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The Current

The Public Policy Journal
of the Cornell Institute for Public Affairs

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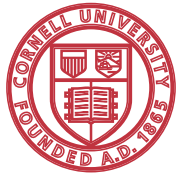

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Mission Statement

As the academic journal of the Cornell Institute for Public Affairs (CIPA), *The Current* provides a platform for public policy discourse through the work of CIPA fellows and their mentors, with contributions from the public affairs community.

Editor's Note

The staff of The Current is pleased to present the Fall 2009 Edition. This semester's edition focuses on articles that highlight a range of issues regarding politics and policy, from post-war policymaking in Iraq, New York State's collective bargaining law, and industrial credit policies of South Korea's development bank, to understanding the concerns of the General Education Development (GED) exam, and the complexities that pertain to the war on drugs.

We are honored this semester to bring you interviews with John P. Walters, former director of the White House Office of National Drug Control Policy; Susan N. Herman, President of the American Civil Liberties Union; and Robert Goldenkoff, Director of the Strategic Issues Team of the U.S. Government Accountability Office, all of whom are experts in the field of public policy.

The Fall 2009 Edition would not have been a success without the continuous dedication and commitment of our Editorial Board. Furthermore, this edition could not have been completed without the efforts of the entire staff in their ability to meet the deadlines and requests asked of them. It has been a great joy for me to be presented with this opportunity to work alongside such a talented and extraordinary group of individuals.

Finally, we would especially like to thank all of our authors for their submissions and as always, the CIPA faculty and administrative staff for their support and guidance in addressing the needs of the journal.

Sincerely,

Nancy L. Sun
Editor-in-Chief

The Current reflects the diverse political, cultural, and personal experiences of CIPA fellows and faculty. The views presented are not necessarily the opinions of *The Current*, the Cornell Institute for Public Affairs or Cornell University.

Contents

[Articles]

[Views & Reviews]

Generals, Ambassadors, and Post-war Policymaking

Lee Robinson

ABSTRACT
The Office of Reconstruction and Stabilization was created within the State Department in 2004 after difficulties in restoring order to Iraq and Afghanistan demonstrated the inadequacy of the national security system in effectively coordinating policies during post-war stability operations. This study examines the possible consequences of transitioning from a model of military to civilian leadership of stability operations as the new office struggles to fulfill its broad mandate. Occupation policies in Iraq demonstrate that critical differences in the organizational cultures of the military and State Department result in fundamentally different approaches to post-war policies with significant consequences for future stability operations.

The Defense Department functioned as the lead agency in post-war stability operations since the United States began such large scale nation-building efforts with West Germany, South Korea, and Japan in the aftermath of World War II. While these reconstruction efforts were incredibly successful, more recent nation-building efforts in Bosnia, Kosovo, and Haiti achieved mixed results. After the latest interventions in Afghanistan and Iraq, the US and its allies struggled to restore order and basic services following initial hostilities as the military was again used to conduct largely civilian oriented tasks to include social, political, and economic transformations within the occupied country. A growing consensus emerged in the foreign affairs community that reconstruction and stabilization tasks should be led by civilians, not the military.[1] The idea of a civilian-led Office of Reconstruction and Stabilization (S/CRS) within the State Department with its own core of deployable civilians was thus born, representing a reversal in the decades-long policy of Defense Department-led stability operations.

Although there is significant support in Congress and the executive branch for replacing the Defense Department with S/CRS as the agency responsible for stability operations, little scholarly literature exists on the military's approach to public policy during foreign occupations. The question I seek to address is whether there are critical differences between the State and Defense Departments that would lead to different policies in stability operations, and if so, what are they? A detailed comparison of military and civilian approaches to stability operations from a policy perspective will aid in understanding the motivations

and potential consequences of transitioning to a model of civilian-led stability operations.

A Framework for Assessing Policy in Stability Operations

Prior to examining Defense versus State Department approaches to policymaking in stability operations, I will briefly describe how the US national security apparatus results in the selection of a "lead agency" for such missions, highlighting the potential consequences in a change to civilian versus military led occupations. Next, I will define the term stability operations to provide a framework for examining and evaluating this particular, important facet of American foreign policy.

To assess whether a State Department-led stability operation would differ in its policies from a military-led operation, I will examine the civilian-led Coalition Provisional Authority (CPA) which briefly controlled policymaking in the recent Iraq occupation. I will contrast the policies from this civilian leadership with recommendations of military leaders in Iraq. Since there is no long-term, purely State Department-led stability operation to examine, the policy recommendations of military leaders and the CPA's policies in Iraq should provide a reasonable perspective on whether policies resulting from State Department control of stability operations may differ from those under military control. To discern possible differences in the military and civilian approaches to stability operations, I will also provide illustrations from the occupation of Japan, led by General Douglas MacArthur, which was a purely military-led occupation comparable in scope to the reconstruction effort in Iraq. If the State Department and Defense Departments differ significantly in their approaches to policymaking in stability operations, the selection of which department serves as the "lead agency" critically affects the overall direction of a reconstruction mission.

Birth of the "Lead Agency" Approach to Stability Operations

The primacy of the lead agency approach to policy implementation in the current national security structure has important implications for the execution of stability operations. As the United States shifted its national security strategy from deterrence of communism to supporting democracies and defeating terrorism after the Cold War, the National Security Council (NSC) system proved to be an inadequate mechanism to support this strategy. Although the NSC was meant to serve as a policy integration mechanism, the system failed to codify formal mechanisms to concentrate the actual execution of policies on a particular problem. In turn, presidents either designated a lead agency or a lead individual in the form of a czar to direct various agencies and departments in the conduct of foreign policy.[2] As a recent blue-ribbon panel reported, the lead agency approach "usually means in practice a sole agency approach"

as neither lead agencies nor czars have the authority to command independent government agencies.[3] While the NSC may coordinate the approval of policies for a particular problem, the actual interpretation and implementation of these policies may be very different depending upon which department serves as the lead agency.

Because of the lead agency approach to stability operations planning, no agency is responsible for maintaining the institutional knowledge and requisite training to succeed in reconstruction tasks. Since each president employs his national security team differently, no formal rules exist at the NSC level to implement a consistent planning process for stability operations.[4] The end result is a disparate policymaking process in which responsibility is passed from one agency to another depending upon the nature of the reconstruction mission, the scale of conflict, and the length of military occupation.

The fundamental flaw with the lead agency approach to stability operations is that it does not adequately provide for coordination mechanisms to manage and direct the federal agencies that contribute to reconstruction missions. Studies by the RAND Corporation found that in the planning process for the Iraq war, disagreements between the State and Defense Departments were not mediated adequately by the president.[5] While the Defense Department was designated as the lead agency for the postwar reconstruction of Iraq, the NSC system once again proved inadequate as a lack of policy coordination and execution resulted in a disjointed, reactive approach to developments during the occupation. While policies are ideally coordinated at the NSC, frequently the lead agency has wide latitude in shaping policies since it is responsible for policy implementation in a particular stability operation. The selection of a lead agency therefore significantly affects the course of US policy in a reconstruction mission.

