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SHADOW BANKING: HELP IS ON THE WAY

Despite being recognized as a primary culprit of the financial crisis, shadow banking has continued to flourish. According to the Financial Stability Board (FSB), shadow banking has grown since the onset of the crisis from $62 trillion in 2007 to $67 trillion[i]. Fortunately, the FSB plans to release regulatory recommendations by the end of the year. This article will summarize the risks inherent with shadow banking, the effects of the Dodd-Frank Act, and possible reforms designed to mitigate these risks and any inadequacies of Dodd-Frank.

Shadow banking refers to largely unregulated bank-like activities performed outside of the traditional banking sector by non-bank financial institutions (NBFI). NBFI include: hedge funds, investment banks, money market funds, and other devices that aggregate and hold financial assets. Banks engage in financial intermediation between savers and lenders by using deposits to finance long-term assets, including loans and mortgages. This conversion of short-term liabilities into long-term assets is known as maturity transformation[ii]. Similarly, NBFI use maturity transformation to provide financial intermediation. However, NBFI do not use cash deposits, but rather deposit instruments ("money-claims"[iii]) like repurchase agreements (repos) or commercial paper[iv]. Since they do not use deposits, shadow banking is largely unregulated, which allows them to leverage disproportionately more than traditional banks[v]. This allows for large profits during a bubble, but ultimately severely hinders liquidity allowing for Great Depression-like runs. Furthermore, systemic risk builds up throughout the entire market because traditional banks use NBFI for investment purposes, so a run on shadow banking leads to bank losses.

The fundamental problem with shadow banking is the volatility of the money-claims market[vi]. While it is easy to target all short-term lenders, it is crucial to specifically target the ones responsible for systemic risk[vii]; over-regulating would have harsh economic repercussions by greatly reducing benefits derived from responsible short-term lending[viii]. Risk-constraint regulations, the lender of last resort, and the Dodd-Frank Act (DFA) each fall short is stabilizing the money-claims market. Furthermore, the DFA potentially over-regulates by grouping private equity funds together with hedge funds[ix]; and by allowing the Federal Reserve to serve as a lender of last resort for NBFI creates a moral hazard[x]. A potential solution to this mess may actually be logically simple, appropriately expand the current regulations imposed on banks to include all money-claims through a public-private partnership (PPP)[xi].

The PPP provides a viable alternative to ineffective policies containing *ex ante* risk constraints and/or *ex post*support subsidies. First, the PPP proposal allows only the licensed issuance of money-claims. Second, licensed entities will be required to abide by portfolio and capital restrictions. Furthermore, the government is to stand behind these private entities (money-claims insurance, as opposed to deposit insurance), eliminating run externalities; this public support will be largely financed by risk-based fees paid by these licensed entities[xii]. Only issuers of money-claims would fall under these restrictions, reducing the risk of over-regulating. Meanwhile, since this would cover all institutions performing bank-like operations, the regulatory arbitrage observed following previous banking regulations would be null.

Despite the potential upsides of the PPP, like all regulatory proposals on shadow banking, implementation could prove to be very cumbersome. Two key difficulties arise at the outset: 1) pricing of the risk-based fee and 2) flexibility of the fee to update as portfolio risk changes. If a fee is underpriced with respect to risk, then riskier firms will effectively be subsidized for incurring extra risk. This problem can be resolved by the government writing a put option priced at a firm's outstanding claims with the fair premium designed to increase with volatility increases and decrease with capital increases [xiii]. Therefore, the fee will be effectively lowered by reducing risks. Consequentially, it is important that the government is able to quickly adjust to changes in a firm's portfolio; otherwise firms will simply increase risk after the fee has been set. This dilemma is reduced by the PPP's inclusion of *ex ante* portfolio and capital constraints; resembling the standard insurance model of paying risk premiums and satisfying covenants against risk taking[xiv].

After implementation, another difficulty will arise when calibrating the constraints and fees so as not to eliminate the benefits obtained through money-claims. For portfolio restrictions the safety needs to be weighed against the benefits of maturity transformation realized by a level of risky investments. Next, is to set capital requirements at a level consistent with the PPP's purpose of generating additional investments capital beyond traditional banking[xv]. So, requiring money-claim entities to reserve too much capital would infringe on this goal. However, since run externalities are absent in the PPP, moral hazard would increase if the capital requirements were too low. Ultimately, capital requirements should be proportional to portfolio risk in order to strike the appropriate balance.

Existing regulations may provide some level of support to shadow banking, but they are ultimately incomplete. Under Dodd-Frank, nondepository banks would only be eligible for support in extreme circumstances[xvi]. Furthermore, both *ex ante* constraints and *ex post* support are needed to curb moral hazard, run externalities and optimize the effectiveness of maturity transformation. The PPP regime mirrors the successful regulations imposed on bank. Careful defining of the term money-claims should prevent over-regulating and also chances of regulatory arbitrage by under-regulating. The PPP is just one of many proposed regulatory schemes for shadow banking; by the end of the year the FSB will have submitted its recommendations.

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3 1 / 2 Job Hiring Practices That Can Skew Your Qualifications

Hiring practices have come a long way over the past century. There are now stringent laws which prevent hiring discrimination based on race, color, religion, sex, national origin, age, disability or genetic information.[1] As a result, when an individual submits a job application, they should be evaluated based on their qualifications. Unfortunately, there are still hiring practices that may prevent a qualified person from acquiring a job.

1. Excluding the Unemployed

Some employers advertise that the unemployed need not apply.[2] It is absurd, however, to say that being unemployed can make someone unqualified to work without taking other factors into account. Accordingly, this hiring practice is banned in some states[3] and has a federal platform against it.[4] Furthermore, this hiring practice disproportionately impacts African Americans, mothers returning to the workforce, and older workers.[5] Given that neutral employment practices resulting in disproportionate negative effects on applicants of a particular race or sex are prohibited,[6] it is difficult to understand why employers can turn away the unemployed.

1.5 Working for a company with a sketchy non-compete agreement

Current employment, however, may not shield applicants from discriminatory hiring practices as evidenced by the current eBay litigation.[7] On November 17th, 2012, the Department of Justice and the State of California sued eBay for entering into an illegal, anticompetitive hiring pact with Intuit.[8] Essentially, even if someone has a job at eBay, their employment status serves as a source of discrimination if they apply for a job with Intuit.[9] eBay and Intuit are not the only companies who have engaged in these types of agreements.[10] In September 2010, Adobe, Apple, Google, Intel and Pixar were also implicated in similar litigation and reached a settlement with the government in which they agreed not to make any further such hiring agreements.[11]

2. Nepotism

Alas, an individual who is either unemployed or works for a company with a questionable non-compete agreement, can try the nepotism route. Nepotism is the practice of showing favoritism towards close friends or family members.[12] This past summer, the Justice Department's inspector general found several instances of federal employees attempting to hire family members.[13] This is the third investigation in the last decade that has found nepotism within the Department of Justice.[14] On one hand, it is great that the government is investigating these instances of nepotism, but on the other hand, this is the third investigation that has found these same results. One has to wonder why nothing is changing when the department has been caught three times.

3. Credit Checks

With an excellent credit score, an individual may become the owner of a brand new shiny job. As of 2011, 60% of employers performed employment-related credit checks either for some or all of their employees.[15] In fact, several states have banned credit checks because the practice is so prevalent.[16] The Equal Employment Opportunity Commission's website indicates that pre-employment inquiries about credit rating or economic status should generally be avoided unless an employer can show that the information is essential to the particular job because they tend to impact minorities and females adversely.[17] The exception carved out for credit checks that are "essential to the particular job in question"[18] seems like a way for highly skilled business men and their lawyers to justify pre-employment credit checks. Similar to the other hiring practices in this article, a credit check alone does not indicate an individual's ability to perform a job. An accountant with a low credit score is not necessarily un-qualified to manage money for a business. A low credit score may simply indicate a stint of unemployment, or any number of situations unrelated to job qualifications.

There is still hope!

Hiring practices that exclude the unemployed or involve sketchy non-compete agreements, nepotism or credit checks are disconcerting for potential job applicants. States, however, are taking action against these types of practices.[[19]] On a local level, employers are realizing that hiring discrimination does not increase efficiency and then developing new approaches to hiring.[[20]] Matthew Mellen of Mellen Law Firm, uses a reality TV approach to hiring.[[21]] He advertises open positions and then applicants are allowed to work at the firm for a one or two week period performing actual associate work resulting in the "top associate/applicant" receiving the job.[[22]] Mr. Mellen's hiring practice is definitely atypical but maybe society needs atypical to avoid discrimination and hire individuals who are actually qualified for the job.

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WEEDING OUT THE ODDS: ANALYSIS OF OREGON AND WASHINGTON'S CONSTITUTIONAL AMENDMENTS TO LEGALIZE RECREATIONAL USE OF MARIJUANA

Far away in the backdrop of the 2012 Presidential election, laid a secondary story that would make for primetime headlines on any other given day. That particular secondary story was none other than the states of Colorado and Washington successfully passing constitutional amendments that legalized recreational use of marijuana. Unlike California and fifteen other states, citizens in Colorado and Washington will not be required to have a medical prescription from a physician to legally possess marijuana.[i] Instead, personal possession of up to an ounce of marijuana will be legal for anyone who is 21 years of age or older.[ii] Though the passing of the law reflects a growing national support for measures that either legalize the drug or aim to reduce the criminal punishments associated with it, federal law still dictates that marijuana is an illegal substance. Consequently, who wins? Does the argument of states as 'laboratories' supersede the notion of federal preemption, or will the Department of Justice (DOJ) and the Obama Administration swoop in and overturn the will of the states' citizens? For the states, winning this legal battle has much to do with the monumental financial benefits it stands to gain.

The Economic Implications

The economic impact of legalized marijuana is projected to be a substantial financial savior for many states that are fiscally stretched thin and unable to properly fund many of their programs. The national marijuana market is estimated to be worth between $10 billion to over $120 billion a year.[iii] An

August 2012 report suggested that Colorado stood to generate nearly $60 million in revenue for the state in the first year of legalization and eventually $100 million dollars after five years.[iv] Colorado would institute an excise tax of no more than 15% to be applied to marijuana produced by a cultivation facility, a state sales tax of 2.9% and an additional local sales tax.[v] The states would only permit state-licensed stores to sell marijuana and thus subsequently tax them.[vi] Of the tax revenue, Colorado has already pledged the first $40 million to construction of needed schools, which will result in the creation of new jobs.[vii]In addition, both states project to gain instant savings via reduced criminal costs. In Colorado about 10,000 and in Washington about 13,000 people per year are arrested for marijuana offenses.[viii] Proponents also believe that legalizing marijuana will reduce the funds criminal organizations receive from the previously illegal product and will allow law enforcement agencies to focus it's resources on more violent crimes than possession of marijuana.

