens”) rushing along the flumes as friction-free as possible while they hurtle toward the big blade waiting for them at the sawmill downstream (“immigration courts”), destroying families along the way. Therefore, as long as ICE and LEAs continue to share data via S-COM, crimes that are neither “aggravated” or “felonies” will continue to trigger removal proceedings and unreasonably separate families.

¹⁶¹ Dreby, *supra* note 155, at 1.

¹⁶² Jeffrey S. Passel, D’vera Cohn & Ana Gonzalez-Barrera, *Net Migration From Mexico Falls to Zero—and Perhaps Less*, PEW RESEARCH CENTER (Apr. 23, 2012), <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

¹⁶³ Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities,”* 57 J. L. ECON. 937, 937 (2014).

¹⁶⁴ *Id.* at 938.

ADDENDUM

After the completion of this paper, President Obama used his executive powers to direct Jeh Johnson, director of DHS, to end S-COM and replace it with the Priority Enforcement Program (“PEP”).¹⁶⁵ PEP will continue to rely on fingerprint-based biometric data submitted during bookings by LEAs to the FBI for criminal background checks.¹⁶⁶ Due to limited resources, however, Johnson acknowledges that ICE cannot respond to all immigration violations or remove all noncitizens.¹⁶⁷ For that reason, ICE’s priorities are national security, border security, and public safety.¹⁶⁸ To meet those priorities, ICE will only seek the transfer of a noncitizen in the custody of LEAs when the noncitizen has a conviction of an offense listed in Priority 1 (a), (c), (d), and (e) and Priority 2 (a) and (b) of November 20, 2014.¹⁶⁹ PEP and the new Priorities became effective on January 5, 2015.¹⁷⁰

But PEP’s priorities are not new.¹⁷¹ Indeed, PEP’s priorities include many of S-COM’s priorities. For example, PEP’s Priority 1(e) describes that “[noncitizens] convicted of an ‘aggravated felony,’ as that term is defined in section 101(a)(43) of the Immigration Nationality Act at

¹⁶⁵ Jeh C. Johnson, *Secure Communities*, DEPARTMENT OF HOMELAND SECURITY, 1, 2-3 (2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf

¹⁶⁶ *Id.* at 2.

¹⁶⁷ Jeh C. Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, DEPARTMENT OF HOMELAND SECURITY, 1, 2 (2014) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_p_osecutorial_discretion.pdf

¹⁶⁸ *Id.*

¹⁶⁹ Johnson, *supra* note 167.

¹⁷⁰ Johnson, *supra* note 165, at 6.

¹⁷¹ See footnote 29 for S-COM’s priorities.

the time of conviction,”¹⁷² are the top priority for removal. Indeed, President Obama stated that he aims his executive action at removing “felons, not families.” Therefore, PEP has the potential to attract S-COM’s criticism, misunderstanding, and litigation, by removing noncitizens for crimes that are neither “aggravated” nor “felonies.”

PEP, however, appears to give ICE greater prosecutorial discretion. For example, PEP requires ICE to exercise discretion based on individual circumstances, such as compelling and exceptional factors that clearly indicate the noncitizen is not a threat to national security, border security, or public safety.¹⁷³ In making those judgments, ICE should consider factors such as: extenuating circumstances involving the offense of conviction, length of time in the United States, and family or community ties to the United States.¹⁷⁴ In addition, this list is not dispositive or exhaustive.¹⁷⁵ Moreover, PEP directs ICE to exercise prosecutorial discretion based on the totality of the circumstances.¹⁷⁶

The discretion mentioned above applies not only to the decision to issue, serve, file, or cancel a Notice to Appear in immigration court, but also to a broad range of other enforcement decisions, including deciding: whom to stop, question, arrest, detain or release.¹⁷⁷ Additionally, although ICE may exercise discretion at any time, PEP notes that discretion should be used as early as possible in the case or proceedings.¹⁷⁸ Furthermore, DHS will monitor PEP at the state and local level, including through the collection and analysis of data, to detect inappropriate use

¹⁷² Johnson, *supra* note 167, at 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 6.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2.

¹⁷⁸ *Id.* 2.

to support or engage in biased policing, and DHS will establish measures to stop any such misuses.¹⁷⁹

In conclusion, PEP appears to attempt to strike a balance between noncitizens that are a threat to national security, border security, or public safety, and humanitarian concerns. Therefore, PEP appears to be much better than S-COM. However, it is too soon to tell what PEP will mean for those living in the U.S. without documentation and their families.

¹⁷⁹ Johnson, *supra* note 165, at 3.