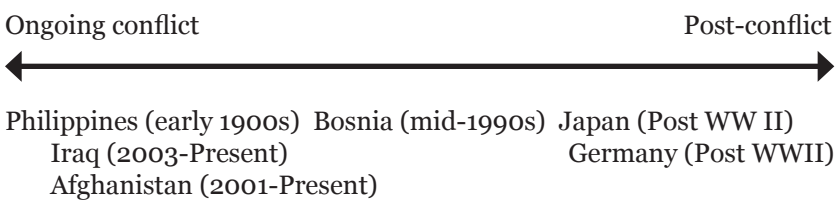
Defining "Stability Operations"

While sometimes referred to as peace-keeping or nation-building operations, the term "stability operations is used in this study because it is most closely linked to the language used by both the State and Defense Departments in reference to assisting societies in the wake of conflict or civil strife.[6] In short, the term stability operations refers to the myriad of tasks involved in halting or preventing the deterioration of existing political, social or economic systems, establishing a secure environment for the populace, transitioning authority to local representatives, and/or reconstructing the infrastructure of a defeated nation to create the foundation for long-term development. Stability operations therefore involve the military, political, administrative, and economic activities undertaken by the US to develop a representative government, reduce sources of conflict, and engender institutions to preserve a lasting peace in a failed state or one emerging from military

conflict. Such operations can take place before, after, or during military conflict, or may not involve combat forces at all.

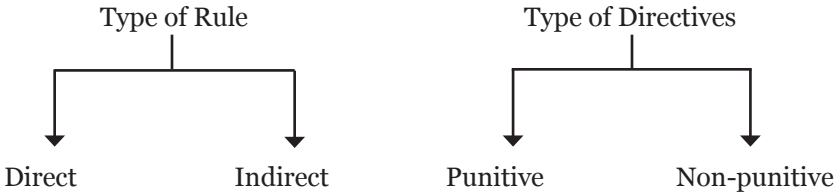
The purpose of this study is to examine stability operations specifically in the aftermath of a conflict in which a defeated country is occupied by American military forces. Such operations are guided by the moral obligations of victors to ensure the stability of a defeated nation codified in the Fourth Geneva Convention of 1949 and the Hague Convention IV of 1907.[7] Since the object of war is a better state of peace in which former belligerents no longer pose a threat, the *jus post bellum* activities of military forces must ensure the disarmament of an aggressor while at the same time preserving the integrity and the right to self determination of the occupied state.[8] The term stability operations can therefore be misleading because it implies that combat operations have concluded. As demonstrated in Iraq, offensive military operations may continue well after the overthrow of a regime. Therefore stability operations can refer to the activities to rebuild a state after the removal of a regime even though offensive operations may continue in the event of an insurgency or uprising.

Figure 1: Spectrum of Conflict During Stability Operations



While the goal of stability operations is to create a stable government in the occupied nation, the strategies that decisionmakers use to pursue that goal may vary widely. An agency may choose to govern an occupied territory through indirect rule in which the local government or bureaucracies are granted significant responsibilities in administration and policy implementation. Conversely, an agency may pursue direct rule in which all authority for governing the occupied territory remains with the occupation forces until satisfactory local institutions and leaders are established. In regard to directives implemented by the occupiers, they may be punitive in nature in which occupation forces pursue disciplinary measures to affect desired changes in the occupied territory. Alternatively, occupation directives may be non-punitive whereby coalition forces pursue their ends by granting powers or privileges to local citizens who are predominately unassociated with the former regime.

Figure 2: Strategies in Stability Operations



These two dimensions provide a basis to compare the strategies used by the Defense and State Department in their approaches to stability operations in situations where military forces occupy a state following a major conflict. As the benign environment in post-war Japan and the rampant insurgency in post-war Iraq demonstrate, the conditions in which occupation forces operate during stability operations can vary widely. However, important insights can be gained by comparing such cases because leaders in stability operations must still choose between the strategies outlined above. As the following examination of military and State Department experiences with policymaking demonstrates, the two agencies differ significantly in their approach to stability operations.

Coalition Provisional Authority and Policymaking in Iraq

Post-war policymaking in Iraq was at different times the responsibility of military and civilian authorities. When General Tommy Franks, the military's regional commander, was briefed by the Chairman of the Joint Chiefs on the initial plan for the invasion, he was notified that he would also be responsible for the military governance of Iraq.[9] To assist General Franks, ORHA (Office of Reconstruction and Humanitarian Assistance) was created to serve as a focal point for reconstruction expertise and was staffed mainly with civilians, although it was still a part of the CENTCOM (Central Command) staff and therefore answered to General Franks.

The CPA was the transitional government in Iraq that was first headed by General Franks. When L. Paul Bremer was appointed by the president as the new chief of the CPA, ORHA was dissolved and policymaking responsibility passed from the military to the civilian administration of Bremer.[10] Only a few weeks occurred between the invasion on March 20, 2003 and Bremer's arrival in Iraq on May 12, 2003.

As the first head of the CPA, General Franks reported to Defense Secretary Donald Rumsfeld. After Bremer's appointment, this reporting relationship was initially meant to remain unchanged, but in reality it created multiple chains of authority in the Iraq occupation. Although

Bremer's chain of command still ran through Secretary Rumsfeld to the president, in his memoirs he stated he "was neither Rumsfeld nor Powell's (Colin Powell, the Secretary of State) man…I was the president's man."[11] Even if Bremer reported directly to the president as he stated, his authority still did not govern the security aspect of the occupation which was under the direction of Franks's commander of coalition forces in Iraq, Lieutenant General Ricardo Sanchez.

Both Sanchez and Bremer were directed by the NSC to coordinate their policies with each other. In reality, Sanchez focused on military actions to suppress the insurgency while Bremer focused on negotiations with the various Iraqi factions, creating a divided authority for the overall conduct of the occupation.[12] Despite this dual layer of authority over occupation personnel, Bremer remained the authority for policymaking during his time at the CPA. However, as the Iraq Study Group reported, there were "no clear lines establishing who is in charge of reconstruction" as the military actions needed to foster reconstruction policies were not fully coordinated with the CPA.[13]

Bremer was a career diplomat in the State Department which culminated in his appointment as the Ambassador to the Netherlands in the Reagan administration. Bremer retired in 1989 and was recalled to public service as head of the CPA in April 2003. Although the CPA was not a State Department office, Bremer and his deputy were career diplomats who filled the ranks of the CPA with retired military officers, Defense Department civilians, foreign service officers, and other civilian experts.[14] While it is difficult to summarize any type of organizational characteristics in such a heterogeneous, newly formed organization, it is reasonable to assume that Bremer adopted many procedures and practices from his nearly 40-year career in the State Department.

In his memoirs and actions as the head of the CPA, Bremer made it very clear that he would rely on his own judgment and skills in crafting US policy in post-war Iraq. Although not overtly critical of the initial CPA policies under General Franks, Bremer wanted his arrival in Iraq to be "marked by clear, public and decisive steps…to reassure Iraqis that we are determined to eradicate Saddamism."[15] Some of his critical first steps were the exact opposite of the policies and assumptions that guided the military's planning prior to his arrival. In turn, the relationship between the CPA and the military became marred by distrust and a lack of unity of effort as Sanchez's headquarters and Bremer's CPA did not coordinate their actions and consult on policy issues.[16]

The guiding approach for the military versus civilian authorities in Iraq differed markedly and is instructive in understanding why the policies of the CPA differed so much under civilian versus military leadership. The military view of stability operations is that it is not its job to rebuild governments; the responsibility for rebuilding a war-torn state rests within the society itself.[17] The actions of General Douglas

MacArthur in Japan largely reflect this approach as he championed indirect rule in which many policies and functions would be carried out by the existing Japanese bureaucracies and legislature. In turn, the occupation of Japan was guided by MacArthur's mantra that "we shall not do for them what they can do for themselves."[18] The view of military leaders prior to Operation Iraqi Freedom was similar: Iraqis would have to create their own democracy and modernized economy.[19]