The Legal Controversy

For the many that welcome DOJ intervention, they believe that this is an issue of morality and legal precedent. That a failure to challenge the legality of such legislation counts as a travesty in the battle of keeping a drug perceived to be harmful out of reach to individuals. The Controlled Substances Act (CSA), a federal statute, classifies marijuana as a "schedule 1" substance on par with heroin; making it illegal.[ix] Thus, the federal government has the authority to block the states' legislation by way of preemption. Federal law has the luxury of trumping state law, simple as that. If the Obama administration stands against the amendments and the states do not relent, the controversy could potentially make its way up to the Supreme Court of the United States.

As many believe that the federal government would rely on marijuana's classification of a "schedule 1" substance under the CSA, some proponents are in favor of trying to reclassify marijuana. Recently, federal judges in Washington, D.C. heard oral arguments in the case Americans for Safe Access v. Drug Enforcement Administration.[x] The plaintiffs are arguing that marijuana's medical benefits dictate that its current classification needs amending. The federal government argues that any such studies that support the medical efficacy of marijuana are not rigorous enough to warrant a classification change.[xi]

So what's the likely outcome? Should hippies, medical believers, and citizens of these two states rejoice in their newly voted upon gold mine? In my opinion, not so much and certainly not so fast. Some believe that the Obama administration's silence on the issue is indicative of their positive lean towards supporting the measure. However, lest we forget, 2012 was an election year. Coincidentally, Colorado and Washington were both crucial swing states. Political savvy would urge any candidate to reserve any form of condemnation for a populous opinion until after the election season. Now that the election has passed, it's likely that the federal government will restrain the states from progressing beyond the medical marijuana loophole that has been widely accepted. In 2010 California unsuccessfully tried to pass a similar effort, Proposition 19, which would have legalized recreational use of marijuana.[xii] The current Attorney General Eric Holder then stated that he would "vigorously enforce" federal prohibition on carrying, growing, and selling marijuana if the proposition passed.[xiii] Thus, it's probable that the Obama administration and the DOJ would take a similar stance.

The curiosity of gaining revenue in an economy where so many, on both the federal and state level, have scratched their heads in dismay in trying to create sustainable financial growth is as appealing of a story as any. Why increase the tax rate when one could simply broaden the tax base? Also, what ever happened to the concept of states being 'laboratories' and maintaining some level of autonomy that does not bend to the will of an "overbearing" central government? Then again, morality and federal preemption should very well take precedent in this situation for very good reasons. The financial and legal implications of this dilemma are monumental. No matter which side you take, this secondary story will soon be a leading headline worthy of national debate.

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UBER BATTLE: CABBIES VS. STARTUP

Those who have hailed a taxi or used public transportation can attest to the downsides of urban transportation including dirtiness, crowdedness, and unreliability. Since its founding in 2010, San Francisco-based startup Uber has aimed to appease the unsatisfied market of urban dwellers that desire easier, cleaner, more dependable transportation than has been available. Uber operates as "your on-demand personal driver" allowing users to hire and pay the nearest of the company's "sleek black cars" (think Lincoln Towncar) as a chauffer through the users' mobile phones. Unsurprisingly, Uber has clashed with regulators, cabbies, and others who claim that Uber is skirting existing regulations that protect customers. Cities including Chicago, Washington, D.C., and New York City have proposed or threatened to propose regulations that would effectively run Uber out of their respective towns. In addition, cab drivers in several cities have filed class action suits alleging that the company is engaging in "unfair business practices." Many cities Uber has or plans to expand to have regulations that govern taxicab operation and separate regulations that govern livery ("black car" and limo) services. Taxicab regulations include such components as standardized fare calculation, operational requirements (like having seatbelts, giving receipts, and accepting credit cards), and a limit on the total amount of cabs to be licensed to operate, while livery service regulations are less restrictive. Uber has encountered its legal issues because its service is a taxicab-livery service hybrid. Regulators and taxicab companies claim that Uber is skirting both sets of regulations and thus gaining a competitive advantage over both industries.

Uber connects users with the nearest available car in their network through their mobile application that tracks the user's location and trip by GPS, charges fare and tip to their app-linked credit card, and allows both drivers and riders to rate each other at the conclusion of the ride. In just a few seconds, a user can view a map of available vehicles, request a ride, and receive an estimated pickup time (usually less than 15 minutes). Uber's network of vehicles is composed of vacant livery service cars who are alerted of nearby ride requests and have 15 seconds to respond before the option moves to the next closest vehicle. Users are picked up, request a destination, and their trip is tracked through Uber's GPS technology. Uber does not publish its exact formula for calculating fares, but states that "[p]rices start with a base fare. After that, we charge depending on speed. When travelling at over 11mph, we charge a distance fee. Below 11mph, we charge a time fee." The company's fare calculation also includes proprietary algorithms that measure location and quantity demand, which have caused fares to increase to two or three times regular fares in the highest demand times (users are notified through the Uber app if fares exceed 2X regular fares). Uber also charges an automatic 20% gratuity to each transaction, which is passed on to the driver. The startup is further removed from regulation as it technically does not run any car services, but merely funnels customers to existing ones. Uber's opponents include regulators, cabbies, and taxicab and livery services. Uber's cited "offenses" have ranged from suspect fare calculations and improperly operating livery services as taxicabs to failing to provide customers with printed receipts. After initial clashes, several cities have proposed regulations that would outlaw Uber's operations. The City of Chicago's proposed rule PV1.10 would preclude Public Passenger Vehicles ("PPV") from charging non-prearranged fares "calculated based on distance and/or time travelled." PPVs operating in this way, such as Uber's, would be considered unregistered taxicabs and could not legally operate. Washington, D.C. has treated Uber like a not-so-welcome guest by first claiming that black cars could not charge by time and distance. When that argument was won by Uber, Washington's Taxi Commission ran a "sting" operation impounding an Uber driver's car for not issuing a printed receipt. In September the Commission proposed new regulations including prohibiting sedan services with less than 20 vehicles, like Uber, from operating within the city. Uber fought this proposal by mobilizing a Washington user protest that has resulting in the Taxi Commission stalling its actions. A group of San Francisco cab drivers have filed a class-action suit against Uber claiming that the company is illegally operating as a taxicab company to the detriment of the cities taxicab drivers. Taxicab and livery service companies have followed suit by filing claims in Chicago.

So is Uber a regulation-dodger aimed at destroying the taxicab industry and the livelihoods of cabdrivers? Yes and no. Uber *is*essentially running livery services as taxis. They are a disruptive technology startup that is operating at the fringe of regulation like no other company in the industry has before. Depending on the interpretation of various city regulations, Uber may indeed by *just*outside of violations. However, the vast majority of concerns and claims against Uber are the result of fear mongering and are unfounded. Regulators and taxicab companies claim that taxicab regulations exist for public safety and that by evading them Uber is a constant danger to the public. However there is much evidence to the contrary. Drivers are better off, being paid more due to higher fares, allowing them to drive safely. Customers cannot jump out of the car to avoid fares because their credit card is linked to their account. Uber's demand algorithms adjust rates in "surge" times until they reach the equilibrium where supply equals demand, and customers are clearly willing to pay a premium for punctual classy transportation. The ability of both drivers and passengers to rate each other ensures at least adequate driver service and polite customer behavior. These checks and balances are not available in regular taxis. The opposition Uber has faced in almost every city it has expanded to stems from the fear of incumbent taxi and livery service companies who are threatened by Uber's superior product. Uber satisfies the market failure that regulations have caused and which fails to connect willing customers with available transportation. Because of regulations standardizing fares and limiting the type and area of service, the only way for cab drivers to make more money is to complete trips faster and to pick up passengers as quickly as possible. This leaves only the most densely populated areas of cities with consistent cab service. With Uber, no matter where you are in a serviced city you can find a guaranteed ride.

AS ARGENTINA FACES ANOTHER DEFAULT, KITCHENWARE A LAST RESORT

Earlier this month, hundreds of thousands of disgruntled Argentines flooded the streets of Buenos Aires to protest the embattled presidency of Cristina Fernandez de Kirchner (CFK). [i]. The anti-government demonstrations, dubbed "the Protest of 8N," were held across the country on November 8th and are estimated to be the country's largest in a decade.[ii]. With CFK's approval ratings falling from 64 percent in October 2011 to only 34 percent today, this month's protests reflect the urgency – and popularity – that now characterizes the opposition movement. [iii]. But with the country's ears still ringing from 8N's boisterous *cacerolazo* (a demonstration technique used in Argentina that involves the banging of pots and pans), we may pause to consider the question – why is Argentina missing out on Latin American growth?

A century ago, Argentina's future looked as bright as any in Latin America. [iv]. An endless expanse of tillable land, a vibrant and continuously replenished immigrant workforce and rich deposits of oil, precious metal and other natural resources throughout the countryside all indicated that the continent's second-largest nation might soon become its most powerful. Throughout the 20th century, though, Argentina found itself mired in persistent political turmoil, recurring military coups and cycles of statist regime changes – all told, Argentina experienced six coups from 1930 to 1976. [v]. After a failed neo-liberal experiment in the 1990s led to a massive economic crash in 2001, Argentina rededicated itself to a new brand of Peronist populism developed by Néstor Kirchner and championed today by his widow, President Cristina Fernandez de Kirchner. [vi].

It is indeed true that Argentina's dramatic and unsteady political history simply failed to establish the sort of security necessary for long-term economic growth; however, in Latin America, political tumult is by no means unique to Argentina. In fact, countries with much more recent and even ongoing social and political conflicts are currently experiencing growth while Argentina is losing steam. Brazil is booming and Argentina's western neighbor, Chile, has been heralded as the continent's most stable economy despite a similarly troubled political past. [vii]. Colombia and Mexico are also enjoying a periods of rapid economic growth and upticks in foreign direct investment (FDI) despite widespread, ongoing violence in both countries. [viii]. The question then becomes – if regional counterparts with similar political histories and hurdles are enjoying growth, why is Argentina moving in the opposite direction?