The approach of the State Department in Iraq was the exact opposite: post-war policies should change the politics, economy, and social structure of the occupied state through an extended period of occupation governance, not by transferring authority to the Iraqi people as quickly as possible. The Defense Department plans for post-war Iraq included creating an Iraqi Interim Authority (IIA) composed of a diverse group of local leaders that would assume sovereign power quickly in designated areas such as foreign relations, justice, and agriculture policy. The US coalition would control other areas of policy for a transitional period that would end as soon as possible depending on the capacity of the newly formed government.[20]

Both the State Department and Bremer's CPA rejected this plan. State Department officials and Bremer did not approve of the power sharing idea of the IIA plan and in turn the CPA remained the sovereign power in Iraq for 14 months after Bremer's appointment wherein Iraqi authorities could not exercise any independent power.[21] This approach is consistent with the State Department's preference for negotiation and diplomacy only with a legitimate, established government. Skills required of diplomats in stability operations such as negotiating with citizen leaders in the aftermath of conflict are not valued by career foreign service officers who have not adapted their methods and training to such critical reconstruction tasks.[22] While the military wanted to transfer power quickly to representative Iraqis chosen by local leaders, Bremer refused to transfer authority to the Iraqi Governing Council (IGC) and instead negotiated with Iraqi leaders to establish a Transitional Administrative Law (TAL) to serve as a governing document until the approval of a permanent constitution.[23]

The Defense Department sought an approach similar to MacArthur's in Japan in which occupation forces would utilize indirect rule with representative Iraq leaders and the existing bureaucracy implementing coalition directives. Conversely, the CPA governed directly and did not cede any measure of sovereignty to the Iraqi government until the official transition of power in June 2004. As demonstrated by major social, economic, and political reforms, Bremer limited the CPA to a mostly direct approach to governing in which powers and responsibilities were not conferred quickly to local leaders and employed a mix of punitive and non-punitive measures.

The CPA in Iraq: Social Reforms

While General Franks conducted very little planning regarding the development of a new constitution or set of directives to guarantee civil liberties and civil rights to the occupied population, Ambassador Bremer quickly decided that a constitution would take time to develop and would be written by Iraqis, not propagated by coalition forces. This decision was made in part because influential Iraqi leaders were aware that General MacArthur's staff wrote the Japanese constitution and were adamant that the same type of scenario not unfold in their own country. Also contributing, however, was Bremer's appraisal that an early transfer of sovereignty would be a mistake and that a government should only be formed after some type of representative body chosen by Iraqis was established.

The burden of occupiers to promote stability within the occupied territory was exacerbated in Iraq by the existence of three large ethnic groups that each sought a role in the new Iraqi government. The Sunnis and Kurds each constituted a sizeable minority and the majority Shia were determined to use their majority status to gain power from the mostly Sunni Baathists that repressed them under Saddam's regime. The promotion of a stable environment that protected the rights of all factions proved to be difficult in Iraq; while ethnic violence was likely to occur, it was exacerbated by the failure of the US occupiers to provide sufficient police and military forces to preserve the peace. Two decisions by Bremer—the dissolution of the Iraqi Army and the DeBaathification order—proved to significantly influence the ability of the new government to guarantee equal protection for its citizens.

The military's post-war plan assumed that the Iraqi Army would be in sufficient shape to preserve law and order after the fall of Saddam's regime. Efforts were made throughout the 1990s to inform the Iraqi army that the US would take care of military members that did not fight after the fall of the regime.[24] Bremer was not a part of this planning process and assessed upon his arrival that the army had self-demobilized as there were no units intact after the fall of Saddam's regime.[25] He quickly dismissed notions of recalling the Army because of fears that it would further instigate ethnic conflict. Since the officer corps of the Iraqi Army was staffed mainly with Sunni Baathists, Bremer feared that Kurdish leaders would push for secession from the new Iraq Shia leaders and would cease cooperating with coalition forces since reconstitution of the army with Sunni officers would essentially be a restoration of the status quo.[26]

Instead of using officers from the remnants of the Iraqi army to formally disband the organization, Bremer instead chose to issue the order directly from CPA headquarters. As part of this policy, he failed to establish a plan to pay stipends to the dismissed soldiers, only later announcing such a plan well after the army disbanded and

unemployed military members turned to the growing insurgency.[27] The announcement of stipends for dismissed soldiers was made one month after the announcement of the dissolution of the army, but most payments would not follow for several weeks because of the absence of formal rosters of dismissed soldiers. In contrast, MacArthur utilized the Japanese military to demobilize their army and naval forces since local leaders possessed administrative knowledge of facilities and personnel.[28] This plan also allowed the occupation forces and Japanese government to have detailed rosters of military members to insure steps were taken to reintegrate them into society, a step that was impossible in Iraq with the dismissal of all troops. Even though Iraq presented a scenario of ongoing conflict while Japan was a post-conflict occupation, the approach of the military was the same: existing institutions should be utilized as much as possible in stability operations.

The extent of Bremer's dissolution order was massive—the armed forces, ministry of the interior, and presidential security units together accounted for over 385,000 citizens.[29] One can only speculate what effects recalling the Iraqi army would have had on the Shia and Kurdish factions, but the results of Bremer's policy were clear: thousands of trained military men were out of work and unpaid, thereby providing ample recruits for insurgent leaders. Efforts to train civilian policemen proved to take much longer than expected as both civilian and military agencies lacked the capacity to train the numbers of Iraqi policemen necessary to promote law and order.[30] Bremer's decision to disband the Iraqi army therefore left the coalition with no local institutions to guard against violence. By disbanding the army without providing benefits or other jobs immediately for these newly unemployed citizens, Bremer exacerbated the challenge of protecting the local population by engendering widespread dissatisfaction with the punitive coalition policies.

The second policy from the CPA that hampered the establishment of security for Iraq's ethnic factions was the DeBaathification order meant to remove senior party members from the government. In recalling his reasons for the order, Bremer stated that he "thought it was absolutely essential to make it clear that the Baathist ideology…be extirpated finally and completely from society" much like Nazism from Germany at the end of World War II.[31] Bremer intended for the order to remove from government service the top 1% of senior party members, resulting in the dismissal of approximately 20,000 appointees from Saddam's regime. The order further stated that the top three layers of management in every government ministry or institution would be reviewed for possible connection to the party; full members would be removed and an appeals process would be available for those that were coerced to join the party and were not loyal Baathists.[32]

Unlike Japan, however, the removal from office of the former ruling

party was not closely supervised by occupation forces. MacArthur, concerned that such directives would expand beyond the limited scope he intended, kept the dismissal of Japanese militarists closely supervised by Government Headquarters (GHQ). In contrast, the CPA turned responsibility for implementing the DeBaathification order over to the Iraqi DeBaathification Council led by dissident leader Ahmed Chalabi who enforced the policy in a political rather than judicial manner.[33] Chalabi expanded the policy to include teachers and lower level government employees, resulting in the dismissal of as many as 85,000 government employees.[34] This wide-ranging DeBaathification policy was against the policy recommendations of many CIA and military members on the CPA staff who argued that in one-party states, being a member of the ruling party did not necessarily mean that you were a person who should be purged from government service.

The greatest effect of the dissolution of the Iraqi army and the DeBaathification policy was the alienation of hundreds of thousands of government employees who were now out of work due to the punitive policies of the occupation authorities. With few employment opportunities available in the war-torn country, many of these former regime members turned to insurgent cells to resist coalition forces. Instead of guaranteeing equal treatment for Iraq's citizens, CPA policies quickly removed Sunni Baathists from the government which hardened that group against coalition forces, setting the conditions for the insurgency that followed in the fall of 2003.

The CPA in Iraq: Economic Reforms

While Iraq certainly suffered wide-scale casualties and massive shocks to its economy as a result of the US invasion, the effects of its war pale in comparison to the destruction in Japan. At the conclusion of hostilities, an estimated 2.7 million Japanese soldiers and civilians were dead, 4.5 million wounded, and 6.5 million displaced abroad.[35] All of its major cities except Kyoto were decimated by fire bombing and the atomic attacks on the industrial centers of Hiroshima and Nagasaki. In contrast, while the Iraq war removed the Saddam Hussein regime, the country itself did not suffer a total defeat as coalition forces took precautions to preserve Iraq's infrastructure for the new government. The level of defeat, combined with the widespread allegiance of the Japanese to the commands of the Emperor, made an insurgency much less likely in Japan than Iraq.

In order to combat an insurgency, reconstruction and economic aid is a critical tool of occupiers to win the allegiance of the local population. In Japan, the order of Emperor Hirohito that the Japanese unconditionally surrendered to Allied forces was sufficient to prevent an insurgency among former military members and dissatisfied Japanese. In contrast, since Saddam Hussein was the center of the Iraqi regime,

no authority figure existed after his removal to promote order among the population. It was therefore vital that coalition forces fill this power vacuum with clear measures that would instill confidence in the ability of the new Iraq to promote order and services.

Distributive policies that confer services and resources to the population are tools that occupiers can use to engender support for the new regime. In Japan, MacArthur pursued policies such as land distribution and labor rights designed to establish legitimacy and support for the state. He did so indirectly as well to promote support for the Japanese government. The CPA was not able to establish such programs quickly in Iraq because it lacked the structure and integrating mechanisms to deliver essential services.[36]

Unlike in Japan, Iraq's bureaucracy was terribly inefficient. As an example, the finance ministry controlled only 8% of the budget in Saddam's regime and was quickly overwhelmed when the CPA attempted to run the entire national budget through the organization.[37] Without a strong state bureaucracy, the ability of the occupiers to deliver services such as electricity, garbage removal, and sewage treatment was critical to winning the support of the population for the coalition's presence. While successful in food distribution programs and funding of small projects, the CPA as a whole struggled to cope with inadequate security measures, an underdeveloped Iraqi bureaucracy, and its own lack of organizational capability to deliver many essential services. Because the coalition lacked the ability to deliver such services, dissatisfaction quickly resulted and in turn fueled the growing insurgency.

Instead of public sector jobs and distributive policies from the state, Bremer and the CPA pursued a program of massive privatization in order to jump-start a free market economy in Iraq.[38] The CPA focused on regulatory reform to create the right laws to encourage private sector growth, but Iraq lacked the banking system and credit market to fulfill the development envisioned by the CPA.[39] In the field of agricultural development, the CPA did not spend reconstruction funding earmarked for irrigation and dam projects. Instead, CPA policies encouraged farmers to abandon agriculture and seek jobs in the city where unemployment was already high.[40]

Combined with large-scale unemployment from the CPA's DeBaathification and military dissolution policies, Bremer's economic policies resulted in few resources from the state to the local population and instead resentment from many Iraqis toward the occupation forces. While funds were disbursed for reconstruction of schools, clinics, and hospitals, due to inadequate organization and complicated oversight mechanisms the CPA spent only 2% of the $18.4 billion allocated to Iraq's reconstruction from the US Congress before its dissolution.[41] Instead of focusing on patronage policies, a fundamental use of the state in a new regime, Bremer and his staff became preoccupied with

regulatory reform and relied on the free market to jump start Iraq's struggling economy. The CPA's preference for direct rule was evident in these policies as the CPA's unwillingness to substantially involve Iraqis in policy design and implementation led to highly centralized development and execution of economic reform efforts.

The CPA in Iraq: Political Reforms

Iraq did not have the institutions necessary to hold elections quickly after the fall of the Hussein regime, so the military's initial plan was to transfer sovereignty to an Iraqi Leadership Council (ILC) composed of Iraqi exiles that broadly represented the three major ethnic groups.[42] In his capacity as head of ORHA, Jay Garner intended to appoint an Iraqi government based upon negotiations with the ILC. Bremer believed this plan to be a "reckless fantasy" engendered in part by the military's institutional aversion to nation-building.[43] Bremer thought that an incremental approach was a much better plan, in part because he did not view the ILC as a representative body since it did not have any Turkmen, Christians, or women.[44]

Bremer was critical of the military for attempting to fill the political power vacuum that existed with the fall of the previous regime. The policies of the military and ORHA reflected a desire to transfer power to Iraqis as quickly as possible, a policy encouraged by counterinsurgency doctrine and the military's experience with nation-building operations. MacArthur sought to transfer power quickly to local leaders and relied on the Japanese Diet and bureaucracy to develop and institute post-war policies. In cases such as the drafting of the Japanese constitution and implementation of new civil liberties directives where GHQ intervened directly to shape policies, MacArthur was careful to craft the image that such reforms were a product of the Japanese Diet, not occupation authorities.

In Mosul, the senior US Commander, General David Petraus, established contacts with Iraqi leaders and managers of key facilities which he used to encourage local leaders to devise solutions to the problems of paying government employees and providing services.[45] Bremer criticized such efforts as he feared that the actions of military units to assemble village councils and appoint local mayors or governors would result in disastrous political consequences.[46] While some members of the military were comfortable working with local leaders to quickly bring Iraqi leaders into positions of power, Bremer's policies demonstrated a reluctance to transfer power without extended negotiations and formal procedures.

Bremer's main criticism of the ILC was that as an appointed body, it was not broadly representative of the Iraqi population. Since elections were not possible because of the lack of institutional capacity to conduct nation-wide voting, Bremer employed a political team from the CPA to

canvass the country and appoint women, tribal, and religious leaders to expand the ILC to a larger body that would be called the Iraqi Governing Council (IGC).[47] The IGC expanded the seven-member ILC to a 25-member body, but because Bremer did not include a formal agreement between the council and the CPA, the IGC functioned strictly as an advisory body.[48]

Even with the more representative IGC, Bremer still championed an incremental transfer of authority that would take place only after several benchmarks were met to include the ratification of a constitution and nationwide general elections.[49] Frustrated with the difficulty of the IGC to reach a consensus on policy issues, Bremer refused to give the council any authority. In turn, the relationship between the CPA and the IGC became one of circular blame. IGC leaders complained that since they lacked authority, they could not reach consensus on major policy issues. Bremer asserted that the IGC had to earn the right to govern by demonstrating responsibility in working on a draft constitution among other measures.[50]

Bremer's preference to issue policies directly through the CPA instead of working indirectly through Iraqi leaders contributed to the population's view of coalition forces as occupiers instead of liberators. Despite the continued negotiations and efforts to transfer authority only to a truly representative Iraqi governing body, upon his departure Bremer still transferred authority to an appointed interim government, not an elected body.[51] The appointed interim leaders were able to govern with enough legitimacy to organize national elections, leaving historians to ponder the question of whether a similar transfer in May 2003 would have been as successful and resulted in a quicker transfer of sovereignty to a new Iraqi government.

The CPA's political reforms demonstrate the penchant of State Department authorities to engage in protracted diplomacy and engagement with established leaders, not local appointees. Whereas military leaders seek to govern indirectly by transferring sovereignty quickly in political matters, the civilian approach favors establishing stability in the host country through direct rule before entrusting sovereignty to local leaders.