To the demonstrators participating in 8N, the blame rests squarely on the shoulders of the current administration and its leftist economic policies. [ix]. In order to finance massive subsidies and growing public expenditures, the Kirchner administration has undertaken a series of dramatically protectionist measures to control and finance the Argentine economy within the last decade. In 2008, CFK's administration nationalized nearly $30 billion in private pension funds. [x]. In 2009, the government expropriated the country's largest airline, Aerolineas Argentinas, from Spanish company Marsans. [xi]. Most recently, the Argentine government again expropriated a foreign-owned company, seizing a majority stake in Argentina's largest oil company, YPF, from Spanish-owned Repsol. [xii] Not surprisingly, FDI in Argentina fell from 3.5 to 2.4 billion dollars in the first half of 2011, even as Latin America and the Caribbean saw an overall FDI increase of 54 percent. [xiii]. To highlight how dramatically averse the world market has become to investing in Argentina – in the same time it took Argentina to lose out on 30 percent of its FDI, Brazil and Colombia saw FDI increases of 157 percent and 91 percent, respectively. [xiv]. Furthermore, if the routine expropriation of private industry is not enough to send foreign investors running for the Andes, government regulations within Argentina further limit the country's ability to access the world market. Notable policies implemented by CFK include highly restrictive import regulations and the wholesale prohibition of purchasing foreign currency by Argentine citizens. [xv]. To make matters worse, Argentina has been loudly criticized for falsifying economic data and masking its skyrocketing inflation – so much so that the country now faces the first-ever International Monetary Fund censure for falsifying economic data. [xvi, xvii] Today, it appears that these measures have caught up with the Argentine economy and that its citizens have noticed. A sluggish economic performance in 2012 – marked by a decline in growth from 8.9% in 2011 to just 2.4% in 2012 – indicates that CFK's policies are not paying off. Still, CFK is remains characteristically defiant. Though denied by CFK herself, rumors persist that the president is working with the legislature to modify the Argentine constitution and extend her presidency by another term, much like Venezuelan leader Hugo Chavez did earlier this year. [xviii]. CFK's insistence on hostile protectionism as a means to retain political power and sustain her administration's widely criticized spending habits is damaging Argentina's ability to capitalize on all of its natural economic advantages. The international community is losing patience and the Argentine people are steadily growing tired of the disastrous effects such policies have had on its once-promising economy. To the critics and large swaths of the Argentine population alike, the outlook for Argentina is gloomy. [xix, xx].

In court, Argentina has done little to combat its worsening reputation and had recently found itself between a rock and a very hard place. Just last week, Argentina bristled at a U.S. District Court ruling that demanded the country pay $1.3 billion to Argentine national debt holders still holding out from a 2001 sovereign debt restructuring. [xxi]. Argentina vowed to appeal the decision and, in the combative fashion that has come to characterize CFK's administration, criticized the ruling as a form of "judicial colonialism" perpetrated by foreign financial "vultures." [xxii]. Dramatics aside, Argentina now officially finds itself standing in the shadow of yet another international debt default – should it abide by the U.S. decision, payment could force them to default on the accepted restructured debt from 2001; should it flaunt the international courts, its status as a market pariah will worsen dramatically. [xxiii].

All of this, taken together, further calls into question the stability and legitimacy of Argentina's government and suggests that Argentina is quickly becoming a *market-non-grata* for highly sought-after foreign investors. [xxiv].

Unfortunately, as CFK and her advisors scramble to effectively respond to latest development in its ongoing debt battle, it is difficult to imagine just how they will think of a solution as the cacophonous clamoring of pots and pans grows ever-louder just outside their office windows.

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xxiv. http://en.mercopress.com/2012/07/24/argentina-the-world-s-most-protectionist-country-says-world-bank-trade-report

FIDUCIARY DUTIES: LEGAL OBLIGATIONS OR INVESTORS' IMAGINARY FRIENDS?

Founded in 1983, Ancestory.com is the world's largest family history website that provides access to more than ten billion records and thirty eight million family trees.[i] Recently, the London based private equity firm Permira Advisers LLP agreed to purchase the company at a valuation of $32 a share.[ii] The $32 amount represents a premium of 10% based on the company's price at the time the deal was announced. [iii] However, many shareholders are unsatisfied and upset.[iv] In fact, many shareholders have filed suit against the company.[v] Principally, these suits allege that the Board of Directors of Ancestry.com breached their fiduciary duties to stockholders by failing to obtain a higher price by adequately shopping the company and that the decision to consummate the sale was not in the best interest of shareholders, rather that of the Board of Directors.[vi]

Attorneys representing pension funds and shareholders that own equity in Ancestry.com allege that Spectrum Equity Investors, one of Ancestry.com's largest shareholders, wrongfully influenced company directors to accept the Permira backed $32 a share offer.[vii] Moreover, attorneys representing the pension fund contend that there was a separate offer to purchase the company for $35 per share.[viii] Consequently, those suing Ancestry.com believe there were and still are more financially advantageous options that would better serve the interests of those who own a piece of the publicly traded company.[ix] In fact, multiple analysts have valued the stock in excess of $32 per share.[x] One particular analyst from a reputable investment-banking firm valued the price point at $45 per share.[xi] Additionally, the company has been financially successful.[xii] The total revenue for the second quarter of 2012 was $119.1

million, which was an increase of 18% compared to the earnings in the prior year's second quarter.[xiii] Given these financial results, the board of directors' decision to sell Ancestry.com may seem inept in pursuit of acting in the best interests of shareholders.

A company's Board of Directors has a special relationship of trust, fiduciary obligations, that it owes its shareholders. "Three broad duties stem from the fiduciary status of corporate directors; namely, the duties of obedience, loyalty, and due care."[xiv] The duty of obedience obligates adirector to avoid taking actions that are not within the scope of the powers of a corporation as defined by its charter or the laws of the state of incorporation.[xv] The duty of loyalty obligates a director to act in good faith and not allow personal interests to supersede the interests of theshareholders.[xvi] The duty of due care obligates a director to be diligent and prudent in managing the corporation's affairs.[xvii] Perhaps it is coincidental or unworthy of note that the CEO and CFO will continue to maintain a majority of their equity stake in the company post acquisition and that Spectrum, owner of 30% of all outstanding shares, will remain a significant investor.[xviii] Or perhaps given the company's financial strength, the Board of Directors violated their duty of loyalty and care in failing to obtain a better deal than $32 per share. Perhaps the Permira deal resulted in a more favorable ownership stake benefiting the Board of Directors and Spectrum investment group versus all shareholders.

On it's face, the scenario plainly brings into question the ability of the government to protect the interests of investors from the harms of a self-serving board of directors/corporate leaders. However, the resolution of the Ancestry.com scenario also fits more broadly into the larger discussion of Social Security and the nation's growing debacle of how to ensure that America's elderly remain financially stable versus destitute. In particular, pension fund participants whose plan invests in Ancestry.com and other corporations can be severely impacted by inadequate valuation and selling of a company's shares. Pension funds (401k plans, Defined Benefit Plans, etc.) are the cornerstone of many Americans' retirement reserves. Thus, even the slightest reduction of an individual's return on their investment can directly affect their ability to maintain their way of life once they are retired. In fact, many pension plans rely on the profits derived from their investments to pay off the benefits a company owes to its retired employees.[xix] A reduction in the expected return of an investment, such as Ancestry.com, could significantly stifle a company to the brink of bankruptcy.[xx] If this were to happen, not only would employees feel the pinch but potentially so too could all Americans. Many corporations that are unable to cover its unfunded benefits liabilities owed its retirees can be "bailed out" via the government Pension Benefit Guaranty Corporation (PBGC).[xxi] Unfortunately, the government must foot the bill for any unfunded pension plans it rescues from failed companies.[xxii] In 2010, The PBGC had a total of $102.5 billion in obligations and $79.5 billion in assets.[xxiii] Even though the debt to asset ratio is clearly unbalanced, the government must find a way to provide the rescue retirement benefits. Simply put, the money has to come from somewhere. Sadly, the likely source of money would come from either an increase in the federal budget or an increase in taxes. These options arguably represent horrible choices for a country already in economic despair.

Just as parents dutifully discourage children from having imaginary friends, the Ancestory.com scenario beckons the court to do so as well. The fiduciary implications need to be heavily considered with the utmost scrutiny in light of its broader implications. More than serving as symbolic rhetoric, analysis of whether the Board of Directors have breached their legal fiduciary duties is monumental. The protections of fiduciary duties personify the government's promise to protect investors along with all of their hopes and dreams that come attached to their hard earned money.

[i]http://ir.ancestry.com/releasedetail.cfm?releaseid=714983

[ii] Id. at 1.

[iii] Id. at 1.

[iv]http://www.businessweek.com/news/2012-10-26/ancestry-dot-com-sued-over-1-dot-6-billion-permira-buyout-deal

[v] Id. at 1.

[vi] Id. at 1.

[vii]http://finance.yahoo.com/news/robbins-umeda-llp-announces-investigation-205500013.html.

[viii]http://www.bloomberg.com/news/2012-10-26/ancestry-com-sued-over-1-6-billion-permira-buyout-deal.html?cmpid=yhoo.

[ix] Id. at 1.

[x]http://finance.yahoo.com/news/robbins-umeda-llp-announces-investigation-205500013.html

[xi] Id. at 1.

[xii] Id. at 1.

[xiii] Id. at 1.

[xiv]Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 719 (5th Cir. 1984).

[xv] Id. at 719.

[xvi] Id. at 720

[xvii] Id. at 720.

[xviii]http://finance.yahoo.com/news/robbins-umeda-llp-announces-investigation-205500013.html

[xix] http://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.html

[xx]http://www.boston.com/news/nation/washington/articles/2009/03/30/pension_insurer_shifted_to_stocks/?page=full

[xxi]http://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974.htmlcorporation.

[xxii] Id. at 1.

[xxiii]http://www.washingtonpost.com/wpdyn/content/article/2010/11/15/AR2010111507470.html

ALTERNATIVE DISPUTE RESOLUTION: AN EXERCISE IN INTERPRETATION OR A LEGITIMATE DISCUSSION OF THE MERITS?