State Department Policies in Stability Operations

The policies of the CPA in Iraq demonstrate that civilian-led stability operations will likely involve direct rule since civilian authorities focus on setting the conditions for an established government before a transfer of sovereignty. The policies of Garner and Bremer therefore provide an illustration of the differences in the military and State Department approaches to stability operations. The retired Lieutenant General sought to transfer authority to representative Iraqis as quickly as possible while the former Ambassador was adamant that legitimately

elected leaders were necessary before any transfer of authority.

In assessing the applicability of this conclusion to future stability operations, it is important to acknowledge that military authorities conducted very little planning for the stability operations phase of the Iraq invasion that would begin after the removal of the Hussein regime. This lack of planning was likely due in part to assumptions from the Defense Secretary and his deputies that only a small invasion force was required because of their expectation that coalition forces would be greeted as liberators, not occupiers. In turn, a universal application of the conclusions of this study is problematic due to the possibility of military plans and policies being shaped by the directives of civilian superiors within the Defense Department. However, the conclusions of this study still have important implications because even after it became clear that the United States faced a growing insurgency in Iraq, military leaders still advocated a rapid transfer of sovereignty to local institutions and political leaders. The evidence from the Japan and Iraq occupations demonstrates that the military prefers to involve local institutions in governance as quickly as possible regardless of the level of post-war conflict.

In regard to a preference for punitive versus non-punitive directives, the charts below illustrate that Bremer in Iraq and MacArthur in Japan employed both types of directives in an attempt to transform the occupied societies socially, economically and politically:

Table 1: CPA Policies in the Occupation of Iraq

	Punitive Reforms	**Non-Punitive Reforms**
Indirect Rule	- DeBaathification policy	
Direct Rule	- Iraqi Army, Interior Ministry, and Presidential Security Unit dissolution	- Food distribution programs - Reconstruction of schools, clinics, and hospitals - Policies to create a private credit market

Table 2: GHQ Policies in the Occupation of Japan

	Punitive Reforms	**Non-Punitive Reforms**
Indirect Rule	- Dismantling of military capacity	- Civil liberties directives - Constitutional rights - Agricultural reform - Protection of worker's rights and unionization
Direct Rule	- Militarist purges	

The most striking difference in the two occupations is in the preference for direct versus indirect rule. Of the major policies examined in this study, only in the area of DeBaathification did Bremer cede implementation powers to local authorities. This proved to be a poor choice since the DeBaathification directive expanded significantly outside of Bremer's intent for the policy. Because MacArthur was concerned with establishing legitimacy for the Japanese government, he relied on the Japanese bureaucracy to carry out his directives and quickly ceded broad powers to the Diet. While the Iraqi bureaucracy was not as capable as the Japanese institutions MacArthur relied upon, Bremer still demonstrated a stubborn reluctance to transfer power to Iraqis before nationwide elections while military leaders sought to transfer power as quickly as possible. In turn, the CPA was forced to rule directly to complete the societal transformation it sought in Iraq. The fact that military leaders in Iraq and Japan sought to establish local sovereignty quickly presents a compelling case that a preference for direct rule is a major difference in civilian and military leadership in stability operations.

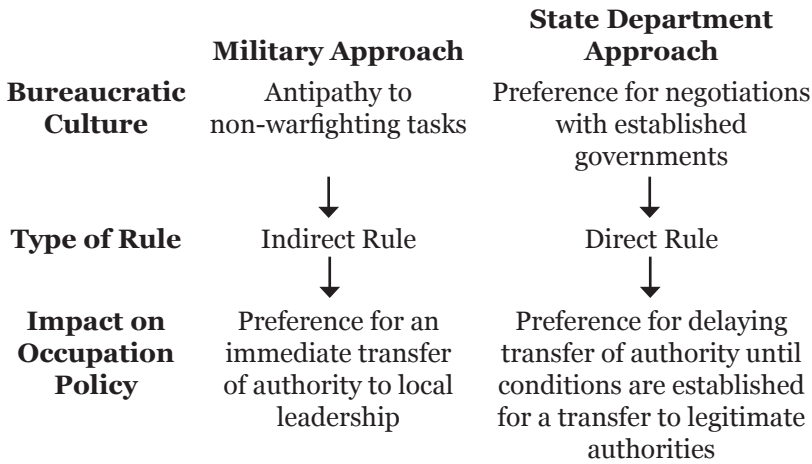
The Military, State Department, and Policy Preferences in Stability Operations

The occupations of Japan and Iraq provide insights into how characteristics of the military and the State Department contribute to the policy preferences of each in stability operations. Illustrations of GHQ policies in Japan and CPA policies in Iraq demonstrate that both military and civilian authorities employ a mix of punitive and non-punitive policies, but the two differ significantly in their preference for direct or indirect rule. State officials are reluctant to confer authority to a transitional government, instead preferring to foster stability in a post-war state by setting the conditions for a representative government. Their penchant for careful and slow negotiations leads to policy approaches that restrict the ability of local leaders to quickly secure a meaningful

role in the new government. In turn, the State Department favors direct rule until conditions are established to transfer power to local leaders who are appointed through some type of legitimate process established by occupation authorities.

In contrast, the military's preference to train and resource its forces for large scale warfare over reconstruction tasks leads to a preference for indirect rule. The military's proficiency is in the management of violence, so in areas of governance it seeks to empower local leaders to take charge of their own affairs and in turn concentrate on security, its area of expertise. By eschewing protracted negotiations and encouraging the establishment of local governance institutions, the military is likely to employ indirect rule in stability operations.

Figure 3: Military and State Department Models of Post-war Policy



Consequences of the Lead Agency Approach to Stability Operations

Regardless of whether State Department or military authorities lead stability operations, both civilian and military capabilities are required to successfully reconstruct an occupied country. Since the current national security apparatus employs the lead agency approach, policymaking in post-war operations entails surrendering a measure of independence and authority for either military or civilian agencies. Cooperation between military and civilian authorities is therefore critical regardless of which department is designated as the lead agency for an operation. Unfortunately the current system favors the employment of the capabilities of individual departments over integrating mechanisms, a situation exacerbated by resistance from the State and Defense Departments to cede authority to other agencies.

The selection of military or civilian authorities as the lead agency for a reconstruction mission therefore has significant impacts on American foreign policy in the occupied country since the lead agency is typically at the forefront of policymaking for a stability operation.

Although this study examined just two occupations to compare civilian versus military leadership, the characteristics of each bureaucracy and the policies implemented in each case provide compelling insights into benefits and possible negative consequences of assigning each department as the lead agency of a stability operation. Since military leaders seek to turn over authority to local leaders as soon as possible, such a policy will have the benefit of minimizing the appearance of coalition forces as occupying powers. By ceding authority quickly to local officials and utilizing local institutions for policy implementation, US authorities may be able to prevent an insurgency that typically relies on inciting the populace to resist occupation forces. Lastly, by focusing on transitioning authority quickly and the associated non-punitive policies to engender support for the new regime, military authorities can create the conditions for political participation by instilling confidence in the new government.

An obvious consequence of an approach that seeks to quickly transition authority is that the political party or leading faction that initially assumes power from occupation authorities is likely to have an advantage over its rivals. In Japan, the Liberal Democratic Party (LDP) benefitted from GHQ's policies that removed individuals with militarist and leftist ties from positions of influence, thereby disadvantaging the far right conservative parties and far left socialist parties. The LDP strengthened its position by placing party loyalists throughout Japan's bureaucracies and used its initial standing to create the conditions for domination of the country's government throughout the Cold War. Rapidly transitioning authority to local leaders therefore carries the risk of transferring power to groups that may not represent the best long term interests of the occupied state or for the United States. An early transition may also limit the ability of the occupier to influence the rule of law and protection of rights in the occupied state.

Conversely, if the State Department serves as the lead agency for a reconstruction mission, its bureaucratic culture favors a longer occupation in which authorities seek to create the economic, political, and social conditions for a successful transfer of authority. This approach has the benefit of ensuring a representative government that provides an opportunity for all major factions to participate in the formation of a new government. Because diplomats value negotiations with appointed officials rather than local citizen leaders, civilian leadership will implement policies that seek to ensure political representatives possess the legitimacy that comes from well monitored, fair elections.

A drawback to this approach is the frequent requirement of a

long occupation to create the conditions for elections. In turn, large numbers of occupation forces are needed to conduct the business of government since civilian authorities are reluctant to cede power to unrepresentative appointees. As demonstrated with CPA policies in Iraq, direct rule complicates the process of engendering support for a new government. Patronage policies are often employed by a state to foster support for its leadership. However, the major patronage policies in Iraq were instituted through a process of direct rule in which privileges granted were a product of occupation authorities, not the state itself. The process of direct rule can be harmful to the process of establishing legitimacy for a new government because local authorities appear to be unable to provide services for the population without the overt help of the occupiers.

Secondly, unless the occupier is willing to commit significant force levels for extended periods of time to engage in stability operations, occupation authorities may face a security problem in which insurgents resist the efforts of occupation forces and those who cooperate with them. If no local institutions exist or are trustworthy to enforce the occupation authority's policies, an additional burden is placed on the occupier to use its own means to compel cooperation. Such an arrangement creates the conditions for civil unrest, making the occupation authority's challenges more difficult. The longer it takes to set the conditions for a transfer of power, the more money, troops, and time the occupier has to commit to achieve a successful outcome.

The experiences of military and civilian leadership therefore impart significant cautions for national leaders as the United States seeks the correct approach to integrate the capabilities of its various executive agencies for stability operations. Given the difficulties of each agency with ceding authority to other agencies for such operations, S/CRS was established within the State Department to resolve the problems inherent in a lead agency approach to policymaking. As this agency struggles to fulfill its broad mandate of leading stability operations, the policy implications of State Department versus military leadership suggested in this study should be considered before the nation embarks on its next stability operation.

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This paper reflects the observations and opinions of the author. The contents in no way reflect the official policy or opinion of the United States Army, Department of Defense, or the United States Government.

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Are Amendments to New York's Collective Bargaining Law Necessary for Consolidation of Local Government Services in New York State?

Katelyn Purpuro

ABSTRACT
In April 2008, the New York State Commission on Local Government Efficiency and Competitiveness issued its final report encouraging municipalities to consider various types of local government consolidation in order to improve fiscal and service efficiency. A major recommendation suggested amending the State's public sector bargaining law, commonly known as the Taylor Law. This action would eliminate the mandatory requirement for management to negotiate with labor about the decision to transfer unit work in cases of consolidation. This paper provides a critical look at the report's recommendation to amend the Taylor Law by examining precedent from state court cases and legislation guiding successful cases of consolidation. It addresses whether it is it likely that local government consolidation can occur without amendment to the Taylor Law, whether the role of organized labor has in fact hindered consolidation from occurring, and whether the Commission's recommendations to change legal barriers would be politically feasible and successful. This paper concludes that even in the event that the Taylor Law is amended based on the Commission's recommendations, the changes would not be sufficient to curb political battles that will take place beyond the traditional labor-management, collective bargaining relationship.

Local Government Consolidation in New York State

In April 2007, Governor Eliot Spitzer created the Commission on Local Government Efficiency and Competitiveness (Commission) to study local government consolidation and make recommendations for improving efficiency at the local level in New York State. Among its many recommendations, the Commission recommended amending the State's Public Employees' Fair Employment Act, commonly referred to as the Taylor Law,[1] to allow employers to avoid the requirement for mandatory bargaining over an employer's decision to transfer exclusive bargaining unit work and the impact of that decision.[2] The

recommendation was aimed at controlling public employee unions' ability to stall consolidation and to control labor costs after consolidation. Because of the powerful role public employee unions play in New York State and the conflicting and unclear legal precedents for proceeding with consolidation, this paper determines whether the Commission's recommendations to amend the Taylor Law or allow legislation to supersede the Taylor Law are necessary and feasible in light of Civil Service Law, court cases, Public Employment Relations Board (PERB) decisions, and a case study of local government consolidation that demonstrates the political rather than legal ability of unions to affect consolidation's efficiency.

To best understand the purpose and context of the Commission's recommendations, one must first understand how and why local governments can consolidate services. Local government cooperation is defined as two or more local governments jointly providing a service to benefit the entities involved.[3] Cooperation can take the form of service or joint agreements. Service agreements involve municipalities sharing in service provision, while joint agreements involve one entity contracting with another entity to provide services for a fee.[4] Consolidation occurs at the service level when a government entity combines functional units or departments, when two or more local governments merge functions, or when entire governments merge into a single entity.[5] For purposes of this paper, the term "consolidation" will be used to encompass the definitions of cooperation and consolidation noted above, unless otherwise specified.

Governor Spitzer's Executive Order creating the Commission determined that the primary reasons for its existence was the overwhelming number of taxing jurisdictions in New York State and the ensuing fiscal and service inefficiencies that plague the State's local governments.[6] The governor appointed fifteen Commission members and a Chairman, former Lieutenant Governor Stan Lundine,[7] and members appointed an Executive Director, the former Assistant Comptroller John Clarkson. The goal of the Commission was to review and analyze the State's current local government structure, while accounting for the findings of state agencies and independent and academic studies on the issues. The Commission had one year to recommend ways to consolidate services or municipalities to increase local government efficiency, addressing any legal barriers to doing so.[8] The Commission was allowed to gather information through holding public hearings, taking testimony of witnesses, and requesting that studies be conducted to gather further information.[9] The Lundine Commission also acknowledged the recommendations of commissions that studied consolidation under the administrations of Governors Cuomo and Pataki. This paper begins with a discussion of the Lundine Report's basic findings and then examines those findings in light of the

purposes and findings of the Cuomo and Pataki Commissions.

The Lundine Commission's Findings and Recommendations

The Lundine Commission concluded that New York State's local government structure is extremely outdated based on the boundaries and operational rules regulating municipalities and other government entities.[10] The Commission estimates that there are approximately 4,700[11] local government entities in New York State that impact taxes.[12] The Commission's recommendations are directed toward decreasing the number of local government entities to lower the tax burden throughout the State without decreasing the quality of public services. Most of the Commission's recommendations would require statutory change in order to be achieved.[13] The report estimates that the combined savings for New York State's local governments based on the report's quantifiable recommendations can reach or exceed $1 billion.[14]

Lundine Commission Executive Director John Clarkson said that cost savings resulting from consolidation are hard to generalize, since consolidation can take many forms, but Clarkson stressed that operational savings in many kinds of consolidation can be limited when collective bargaining agreements are "leveled up" post-consolidation.[15] The leveling up of pay occurs when two or more consolidating entities combine their work forces upon consolidation, and the remaining bargaining unit of workers is given the highest compensation package that existed among the pre-consolidation entities. Clarkson stated that the issue of containing costs incurred due to the leveling up of pay can either be addressed through collective bargaining, which is unlikely to benefit the employer, or through changes to the structural issues that drive the process of public sector collective bargaining,[16] which is the approach the Lundine Commission emphasized to address this perceived obstacle to consolidation.