As a way to efficiently resolve cases without drawing on judicial resources, courts are starting to provide litigants with the opportunity to engage in alternative dispute resolution.1 ADR programs vary from court to court but Maine provides an example of how a mandatory ADR program can work.2 Maine has a presumptive ADR program for its civil cases but there are some exemptions or opportunities for waiver.3 Rule 16b requires at least one ADR conference which is where the parties engage in mediation, non-binding arbitration or early neutral evaluation facilitated by a neutral agreed upon by the parties.4 While in the past, an ADR conference may have meant begrudgingly sitting across from an opponent that had no interest in coming to an agreement, technology proposes the online dispute resolution ("ODR") option.5 Both face to face and online ADR have their advantages and disadvantages, however, ODR offers parties the opportunity to discuss the merits without the distractions associated with face to face ADR.

The benefit of face to face ADR is the ability to observe your opponent in person, react to their body language, and physically control the situation. An experienced attorney can fluster his opponent a few different ways. Firstly, the attorney can take control of the pace of the discussions, speeding through disadvantageous issues and focusing on advantageous issues.6 Secondly, confidence goes a long way.7 If an attorney conducts herself in a manner that conveys mastery of the subject, then the opponent may second guess them self and be more willing to give in.8 Thirdly, an attorney has the opportunity to tell when to move on to a new topic.9 The attorney can look into the eyes of the other attorney or observe their crossed arms and legs, and realize that the bulldog tactic may not be working.10 The attorney can switch to a trusting character. For example, people are often more comfortable in situations where they have contact with one another.11 A mere handshake at the beginning of a transaction if done correctly can trigger positive feelings.12 Essentially, engaging in face to face ADR for the experienced attorney well versed in reading and reacting to the body language of their opponent can be quite beneficial. The problem with face to face ADR, however, is that while an attorney is interpreting body language, the actual merits of the case may not garner enough attention.

There are also a few aspects that can easily make a face to face negotiation proceed badly. ADR involving non-citizens from foreign countries could lead to misinterpretation based on negotiation styles.13 While Japanese negotiation is often conducted in a non-confrontational manner, Russians view negotiation as a debating match in which strict attention is paid to detail and knowledge of facts.14 Furthermore, even if there is not a cultural barrier based on nationality, racial differences can hamper an ADR session as well.15 The race of the mediator or the negotiations can provoke pre-conceived notions about the willingness to agree and trustworthiness.16 These notions along with general stereotypes and misunderstandings between people of different races, can hurt the ADR process.17 Lastly, face to face negotiations can be a charged atmosphere and it is reasonable that removing the face to face elements allows parties to cool down and take more time to think about what they want to say instead of just blurting out phrases.18 Essentially, face to face ADR has the potential to be unsuccessful based on misinterpretation and false beliefs related to race and culture.

Face to Face ADR can cut either way for a client. On one hand, a hand shake and a kind face with a controlling demeanor can facilitate a positive agreement for the client.19 On the other hand, misunderstanding body language, culture or pre-conceived racial notions, can lead to a stand-off that results in taking a case to trial that was easily resolvable.20 Online dispute resolution is not the perfect solution. Negotiating using technology can seem impersonal but it is the best option because it allows each side to present their case and focus on the merits of the cases rather than using physical presence to manipulate a situation.

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1 *See* Me. R. Civ. P. 16B

2 *Id.*

3 *Id.*

4 *Id.*

5 Sarah Rogers, Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence, 24 Ohio St. J. on Disp. Resol. 349 (2009).

6 Charles A. Goldstein & Sarah L. Weber, The Art of Negotiating, 37 N.Y.L. Sch. L. Rev. 325 (1992)

7 *Supra* note 5

8 *Id.*

9 *Supra* note 6

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Supra* note 5

16 *Id.*

17 *Id.*

18 *Id.*

19 Trial Communication Skills § 2:2 (2d ed.)

20 *Supra* note 5

TAKE YOUR BUSINESS ELSEWHERE: WHY THE FEDERAL CORPORATE INCOME TAX IS DESTROYING OUR ECONOMY

The national debt of the United States now exceeds $16 trillion. Current estimates suggest that the present year's deficit will amount to approximately $1.1 trillion, a negligible improvement upon 2011's $1.3 trillion deficit. The present unemployment rate is one of the highest of the past sixty years, with approximately eight percent of Americans unable to find work. Unless significant changes are made in both federal income and expenditure, the economic livelihood of future generations is bleak.

Searching high and low for a remedy to our nation's economic woes, many politicians and businessmen have set their sights on the federal corporate income tax. Hoping to simultaneously create jobs and stimulate our economy, individuals from across party lines, including Barack Obama and Mitt Romney, have suggested that we lessen the federal taxation of corporate profits. A small group, though, including individuals such as Gary Johnson and Ron Paul, are of the opinion that a mere reduction of the federal corporate income tax rate would be insufficient. Instead, they propose eliminating the federal corporate income tax in its entirety.

Despite having the highest federal corporate income tax rate in the world, the Center on Budget and Policy Priorities and the Office of Management and Budget reports that, in 2011, only eight percent of federal tax revenue was drawn from the corporate income tax. The main source of federal tax revenue lies with personal income and payroll taxes, which constituted nearly 85 percent of the federal tax revenue for that same year.

Yet, how is it that reducing or eliminating the federal corporate income tax would help stimulate our economy? After all, when discussing possible solutions to our economic plight, many suggest cutting federal spending or raising taxes, rather than the seemingly counter-productive notion of reducing or eliminating a source of federal revenue.

The argument in favor of reducing, or eliminating, the federal corporate income tax begins with the concept that taxation of a corporation's profits is essentially a punishment on productivity. Taxing corporations with the highest profit margins most heavily, which our current federal corporate tax policy does, stifles the incentive for corporations to succeed and expand.

Many individuals mistakenly turn to the federal government in search of a solution to our nation's high unemployment rate. Yet, it is not the federal government that creates jobs, per se. Businesses, small and large, are responsible for creating and providing jobs. Due to the federal corporate income tax, though, businesses are currently forced to part ways with a significant portion of their resources. These same resources, were corporations allowed to use them, could be used to expand, hire additional employees, pay existing employees higher wages, provide increased returns to shareholders, and lower the prices that consumers pay for goods and services.

One of the most fervently expressed gripes about our current political environment is that our government no longer serves its purpose of representing the interests of the American people. Aside from serving as an impediment to job creation and economic stimulation, the federal corporate income tax is largely responsible for inviting corporations into the political spectrum. Corporations sink vast sums of money into efforts aimed at leveraging legislation favorable to their interests. In 2003, after reincorporating in Bermuda, Tyco paid Jack Abramoff's lobbying firm $150,000 per month for its successful assistance in preventing the passage of legislation which would subject the company to U.S. taxation which would have amounted to nearly $4 billion.

Despite the significant control corporations wield over our government's policy-making, businesses have taken further, and more drastic, measures in order to avoid tax liability. With the world's highest federal corporate income tax rate, it should come as no surprise that the United States is perceived as exceedingly unwelcome to big business. Not only are we failing to invite foreign businesses to American soil, but many of our own businesses have moved their operations out of the United States and into countries with more favorable tax rates.

For example, technology giant Google has begun shifting portions of its business to Ireland, to a subsidiary entitled Google Ireland Limited, where they are greeted by the comparably minuscule corporate tax rate of 12.5%. Google Ireland Limited employs approximately 2,000 Irish citizens, jobs that would have been provided to American citizens were it not for our federal corporate income tax rate being twice that of Ireland.

Though 2,000 jobs may appear negligible in light of the millions of unemployed Americans, Google is far from the only corporation to look elsewhere when attempting to expand. In fact, Facebook, Amazon, Intel, Microsoft, Hewlett Packard, and others have all begun following similar tactics to those of Google as a means of lessening tax liability. According to the Wall Street Journal, over two million jobshave been moved overseas. Moreover, in May of 2011, JPMorgan Chase and Co. reported that United States companies were holding approximately $1.4 trillion in undistributed foreign earnings.

Policies that serve to outsource American jobs are contradictory to our nation's economic needs. Reducing or eliminating the federal corporate income tax would allow the United States to be competitive in the global market, bringing our own businesses back home and drawing foreign corporations to our soil. The increased payroll, personal income, dividend, and capital gains taxes drawn from the creation of new jobs would serve to replace the revenue previously created by the federal income tax. The federal government may not create jobs, but they do have the power to pass legislation that will foster an environment in which millions of jobs could be created in the immediate future.

ELECTION 2012 – BUSINESS LEADERS AND THE SOCIAL CONTRACT REFERENDUM

Next week's presidential election is not a simple referendum on Barack Obama's first term in office, nor is it another routine debate over the appropriate size and role of the federal government. The contest between Barack Obama and Mitt Romney is a referendum on the American social contract as we know it. This November, the electorate will answer a meaningful question – to what extent do our country's most successful captains of business and industry have a contributive, financial duty to the maintenance of the American economy?

The modern understanding of the American social contract first took form with Franklin Roosevelt's New Deal, passed in the wake of the Great Depression. In FDR's view, the government could only continue to fulfill its obligation to those it governed by securing some measure of economic protection for its citizens. "As I see it, the task of government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order," FDR said in 1932, "Faith in America, faith in our tradition of personal responsibility, faith in our institutions, faith in ourselves demand that we recognize the new terms of the old social contract." [1]

From this sentiment, programs like Social Security and, later, Medicare, were born. FDR's program was one that called upon government and business to work together in the cause of establishing economic security for all Americans, particularly the working classes. And he was blunt about from where the financing for his newly devised social safety net would come. "The men who have reached the summit of American business life know this best; happily, many of these urge the binding quality of this greater social contract . . . They must, where necessary, sacrifice this or that private advantage; and in reciprocal self-denial, must seek a general advantage."[1]

President Obama has positioned himself as the torch bearer of America's new social contract, championing the idea that America's wealthy are obligated by civic duty to assist the government in the process of economic recovery. This election season, Obama has proposed higher taxes for the country's top earners as the agent of this cooperation. He has campaigned loudly on the principle that the nation's most successful business leaders "pay a little bit more," to help balance the budget and continue financing social service programs.[2]

This "little bit" includes an income tax hike for the top two tax brackets – an increase of 3% and 4.6%, respectively – and a 5% hike in capital gains tax for the same groups. It also involves hiking estate taxes and allowing the Bush tax cuts to expire.[3] Ideologically, Obama justifies his proposed tax increase in much the same way FDR did – not only with the assertion that added tax revenue with stimulate economic growth, but with a forcefully delivered rhetorical principle that such contribution is ultimately the patriotic obligation of the nation's wealthy. The now infamous "you didn't build that" speech, read in its entirety, serves as a neatly distilled version of Obama's social contract theory. "Somebody helped to create this unbelievable American system that we have, that allowed you to thrive," he said. "The point is that when we succeed, we succeed because of our individual initiative, but also because we do things together." [4] In Obama's view, those that profit from a free and prosperous society are obligated to return a measure of the gains to the government for the "roads and bridges," real and metaphorical, that they used to become successful. In turn, the government is obliged to reinvest this capital at the service of the American people, in education and research, entitlement programs and infrastructure.

Mitt Romney's platform reveals a markedly different understanding of the American social contract. The Romney campaign is driven by the idea that government must ease the tax burden for "job creators" who, along with the taxes they already pay, fulfill their civic obligation as the engines of economic growth alone. Distasteful to the expansion of entitlement programs, Romney favors a simultaneous cut in taxes and reduction in government spending. "This is ultimately a question about direction for the country – do you believe in a government-centered society that provides more and more benefits or do you believe instead in a free enterprise society?" [5]

Well in line with the Reagan era theory of trickle-down economics, Romney's social contract theory releases both the American businessperson from a heightened tax burden and the government from the financial obligation of expanding social service costs. Romney's ideology is the modern manifestation of the classic free-enterprise gamble – that a market only minimally influenced by government interference will provide the highest standard of living for the largest portion of its citizenry.

As we approach Election Day with these two competing notions in mind, the echoes of FDR's 1936 reelection campaign can be heard across the country. In the face of vehement opposition from industrialist rivals, President Roosevelt warned against those that would "deceive" [6] the American people into believing that the social contract comes without a cost and openly taunted the challenging Republican party. "I should like to have it said of my first Administration that in it, the forces of selfishness and of lust for power met their match. I should like to have it said of my second Administration that in it, these forces met their *master*." [6] Later that year, standing on the record of his New Deal and his vision for the new American social contract, Roosevelt defeated Republican challenger Alf Landon in a landslide, winning 98 percent of electoral votes. 7

On November 6, the American people will be presented with a similar referendum on the American social contract, on Roosevelt's New Deal and all that it has become. And while Roosevelt stood ready in 1936 to "welcome their hatred,”[6] today, President Obama asks only that the most wealthy, most successful and most accomplished individuals in the country “pay a little bit more.” Next week, it will be up to the American people to decide whether those individuals have a duty to do so.

1http://teachingamericanhistory.org/library/index.asp?document=447

2http://www.whitehouse.gov/the-press-office/2012/07/13/remarks-president-campaign-event-roanoke-virginia.

3http://www.cnbc.com/id/48739927/Stark_Differences_in_Ryan_Romney_Obama_Tax_Plans.

4http://www.youtube.com/watch?v=YKjPI6no5ng

5http://www.youtube.com/watch?v=JfTL9jZXIaw&feature=related

6http://www.youtube.com/watch?v=IjSTQwamo8M

7http://uselectionatlas.org/RESULTS/national.php?year=1936

WELFARE, INNOVATION AND GROWTH: THE PATENT PARADOX

Increasing intellectual property rights (IPR) poses a risk to both consumers and economic growth. The United States scored 4.9 out of 5 in 2005, up from 3.8 in 1975, according to the Park index for evaluating the strength of patent protection.[1] This trend has continued to gain strength, as evidenced by the over one billion dollars awarded to Apple for its infringement case against Samsung. Economic considerations dominate the arguments favoring this trend towards strong IPR, namely the "incentive to invent" theory. This rationale, however, falls short in its justification for continuing to strengthen IPR. Firstly, the "incentive to innovate" theory fails to discuss the implications stringent IPR have on consumers. Secondly, the Endogenous Growth Model demonstrates the role imitation plays in fostering economic growth. Finally, this article will examine a policy solution to these conflicting social and economic standpoints.

The "incentive to invent" rationale appears to satisfy capitalist ideals. This rationale relies upon the presumption that the propensity for a prospective inventor to invent would be increased by protection against imitators. This protection secures an inventor's investment of time and capital with the prospect of market control, thereby gratifying Lockean notions of property and profiting from the fruits of one's labor. This article will argue that, while IPR justification is valid, greater incentives for innovation and economic growth can be achieved by balancing IPR with appropriate levels of imitation; at the same time maximizing utility for society as a whole.

Effect on Consumers and Society Through Waste

Patent holders incorporate high levels of rent protection activities (RPA), to ensure rent is paid by imitators.[2] RPA discourage cumulative innovations, advancements on existing innovations, thereby forcing R & D towards horizontal innovations, essentially just differentiations of an existing patent.[3] For example, iPhone software and Android software are the result of horizontal innovations, they both achieve similar functionality but were developed independently (infringement suit aside) to avoid patent infringement. In contrast, vertical innovations, or cumulative innovations, resemble a step-by-step process of imitation followed by improvement (this process is discussed at length in*Competition, Imitation and Growth with Step-by-Step Innovation****[4]***). This process is analogous to "standing on the shoulders of giants," where previous ideas are seen as building blocks for future developments. To the degree that strong IPR allows only horizontal innovations among competitors, "incentive to invent" holds true, but how much do these innovations benefit society? Resources would be better spent advancing technology rather than simply developing similar technology a different way to avoid infringement. Society is ultimately left advancing at a slower rate than the equilibrium between imitation and IPR protection.

A company's goal is to reduce competition. IPR allow for horizontal innovations, so companies have been increasingly utilizing design patents as additional barriers to entry.[5][6] Design patents are the stylistic, in essence the fashion, components of a product that may be valuable to clothing companies, but do little to enhance the utility of a technology product. A company will invest in hoarding design patents, making it difficult for a competitor to avoid infringement, even after independent development. The adverse effects of incentivizing design patents in technology as quasi-RPA are twofold: 1) innovators will be discouraged from attempting enter the market due to an additional barrier and 2) societal advancements will be even further slowed. With the continuation of this trend, resources will be increasingly allocated away from utility enhancing R & D and placed towards fashionizing technology. Despite, its “incentive to invent” rationale, strong IPR create a number of disincentives for potential innovators.

Effect on Economic Growth

In contrast to strong IPR, the Endogenous Growth Model discourages disincentives towards imitation.[7] The Endogenous Growth Model relies on innovation to stimulate economic development,[8] so why are IPR an inefficient means for growth? When IPR are highly protected, monopolistic effects occur as a result of the high levels of RPA.[9]With strict IPR, patent holders will typically be the industry leaders, so by utilizing effective RPA they create barriers against competition giving them price control. This creates the monopolistic effect of unfair pricing with little incentive to innovate. Furthermore, it increases benefits for allocating funds into RPA instead of R & D. Aghion et. al. uses the Endogenous Growth Model to suggest some imitation will mitigate these monopolistic effects. The logic behind this idea is that through imitation competitors are placed on a more level playing field.

The ultimate result of the Aghion et. al. system is that the “top” will be in constant flux; terms as market leaders will be cyclical. In this competitive atmosphere resources would be better spent on vertical innovations instead of RPA. IPR protection will be sufficient to compensate investment through cyclical market leader profits. In fact, incentives for prospective inventors and start-ups will be increased by the greater prospect to be a market leader. In summary, economic growth depends on vertical innovation,[10] and the allowance of imitation improves the quality and rate of innovations.

Advocates for strict IPR protection argue that U.S. firms receive investments over firms abroad *because* of our strong protection and enforcement. If the U.S. were to reduce its IPR protection, the gap between domestic investments and investments abroad may shrink. However, more firms in close competition coupled with increased economic growth would mitigate investment risks. Consider the following relationships: 1) diversity reduces investment risk while lower IPR protection increases diversity among competitive firms; 2) economic growth reduces investment risk while lower IPR increases economic growth. These relationships would encourage a greater quantity of investments mitigating the potential loss to foreign innovators. Overall, the benefits from a policy encouraging some imitation with moderate IPR protection could greatly improve societal welfare.

Potential Policy Solution

After all this analysis, an important question still lingers, how can policy consolidate these issues? Ultimately the answer to this question rests with various taxes and subsidies regarding RPA, R & D, and imitation.[11] The strength of IPR in a country, the natural rate for imitation within a society, and the desirability of horizontal goods need to be balanced to determine the appropriate policy. RPA, being private solutions for patent holders, benefit social welfare when IPR protection is low.[12] However, U.S. protection is extraordinarily high. Hence, taxing RPA would be the most beneficial recourse to dissuade patent holders from obstructing potential innovations. Absent extremely high natural propensities to imitate, subsidizing vertical R & D would benefit the U.S. economy as well.[13] To a certain extent horizontal innovations also provide a benefit to consumers, so this benefit should be weighed against imitation subsidies.

Conclusion

Given the incredibly high, and increasing, IPR protection in the United States it is important to evaluate whether the “incentive to invent” is maximized through IPR protection. Consumers and society as a whole are adversely affected by strong IPR. Consumers may benefit from diversity of similar products through horizontal innovations, but this benefit is less than the benefit obtained from cumulative advancements. Strong IPR protection is supposed to create economic growth by incentivizing innovators. However, when the protection is overbearing, many vertical incentives are lost and monopolistic effects come into play obstructing economic growth, under the Endogenous Growth Model. U.S. policy has been to keep strengthening IPR, as evidenced by the large amount of damages awarded to infringement plaintiffs. A better policy would be to provide incentives for patent holders to forego RPA through close competition. Furthermore, actually providing some level of subsidies for imitation in R & D would vastly improve vertical innovation and further reduce monopolistic impacts of IPR. We are a long way from getting out of the "Great Recession," but IPR reform could go a long way towards building consumer morale, sustaining economic growth from within, and bringing back the vertical innovations that have propelled the United States to the forefront of the world's economies.