In a staff brief on how collective bargaining clashes with consolidation, the Commission explains that because consolidation involves the transfer of unit work,[17] it is subject to mandatory collective bargaining over the decision itself and the impact of that decision.[18] The mandatory duty to bargain is triggered whether the transfer of unit work is to a private contractor or another public employer.[19] Because of the Taylor Law's requirement for mandatory bargaining over the transfer of unit work, which would apply to decisions to consolidate, many of the Lundine Commission's recommendations would require amending or superseding the Taylor Law to overcome a hurdle that may allow unions to stall consolidation through bargaining or litigation over a failure to bargain.

The Commission has not yet proposed a bill draft to amend the Taylor Law, but when such a bill is eventually proposed, the bill would remove the decision to consolidate and the impact of that decision from

mandatory bargaining.[20] The bill would also provide that collective bargaining agreements would terminate upon consolidation and be renegotiated with the new post-consolidation entity.[21] Because the Commission cannot predict whether some or all of its bills will be enacted, it would also propose some consolidation bills with specific language that would allow the provisions of those bills to supersede the Taylor Law's requirement to engage in bargaining over the transfer of unit work and its impact in cases of consolidation.[22]

To date, the Commission's findings have supported one bill that was passed by the Senate in June 2009, known as the "New N.Y. Government Reorganization and Citizen Empowerment Act."[23] Rather than allowing the State to mandate consolidation, the Act "establishes in a single article of the General Municipal Law uniform and all-inclusive procedures under which local government entities may be consolidated or dissolved" and "does not mandate the reorganization of local government entities in which a majority of the citizens are opposed to it."[24] The Act stipulates that any consolidation agreement proposed by the governing bodies involved must specify what will happen to public employees affected. The Act also precludes "those officials and employees protected by tenure of office, civil service provisions or collective bargaining agreement" from being covered by such arrangements in consolidation agreements.[25] Therefore, the new Act does not explicitly accomplish the Commission's goal of amending or superseding the Taylor Law's bargaining provisions. However, as discussed later in this paper, the Act may supersede the law based on legal precedent which interprets an employer's collective bargaining obligations during and after cases of consolidation that are procedurally rooted in legislation.

Amendments to the Taylor Law would be extremely difficult to implement, considering the vast political power of New York's public sector unions and their advocates in the legislature. By comparing the Lundine Commission's approach to labor-related issues during consolidation with the findings of the consolidation commissions of Governors Cuomo and Pataki, one can better understand the role of organized labor in helping or hindering consolidation and why the Cuomo and Pataki Commissions did not think changes to the Taylor Law were necessary.

Prior Consolidation Commissions' Recommendations for Collective Bargaining

The Cuomo Commission, which existed from 1990 to 1993, was created after an upswing in the amount of inquiries to the government regarding how to consolidate, along with financial pressures at all government levels and growing citizen unrest with increasing taxes.[26] The governor's blue ribbon task force was chaired by the Secretary of State and had members from a variety of constituencies, including executive

branch members, local government association representatives, local officials, union representatives, and a business leader.[27] The Cuomo Commission's recommendations on improving merger, consolidation, shared services, and regionalization procedures were not implemented, but the final report did lead to an increase in scholarly work on consolidation.[28] The Cuomo Report has an extensive section on workforce impacts of consolidation and emphasizes the basic need for inclusion of labor groups in the pre-consolidation planning phases.[29] It suggests using preexisting labor-management committees from the consolidating entities to address any impacts on the work force and to invite experts from PERB and local and state government to help clarify what would happen to public employees after consolidation.[30] The report also notes that traditional collective bargaining entered into voluntarily by both parties would be a favorable way to include labor in the consolidation discussion.[31]

The next consolidation commission was Governor Pataki's Task Force on Local Government Reform from 2002 to 2004, which issued preliminary findings but no final report.[32] The Pataki task force, mostly comprised of local government officials, offered several recommendations relating to the role of organized labor in local government efficiency, but none of its preliminary suggestions indicated that the Pataki task force valued organized labor's input or that it saw the Taylor Law as a legal obstacle to consolidation.

The Lundine Commission's general approach to exploring work force issues differed from the Cuomo and Pataki Commissions' approaches to the topic. The Lundine Commission failed to include advocates for organized labor among its members and only gave labor groups a voice in its public hearings. Even though the majority of the report's recommendations did not directly address labor, almost every recommendation involving consolidation has secondary impacts on at least one work force. The lack of clear dialogue with labor experts will also pose a challenge for the Lundine Commission's future bill drafts to change collective bargaining rights under the Taylor Law in cases of consolidation. In addition to the lack of union input, one can understand the Lundine Commission's reasons for suggesting such amendments by examining how the Taylor Law currently impacts decisions to consolidate and why changing the law may or may not allow consolidation to occur more easily.

The Taylor Law's Implications for Local Government Consolidation

The Lundine Commission acknowledges the Taylor Law's unclear role in consolidation cases. As noted by the Cuomo Commission, the law does not clearly define whether consolidation itself

would trigger the duty to negotiate over the decision and its impact with the effected workforce.[33] The gray area in understanding consolidation under the Taylor Law stems from the need to determine whether consolidation should be treated like subcontracting, which has generally been considered a mandatory subject of bargaining by the State's Public Employment Relations Board (PERB).[34] Based on PERB's interpretation, the term "subcontracting" encompasses the reassignment of unit work to non-unit employees, no matter if the employees are of the same public employer or of another public or private employer.[35] This definition of subcontracting would apply to cases of consolidation in which municipalities enter into cooperation agreements with other municipalities, but it is unclear whether PERB would take the same approach toward other types of consolidation, such as the merging of entire municipalities or several functions of one municipality.

If employees affected by consolidation file improper practice charges against their employers for failing to negotiate over the decision to consolidate or its impact, PERB would have to determine the employer's bargaining obligation. PERB's application of the Taylor Law to cases of subcontracting has established that a decision to transfer unit work to anyone outside the bargaining unit is considered a mandatory subject of bargaining if the work is the same after the transfer.[36] PERB has held that an employer cannot unilaterally change the terms and conditions of employment unless it has bargained with the union in good faith to impasse, has a pressing need to make the change, and continues negotiations after the change has been made in order to reach agreement.[37] Mandatory bargaining over a transfer of unit work applies to a transfer to a private entity, another public employer, or other employees of the current public employer that are outside the bargaining unit in question.[38] If the qualifications of the job have been significantly altered, however, PERB balances the interests of the public employer and its employees in determining the necessity of bargaining over the decision to transfer unit work.[39]

The employer may also be required to bargain over the impact of its decision to transfer unit work. If an employer is going out of business and transferring its functions to another entity, then the employer has the ability to make a unilateral, managerial decision to change its operations. Since some employees may lose their jobs or face changes to their terms and conditions of employment as a result of a consolidation decision, management has the duty to negotiate the impact of the decision with the bargaining unit.[40]Although management must bargain over the impact of its decision, it is permitted to make the unilateral change before impact bargaining has commenced.[41] Impact bargaining is required in almost all instances of public sector work-place changes, including layoffs. Even if the Commission proposes changes to the

Taylor Law, the part of the law requiring impact bargaining, which the Lundine Commission views as an obstacle to keeping costs low, would be even harder to change politically than the requirement for bargaining over the decision to transfer unit work, in light of the rights afforded public employees by the law.