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[1] Angus C. Chu et. al., *Does intellectual monopoly stimulate or stifle innovation?*, European Economic Review (2012) 56, 727–746

[2] Lewis S. Davis and Fuat Sener, *Private patent protection in the theory of Schumpeterian growth*, European Economic Review (2012) 56 1446–1460

[3] Chu et. al. (2012)

[4] Philippe Aghion et. al., *Competition, Imitation and Growth with Step-by-Step Innovation*, Review of Economic Studies (2001) 68, 467-492

[5] Bruce Kugler, *A Fresh Perspective on Design Patents*, 38-JUL Colo. Law. 71 (2009).

[6] *U.S. Patent Statistics Chart Calendar Years 1963 – 2011*, U.S. Patent and Trademark Office: Patent Technology Monitoring Team (May 21, 2012, 6:53 PM),http://www.uspto.gov/web/ offices/ac/ido/oeip/taf/us_stat.htm.

[7] Philippe Aghion et. al., *Competition, Imitation and Growth with Step-by-Step Innovation*, Review of Economic Studies (2001) 68, 467-492

[8] Philippe Aghion and Peter Howitt, *A Model of Growth Through Creative Destruction*, Econometrica (1992) 60 #2, 323-351

[9] Lewis S. Davis and Fuat Sener (2012)

[10] Chu et. al. (2012)

[11] Lewis S. Davis and Fuat Sener (2012)

[12] Lewis S. Davis and Fuat Sener (2012)

[13] Lewis S. Davis and Fuat Sener (2012)

Bluebird: Walmart Wants To Be Your "Every Day Low Price" Bank.

Frustrated with your bank's surprise fees and minute interest rates? Shop at Walmart? You may find a solution to your woes in an unusual but convenient location: on the "Every Day Low Price" stores' shelves. Bluebird, the child of a Walmart and American Express partnership, will offer a prepaid, easy-to-refill, low fee debit account and card that aims to attract disgruntled bank customers and millions of "underbanked" households. The product is poised to change the banking industry (to the dismay of banks) by offering traditional banking services from a non-bank, but consumer activists have voiced concern over the legitimacy of Walmart's foray into banking and the potential for abuse in the relatively unregulated area of prepaid card accounts.

In its quest to be America's neighborhood "everything" store, Walmart has taken aim at the personal banking industry. The "underbanked" market, populated by "customers who use few, if any, bank services," is estimated to be worth around $45 billion. The unlikely pairing of discount retail behemoth and high-end financial company will attempt to create a new tier in personal banking for many of the "underbanked" who feel that they are "paying too much for simple banking activities." The deal makes sense for both AmEx and Walmart, who have long desired to expand into each other's markets. AmEx, usually associated with high-end customers, now has access to middle America through Walmart's near four thousand stores nationwide, while Walmart, who has attempted to expand into the banking world in the past, adds yet another reason for customers to stop by their superstores. Bluebird will do away with a number of potentially infuriating aspects of traditional personal banking such as minimum account balances, and monthly, annual, overdraft and ATM fees (at nearly 22,000 ATMs), though some charges may apply depending on account type. Further, it will borrow successful personal banking components from the same traditional banks including direct deposit, person-to-person transfers, smartphone photo check deposits, and mobile payments. No credit check is required to become a user, and the cards will be usable anywhere American Express is accepted. Bluebird will clearly be attractive to lower income families and individuals who use have little use for their banks other than simple personal banking, or who don't qualify for checking accounts due to their credit history. The accounts may additionally draw in higher income families for use in budgeting or as 'starter' bank accounts for children. While, at least at first glance, Bluebird appears to be a creative new product that has the potential to satisfy a largely neglected group, bank lobbyists and some consumer activists will undoubtedly disagree, citing danger to consumers and questioning the offering's legality under banking regulations.

While the prepaid card market is booming in size, growing from $27 billion in 2009 to an anticipated $90 billion by 2014, it is also relatively new, causing the market to have outgrown the regulatory attentionpaid to it in the past. Of concern to consumer activists is that such prepaid accounts are not necessarily protected by the Federal Deposit Insurance Corporation or by Dodd-Frank. Financial services companies including J.P. Morgan, U.S. Bank, and Wells Fargo have already delved into the market that the Consumer Financial Protection Bureau has described as unregulated and lacking in consumer protections. "Advocacy groups have questioned whether prepaid card issuers clearly explain to cardholders the fees that come with products, including charges to activate the card, load money on it, check a balance at cash machines and speak to customer service." However, Walmart and American Express have ensured that in using Bluebird "[t]he only fees consumers will ever pay are clear,transparent and within their control." Another issue that has been raised regarding Bluebird concerns the 'creative' structuring of the prepaid card's transaction processing. When credit or debit cards are used, the charging store is levied an "interchange fee" from the cardholder's bank in facilitating the transfer of funds. These fees are often hidden from cardholders, who are often ultimately the ones to bear the cost. Though they vary, "interchange fees" for credit card average around 2% of the transaction, and debit card fees are capped at $0.21 per transaction, both regulated by the Durbin Amendment to Dodd-Frank. Banks are estimated to make "over $30 billion a year from interchange fees alone." In order to offer this revolutionary banking product to help low income earners, Walmart and American Express are bypassing the consumer protection provisions of Dodd-Frank intended to protect this same group. American Express does not charge "interchange fees" but "merchant discount fees" which effectively allows Bluebird transactions to be treated like traveler's checks. "Presumably, by using this technique, Wal-Mart avoids Durbin and it can receive whatever "commission" American Express chooses to pay on these cards." This both deprives banks of both their leverage and potential revenue and allows for the potential abuse of the unregulated fees by Walmart and American Express.

Despite the appearance that a loophole in Dodd-Frank is central to the product, I think that Bluebird is poised to be a huge win for consumers. There is no evidence that Walmart or American Express have any ill intentions in regard to their free-reign over the "merchant discount fee," and I believe the advantages to both partners are too large to jeopardize by playing games with their customers. Walmart wins here in multiple ways. They are offering an attractive new product that appeals to their target customers and their largely unsatisfied banking needs. This will potentially entice existing customers to visit Walmart stores more often, to spend more money, and new customers who just might do some shopping while they are attending to their banking needs. There have been a number of recent advances in banking and personal finance that have made it easier for the public to complete money-related tasks, however, none have truly threatened to loosen big traditional banks' stranglehold on personal banking . Here, Walmart and AmEx offer a new tier of banking, where many of these "underbanked" will find all of their personal banking needs met without the extra complexity and frustration of traditional banks. Bluebird and similar future products will force traditional banks to reevaluate their practices and to eliminate unnecessary fees in order to compete. Undoubtedly, banking lobbyists and consumer activists will campaign to have the Durbin and other Dodd-Frank loopholes closed to prevent Walmart from "acting as a bank" and to classify American Express's "merchant discount fee" as an "interchange fee." However Walmart may belong to the minority of companies that is equipped to compete in such a battle. The fact that an innovative solution is on the outskirts of existing regulation is not reason alone for denying its merit.

LET ORGANIZATIONAL SENTENCING GET CREATIVE

Earlier this month a United Kingdom court took their turn on stage in the world-wide Apple v. Samsung dispute over copyright infringement. The court upheld a July ruling which took a slap at Apple. This slap did not consist of incarceration or a monetary fine, but instead brought Apple a taste of public shame. The court ruled that Apple must place a link to the ruling on its webpage run advertisements in prominent British magazines saying that Apple is not a copycat. The appeal court stated, "The acknowledgment must come from the horse's mouth."[1] This was a small demonstration of a court taking steps to actually hit an organization where it hurts. In this particular case, Apple was required to tarnish its image.

While corporations are not people, they are in many regards citizens of their respective states. This privilege of citizenship comes with a great deal of protections and rights, but also comes with responsibilities and obligations. Some of these duties are spelled out in the law, and violations require criminal and/or civil proceedings. In this day one has to ask, "How do you properly punish a corporation?" After all, you cannot incarcerate a corporation and fines often do not seem to truly satisfy the full scope of such a punishment's intentions. This article will make a case that legislators and justices should widen the options for organizational probation and consider expanding the option of "creative sentencing".

Let's begin with a straight forward example of credit card malpractice leading to a class-action suit against the issuing bank. Generally the bulk of plaintiffs receive a multi-page pamphlet written in strict legal jargon with microscopic font. Upon full reading and hoop jumping plaintiffs find that they are entitled to a miniscule portion of the settlement that may be enough to buy them a cup of coffee or if they are lucky, a nice dinner. The bank has undoubtedly harmed a large number of individuals, but is such a settlement truly appropriate? Is this settlement designed to make every plaintiff whole, or to simply punish the bank with a fine that seems much smaller when it is spread over millions of victims? Is the bank able to absorb this fine, as an acceptable loss, into the cost of doing business? It seems that it is too easy to satisfy the class-action claim and leave something else unsettled. I argue that it would be fitting to take from the UK court and order some additional judgment against the bank such as media ads that share what they did and offer a public apology or adding a easy to read disclaimer to with the same information to their business solicitations over a reasonable period of time.

Michael McDermott, a Town Justice in Somers, NY, discusses some great examples of judicial creativity from across the country. These include: "Judge Michael A. Martone in Troy, Michigan, sentenced two teenage alcohol offenders to view an autopsy at the county morgue to show them the effects of alcohol on the body in an attempt to demonstrate what could happen to them if they did not stop abusing alcohol.", "In a Portland, Main Court, a Bowdoin college graduate convicted of smuggling several thousand pounds of marijuana was sentenced to set up and run an AIDS hospice. The Judge explained that the city needed the hospice, and the smuggler had the organizational and business savvy to make it work.", and former judge, now Congressman Ted Poe was especially fond of the creative sentence as he, "[s]entenced a hair dresser, convicted of damaging a neighbor's house, to cut hair at the Texas Center for the Retarded and School for the Blind. . . required Defendants sentenced to probation to grow vegetables in large gardens situated on their property and donate the food to the Houston Food Bank. . . required Defendants who stole valuable books from a collector to spend time working in the public library or reading books to children. . . routinely has sentenced electricians, carpenters, plumbers and painters to help restore the

Battleship TEXAS which was dry-docked at the Houston Ship Canal"[2]. While some of these types of sentences and judicial discretion are not without controversy, does it not seem requisite and just that we extend these methods to organizations?

Concerning criminal penalties Professor Richard Gruner wrote about how the Sentencing Reform Act of 1984 (SRA) set the stage for organizational probation which provided, "Sentencing courts have broad discretion to develop probation conditions matched to corporate defendants and their crimes."[3] Groner importantly lays out four important purposes of sentencing under the SRA which include show the seriousness of the offense with concern for respecting the law, provide deterrence of future criminal conduct, protect the public, and rehabilitate the defendant.

These goals grasp the spirit of both utilitarian and deontological theories of justice by calling for the moral retribution by the offender while maximizing benefits to society at large. In order to relate this to my prior bank example let us switch the theater from a civil class action brought by injured card holders to a criminal fraud brought by the Department of Justice. Michael Loucks a DOJ attorney discussed the complexity of federal organizational sentencing. The SRA has led to the compilation of complex formulas that relate to the range of fines a judge may impose. One of the mitigating factors that could benefit a defendant is to have an "effective corporate compliance program." Loucks argues that in this day such a program is essential for every organization and if it does not exist the judge may order it as part of the sentence.[4]Thus, if our bank has such a program it is likely to be held less culpable for the errors of an employee. However, if they do not, the fine will in all likelihood be greater and the court will limit the liberty of the organization by forcing it to establish such a program under supervision. While this is an example of probationary measures, it should serve as the starting point in probation sentencing rather than the finish line. However, I still fail to see how this fully satisfies either theory of justice.

Professor Martin Harrell discusses some movement in this direction since passage of the SRA. The SRA established the United States Sentencing Commission to "establish sentencing policies and practices for the federal criminal justice system". The Commission considered the economic school of thought which believes that fines are satisfactory as punishment as well as corporate reformist arguments which request more probation and non-monetary sanctions. The Commission adopted an approach that favored the reformer's view by establishing four general principles in sentencing. These principles are: resources taken should be used to make a victim whole rather than be considered punishment, if the organization's operations were primarily for criminal purposes the fines should be significantly higher, fines should be based on severity and culpability, and sanctions should deter future criminal behavior.[5] Clearly these guidelines show a trend towards letting the punishment fit the crime rather than simply allowing for criminal behavior to be a cost of doing business.

Although the trend does seem to be moving in the right direction, baby steps do not constitute the leap that is necessary to send the appropriate message. Some of the greatest harms that have occurred in our society over the past decade have been caused by organizations. In some cases individuals have been held criminally responsible and subsequently punished, but in others the singling out of individuals has been much more difficult. Perhaps offending members of organizations could be sentenced to a level of community involvement which helps to re-establish any lost link in the symbiotic relationship between persons and corporate citizens.

Fines simply do not satisfy the purpose of sentencing organizational defendants, as it may be all too easy for such a fine to be considered part of the cost of doing business. Federal statutes have allowed for levels of organizational probation which has taken steps to punish corporations in a manner that helps rectify the offense while deterring future crimes. This judicial discretion should be extended to civil courts as well as state courts. Such a change is not likely to arise out of a dramatic paradigm shift, but will likely continue as a gradual slide as we watch the steps that have already been implemented evolve in policy and judicial discourse. Such standards will not cause unjust harm to the corporate world, but would in fact strengthen the relationship between ordinary and corporate citizens.

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[1] http://www.bbc.co.uk/news/technology-19989750

[2] Michael J. McDermott, *Creative Sentencing Around the United States*, 30 Westchester B.J. 17 (2003).

[3] Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 Am. J. Crim. L. 1 (1988).

[4] Michael K. Loucks, *Corporate Criminal Liability: Compliance Programs*, Boston B.J., MARCH/APRIL 1997, at 8

[5] Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 Vill. Envtl. L.J. 243 (1995).

SAY-ON-PAY: THE FIRST RESULTS ARE IN

Pursuant to enacted legislation, shareholders of publicly owned companies are entitled to hold a non-binding vote on executive compensation packages (say-on-pay). With the 2011 say-on-pay votes complete and a substantial portion of the 2012 say-on-pay votes well underway, analysis of all the available data is beginning to give say-on-pay supporters reason to celebrate.

During the first Congressional hearing into the financial crisis, Richard Fuld, the former Chief Executive Officer of Lehman Brothers, was forced to defend his receipt of $484 million in salary, bonuses, and stock options between 2000-2008http://abcnews.go.com/Blotter/story?id=5965360&page=1#.UIFzH6DNlFI. Part of his explanation was to suggest that, because the collapse of Lehman relegated his stock worthless, his actual earnings were closer to $350 million (Id.). He conceded, “That’s still a lot of money” (Id.).

That sure is a lot of money for someone who, by virtue of his title as CEO, bears responsibility for the taxpayer bailout needed to prevent the collapse of Lehman Brothers, and the far-reaching ripple effects that would ensue. Mr. Fuld’s story is of course not unique. In the immediate aftermath of the financial crisis, public outcry over the immense executive compensation packages received by the leaders of these failing companies reached an apex.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), signed into law on July 21, 2010, sought to provide shareholders of publicly traded companies a voice in executive compensation decisions—a say on pay. http://thomas.loc.gov/cgibin/bdquery/z?d111:HR04173:@@@L&summm2=m&#major%20actions. Under Section 951 of Dodd-Frank, publicly traded companies must hold a non-binding vote at least once every three years for shareholders to approve or disapprove of executive compensation.http://blogs.law.harvard.edu/corpgov/2011/09/17/say-on-pay-under-dodd-frank/. The three central tenants behind supporting "say-on-pay" are, "(a) say-on-pay brings greater attention to executive pay policies and practices; (b) shareholders feel more connected with the process of setting executive pay; and (c) directors and management give increased attention to whether executive pay is consistent with shareholders' views."http://blogs.law.harvard.edu/corpgov/2011/09/17/say-on-pay-under-dodd-frank/. The available data so far shows that say-on-pay has been effective towards achieving these three aims.

Semler Brossy, an executive compensation consulting firm, has collected say-on-pay results from companies in the Russell 3000 Index (the 3,000 largest companies based on total market capitalization) http://www.semlerbrossy.com/wp-content/uploads/2012/09/SBCG-SOP-2012-09-05.pdf. In their newest report (current as of September 3, 2012), Semler Brossy data and analysis shows that, of the over 2,000 say-on-pay votes that have taken place, over 72% of companies have passed say-on-pay votes with overwhelming support (over 90% shareholder approval). 91% of companies have passed with over 70% approval—considered the benchmark approval percentage needed for permissible executive compensation packages—and only 53 companies (2.6%) have failed a say-on pay vote. As of May 15, 2012, of the 16 companies that failed a vote in 2011 that have held another vote in 2012, all have passed.http://www.semlerbrossy.com/wp-content/uploads/2012/05/BTN-How-have-companies-responded-to-failed-2011-Say-on-Pay-votes.pdf. Semler Brossy notes that the average vote result for these 16 companies was 89%, an increase of

48% from 2011. Semler Brossy shows that each of the 16 companies undertook measures to improve their score, including: increasing performance-based equity tied to specific performance measures in long-term incentive programs, undertaking significant shareholder outreach efforts, reducing absolute CEO pay year over year, and eliminating "problematic" pay practices as defined by proxy advisors. http://www.semlerbrossy.com/wp-content/uploads/2012/05/BTN-How-have-companies-responded-to-failed-2011-Say-on-Pay-votes.pdf.

One of the most important changes to come with the advent of say-on pay—votes is the increased influence and impact of proxy advisors. The most important advisory firm, ISS, has assessed 2,067 of the Russell 3000 companies, of which 2,025 have reported vote results. http://www.semlerbrossy.com/wp-content/uploads/2012/09/SBCG-SOP-2012-09-05.pdf. ISS has recommended shareholders vote to disapprove executive compensation for 14% of companies. For these companies, shareholder approval is 64%. Although 64% still constitutes an approving vote, it is below the 70% benchmark and well below the 94% approval average companies garner when ISS gives them a 'for' recommendation.

Professional analysis of the collected data has already been undertaken. Katayun Jaffari and Josh Bobrin, writing in "The Legal Intelligencer" suggest that preparation for an approval process typically requires companies and their compensation committees to engage their shareholders early. They note, "Engaging and communicating with shareholders is vitally important and must start early, beginning with the end of the most recent proxy season, and must occur frequently and regularly throughout the year… Companies have approached shareholder engagement in several ways, such as creating a separate website to provide information and to accept comments directly from shareholders on executive compensation pay practice, and providing other forums where shareholders can communicate their concerns and comments."http://www.law.com/corporatecounsel/PubArticleFriendlyCC.jsp?id=1350234825149. The growth and sophistication of communication between companies and their shareholders indicates progress is already underway towards achieving the policy goals of say-on-pay.

One important take-away from the available data is the role "pay for performance" has had on vote outcomes. Jaffari and Bobrin remark, "In most cases where ISS has issued a negative recommendation, the advisory firm has indicated that a disconnect between pay and performance exists. The ISS analysis of pay for performance focuses heavily on the alignment of an executive's total pay and total shareholder return (stock price performance plus any paid dividends). ISS then compares this ratio to those found at the company's peer group. http://www.law.com/corporatecounsel/PubArticleFriendlyCC.jsp?id=1350234825149. In addition, they note, "Pay for performance clearly reared its head in the 2012 proxy season as the correlation between a company's total shareholder return (TSR) and the results of say-on-pay increased when measured against the 2011 proxy season." http://www.law.com/corporatecounsel/PubArticleFriendlyCC.jsp?id=1350234825149. Although say-on-pay does not explicitly connect executive compensation with performance, it certainly appears to satisfy one of the legislative goals of Dodd-Frank—to better hold executives accountable to their shareholders.

Say-on-pay certainly in and of itself will not prevent financial crises such as the one that catapulted Dodd-Frank into law. Although still in its infancy, the say-on-pay initiative of Dodd-Frank appears to be progressing towards accomplishing its policy goals of increasing and improving communication between shareholders and companies, as well as better holding executives accountable by creating a more direct link between performance and pay.

NON-LAWYERS OWNING LAW FIRMS

Associate classes are smaller. Partners are leaving firms. Equity partnerships are off the table for promoted associates. Mid-size firms only want laterals. Law firm hiring is not looking great these days. As the recession wages on law firms, and clients for that matter, are tightening up. Firms don't have the work available to hire new associates. For the associates there, firms can't afford to provide partnership, let alone equity partnership. Perhaps part of the problem is the model by which law firms have operated. Unlike most other businesses (and the practice of law for-profit is as much a business as anything else), law firms are not open for outside ownership and investment. Rather firms' own principals are their owners. With dwindling work, it stands to reason new equity partners might not see returns on their initial investments, hence limitations on equity partnerships. Outside of America, other countries like England and Australia are embracing the idea and allowing for outside investment. However, stateside, the idea is firmly opposed.

Last month, the United States District Court for the Southern District of New York dismissed a lawsuit filed by Jacoby & Myers, a large personal injury law firm, against the Appellate Division of the New York Supreme Court.[1] The firm was seeking a declaratory judgment that Rule 5.4 of the Model Code of Professional Conduct in New York was unconstitutional. Specifically, Jacoby & Myers contended that Rule 5.4 impermissibly interfered with interstate commerce by preventing the firm from raising capital through private investments. Jacoby & Myers is a nationwide operation with offices ranging from the New York City to Los Angeles. The firm contended that they could not deliver cost-effective legal services without the aid of outside investment. As a plaintiff's firm operating on a contingency basis, the firm wanted to utilize funds from outside investors to stay competitive in matching the resources of large law firms that bill hourly for defense-side work. The District Court however, dismissed for lack of standing. Jacob & Myers had failed to raise a particularized injury. While Rule 5.4 did prevent them from raising outside capital, numerous other professional conduct rules in the State of New York did as well. Accordingly, the Southern District refused to issue what would essentially have been an advisory opinion.

While for now it seems well settled that non-lawyers won't be owning law firms anytime soon (all 50 states prevent it and only local practice rules of the DC bar allow it),[2] law firm ownership is possible for non-lawyers in England.[3] The Solicitors Regulatory Authority is beginning to approve applications for Alternative Business Structures ("ABS"). British lawyers expect the opportunity to allow outside investment to create more cost-effective options for clients. Britons expect smaller shop services like will-writing to be affected first, but even Britain's "Magic-Circle" firms might start to turn a weary eye. Large firms like Allen & Overy and Clifford Chance are not completely immune to the global recession. Allen & Overy opened a satellite office in Belfast and Clifford Chance plans to open one in India later this year. As noted by a British consultant in a recent article on the matter in The Economist, "if lawyers, 'insist they're not a business, they will carry on until they are out of business.'"

The above quote is certainly telling for American law firms as well. The British plan to liberalize law firm ownership may help struggling law firms as the recession continues to be slow in its resolution. Australian firm Slater & Gordon has nearly tripled its revenue since opening itself up to outside investment in 2007.

The American system wherein partners do all the owning might be wise to consider the change. A recent article in *The Am Law Daily* on St. Louis firm Husch Blackwell, is telling.[4] The firm recently demoted 25 partners from equity status to fixed income. It also reduced its equity partnership by more than 4 percent. Liberalizing firm ownership could change the playing field on this type of issue. Psychologically in the workplace, the vaunted status of equity partner might have a different meaning if non-lawyers could have ownership of the firm. Simply put, the expectations of young associates would be far different if firm ownership extended beyond the firm. Non-equity partnership would hardly carry the sting it seems to today. Firms could in turn divert their revenue more efficiently toward paying fixed salaries. If shares of law firms went on the market, equity partners might be enticed to cash out. As partners departed, associates advancing toward partnership could all be placed on a non-equity track with the option to purchase shares of the firm. The opportunity to obtain a share of the firm’s revenue would still exist but without the superficial layer of prestige. Additionally, outside investing would presumably allow for businessmen to become part of the management of law firms. Excellent lawyers are not always excellent businessmen; management might actually find itself in more capable hands.

The main contention against this has been that allowing clients to own part of the firm would create a conflict of interest. At the same time however, equity partnership has always created a perverse incentive for firms to bill inefficiently. As a moneymaking business, the practice of law can never truly avoid money-motivated conflicts of interest. However, ownership by outsiders might allow firms a chance to meet the demands of recession-weary clients, to become more sustainable should another recession present itself, and to benefit from the insight and business management skills of full-time business people.

[1] Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments, Appellate Div. of Supreme Court of New York, 2012 WL 751946 (S.D.N.Y. Mar. 8, 2012)

[2]http://online.wsj.com/article/SB10001424052748703421204576331531008464712.html

[3] http://www.economist.com/node/21543554

[4] http://amlawdaily.typepad.com/amlawdaily/2012/03/husch-blackwell.html

STUDENT LOANS: TRADING YOUR LIFE FOR A DEGREE

Many of today's high school students are led to believe that, should they wish to be competitive in the job market, a bachelor's degree, and often a post-graduate degree to boot, is necessary. Flocking to universities across the nation, America's youth are betting against their uncertain futures and burying themselves under mountains of debt. Too often, these students find themselves overwhelmed after they have graduated and the bill collectors come knocking.

In 2010, students borrowed approximately $100 billion to fund their educations. In 2010, graduates who had relied upon student loans to fund their educations emerged from their respective universities with an average of $24,000 in student loan debt. By September of 2010, according to the Department of Education, over 320,000 of the 3.6 million individuals with student loans who had entered their repayment period from October 1, 2008, to September 30, 2009, had fallen behind in their payments by nearly a full year. In 2011, the total value of unpaid student loan debt exceeded $1 trillion.

The Purpose and Effect of Bankruptcy

According to the United States Supreme Court, bankruptcy "gives to the honest but unfortunate debtor … a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Debt accrued from home mortgages, medical expenses, credit cards, and even gambling, is dischargeable through bankruptcy. Until 1976, student loan debt was dischargeable, as well. However, changes to the bankruptcy code have decreed that student loan debt, like debt due to unpaid taxes and spousal or child support, is non-dischargeable.

Unlike many types of dischargeable debt, such as credit card debt, student loan debt is generally undertaken with the best intentions. Student loan debt is not accumulated by retail-therapy or the imprudent purchase of homes, automobiles, or other tangible goods. Student loans are taken with dreams of personal fulfillment, notions of being able to better contribute to society, and aspirations to earn a comparatively high salary with which to repay the debt. Yet, all too often, the repayment of these loans is what forces individuals to abandon their passions and settle for the first available job in order to begin repaying the debt.

The Effect of Being Unable to Discharge Student Loans

By denying individuals with good-faith debt, such as student loans, the opportunity for a new beginning, Congress stifles the incentive for individuals to further their educations and implicitly gives approval to those who choose to spend more than they earn on frivolous purchases.

Some argue that it is the prevention of discharge of student loan debt through bankruptcy that compels lenders to provide ready access to the vast sums so many students require. Knowing that the debt owed to them is inescapable, it is said that lenders are less reluctant when faced with the negligible credit histories of prospective college students. However, such easy access to student loans from both federal and private sources has come with dire consequences.

By increasing the amount of funding available and lessening the restrictions to access these funds, we have provided incentives for institutions of higher education to increase the cost of attendance. A study by Bloomberg found that, since 1978 – two years after student loan debt became non-dischargeable – the college price tag has increased by 1,120%.

Solution: Less Federal Funding

Approximately 85% of student loans are federally funded. By limiting the amount of federal funding available through student loans, prospective students will be pushed to make more prudent decisions regarding their financial futures.

Rather than choose to place themselves under astronomical debt in order to foot a tuition bill for a degree they may never use, some students may instead opt for the more fiscally sound option of attending community college for two years. Should they then decide that further education is in their best interests, these students have the ability to transfer to a traditional four-year university to complete their studies.

Additionally, reducing the amount of federally funded student loans available to students will lead universities who desire to maintain attendance rates to lower their tuition and fees. Over 7 million students who would otherwise be unable to afford their dream-schools will be taking out federally sponsored student loans to cover their tuition this coming year. Cutting back the available funding is not a penalization levied upon those students, but rather a cap placed on the amount our society says it is willing to pay for higher education. Our current predatory student loan system feeds off well-intentioned students and serves the interests of both the providers of loans and for-profit universities rather than the students reliant upon them.

Why Student Loan Debt Should be Dischargeable

Preventing the discharge of student loan debt has not solved the problem of making college a more attainable goal, but has instead lined the pockets of for-profit universities and destroyed the lives of countless college graduates who struggle to repay the debt.

Enabling the discharge of student loans through bankruptcy will compel lenders to more carefully scrutinize prospective borrowers. Lenders, forced to evaluate prospective students' likelihood of repayment, will become more restrictive with their disbursements. The burden here is placed not just upon students, but also upon universities who must demonstrate that they are providing a useful, quality education.

Today, the only means by which student loan debt can be discharged through bankruptcy is by showing that repaying such debt will cause an undue hardship. There is no clearly defined means by which an individual can demonstrate that an undue hardship will be caused, though many federal bankruptcy judges have adopted the"Brunner Test" in order to make the determination.

The "Brunner Test" is a three-pronged evaluation which requires that the debtor show that: (1) should they be required to make payments on their student loans, a minimal standard of living could not be maintained; (2) that future prospects of an increased ability to repay the debt are sufficiently bleak to warrant the discharge; and (3) the debtor has made a good-faith effort to make payments thus far. The second prong requires judges to predict the future of the debtor, an inherently difficult and subjective task. Demonstrating that an undue hardship exists is exceptionally trying, providing relief to a mere 50 percent of the few who make the attempt.

Allowing for the discharge of student loans through bankruptcy will not, as some posit, allow graduates to take advantage of a system in which they could theoretically rack up sky-high debt in pursuit of higher education and discharge that debt as soon as they've obtained their degree(s). Instead, the federal government and for-profit universities will be given the incentive to provide a quality education at a more affordable rate, reducing the amount of borrowed money necessary.

Some fear that the competitive edge of the United States will be lost if individuals lose access to higher education due to less federally funded student loan money and the limited private disbursements in response to the enabling of student loan debt discharge through bankruptcy. However, it is precisely because graduates are bogged down by debt that our competitiveness is placed in jeopardy. The United States is a nation of ideas and innovation. By forcing graduates to settle for the first available paycheck, rather than use their intellects to pursue their wildest ambitions, we risk our nation's greatest asset. Proactively seeking to prevent individuals from accumulating debilitating debt is the solution, not the problem.

Professor of education and public policy at the University of Michigan Susan Dynarski stated that "[w]hen you think about what's good debt and what's bad debt, student loans fall into the realm of good debt, like mortgages. It's an investment that pays off over the whole life cycle." While student loan debt may once have been an investment that paid off over the course one's entire life cycle, that is no longer the case. For many of today's graduates, such loans are an inescapable debt for which they are paying throughout their life cycles.