The gray areas regarding mandatory bargaining over the decision to consolidate and the resulting need for impact bargaining contribute to local governments not knowing what the full outcome of their consolidations will entail, especially outcomes related to organized labor. To make an informed decision to pursue consolidation, one must examine the Taylor Law in conjunction with laws that have been held by state courts to supersede the requirement to bargain over the decision to transfer unit work in cases of consolidation. Although the main hurdle that the Commission's suggestions must overcome is getting past union animus and political clout to block the amendments from ever passing in the legislature, this paper argues that the amendments recommended by the Lundine Commission are unnecessary given state courts' interpretations of Civil Service Law § 70, which have indicated that transfers of function pursuant to that law are not subject to mandatory bargaining.[42] Therefore, those court cases may already accomplish or at least lay the groundwork for what the Lundine Commission wants to achieve with its Taylor Law amendments, without requiring a lengthy and controversial debate in the legislative arena.

In addition, the New York State legislature initiated the large consolidation of the State's Unified Court System via legislation, with clauses as to how workers would be transferred and retain their bargaining rights, contracts, and units after the transfer. The labor-related clause has been upheld as constitutional, but in that case, the power of public employee unions was strong enough to threaten the success of the consolidation had the court system and legislature not met the unions' conditions.

The major problem for the Lundine Commission is whether its amendments can be passed legislatively and, if passed, whether the political power of the State's public employee unions would help labor make post-consolidation gains without using traditional collective bargaining, such as seeking more lucrative contracts in the future as compensation for their support for consolidation legislation. One must analyze whether the Lundine Commission itself is promoting the belief that consolidation cannot take place without Taylor Law amendments, when in reality collective bargaining under the law may not act as a legal impediment to consolidation, based on historical cases of consolidation under several New York State laws.[43]

A Public Employer's Duty to Bargain Before Consolidation

Although the Lundine Commission has a reasonable belief that there are collective bargaining barriers to consolidation, a study of the key parts of the law in this area contradicts this idea. This paper's interpretation of relevant law and court cases addressing the Taylor Law as it clashes with other laws reveals that some kinds of consolidation are already absolved from mandatory bargaining over the decision to transfer unit work.[44] This paper will also look at an existing law outlining methods for consolidation that includes provisions on how to transfer employees' bargaining units and collective bargaining agreements. Such analysis helps one understand the realistic role of public employee unions in the consolidation process and the political power they wield over consolidation outcomes, which transcend any limitations to their rights that could be outlined in Taylor Law amendments.

Transfer of Public Employees under Civil Service Law § 70(2)

When a transfer of functions occurs between public entities and any legislation initiating the transfer is silent on how to transfer the work force, Civil Service Law § 70(2) applies and stipulates that employees working in the transferred function should be transferred to the new entity that performs the function while retaining their civil service classification and status.[45] Transfer can occur through legislation, rules, orders, or other actions, such as referenda.[46] The law establishes some guidelines under which employees shall be transferred, accounting for what would happen to their civil service status and vacation and sick leaves and how to reassign non-transferred employees, if appropriate.[47] By accounting for how the transfer will impact employees of the transferring public entity, courts have held that the provisions of Civil Service Law § 70(2) remove the decision to transfer from collective bargaining.[48]

The applicability of Civil Service Law § 70(2) to a specific case of consolidation was described in *Vestal Employees Association v. PERB*.[49] In *Vestal*, the union filed an improper practice charge with PERB, alleging that the school district unilaterally subcontracted the printing work performed by one unit member, who was transferred to employment with a Board of Cooperative Educational Services (BOCES), accreted into the BOCES unit, and maintained his civil service status after the transfer.[50] The court held that Education Law § 1950(4)(d) authorizes the Commissioner of Education to approve certain cooperative services to be taken over by BOCES, including the printing services at issue.[51]

Because the consolidation in *Vestal* was allowed, the Court of Appeals had to determine whether the school district was required to bargain with the union over that decision. The court examined the legislative intent of

Education Law § 1950(4)(d) and cited its own precedent in *Webster*, which determined a school district's collective bargaining obligations under a different part of Education Law regarding a BOCES takeover of summer school programs. In *Webster*, the incorporation of specific job protections into the Education Law that authorized the consolidation absolved the school district from having to bargain over its decision to transfer unit work.[52] The *Vestal* court held that even though Civil Service Law § 70(2) is not explicitly cross-referenced in Education Law § 1950(4)(d), the "protections it affords are noted in the statutory scheme of the Education Law that deals with a program takeover by BOCES."[53] Therefore, because BOCES program takeovers are guided by Civil Service Law § 70(2), actions by BOCES pursuant to Education Law § 1950(4)(d) are not subject to collective bargaining.[54] The court also noted that the compressed statutory time frames for BOCES takeovers supported the court's conclusion that collective bargaining in those situations was not intended by the legislature.[55]

The *Vestal* decision is significant because it allows school districts, when lawfully transferring services to BOCES according to powers bestowed upon the districts in Education Law § 1950(4)(d), to avoid bargaining collectively.[56] The *Vestal* court determined that BOCES takeovers are subject to Civil Service Law § 70(2), which allows school districts to avoid the bargaining requirement over the transfer of unit work in this kind of consolidation. If employers are not required to negotiate over transfers such as those in *Vestal* because of Civil Service Law § 70(2), the Lundine Commission's recommendation to remove the right of unions to bargain over the transfer of unit work in cases of consolidation is unnecessary. As long as the consolidation actions taken by a public entity are legal, Civil Service Law § 70(2) has been interpreted to allow the employer to avoid bargaining over its decision.

The precedence given to Civil Service Law § 70(2) over the Taylor Law was also apparent in another consolidation case, which addressed the transfer of an entire unit of workers from one public entity to another. In *Nickels v. New York City Housing Authority* (NYCHA), NYCHA transferred its police functions to the New York City Police Department (NYPD).[57] The petitioner president of the NYCHA police officer union, Timothy Nickels, filed for an order to show cause to stop the transfer of NYCHA police officers to the NYPD, arguing that NYCHA was not authorized to initiate the transfer under Civil Service Law § 70(2) since it was not a civil division of the State as specified under the law. The union argued that NYCHA should have either sought legislative action to enact the transfer and therefore uphold the rights of the transferred employees, or it should have negotiated the transfer with the union.[58]

The Appellate Division examined whether NYCHA as a public authority was bound by Civil Service Law § 70(2). The court determined that the Mayor, City Council, and NYCHA took the appropriate actions

for addressing the transfer of employees upon a transfer of function as outlined in Civil Service Law § 70(2).[59] Their actions were based on the provisions in the Public Authority Law mandating that public authorities must follow Civil Service Law in their employment decisions.[60] Therefore, the court held that Civil Service Law § 70(2), which does not require a negotiated agreement between NYCHA and the union before the transfer of police functions can occur, governed NYCHA's transfer of services to the NYPD.[61]

Reading *Vestal* and *Nickels*, it seems apparent that the Taylor Law was not a barrier to consolidating on an inter-municipal or intra-municipal level. The ability of the school district and NYCHA to transfer an entire function to another entity was protected from employee interference by Civil Service Law § 70(2). Based on these cases, consolidation under the recently enacted New N.Y. Government Reorganization and Citizen Empowerment Act may also fall under Civil Service Law § 70(2) and therefore remove the employer's requirement to bargain over consolidation—achieving the Lundine Commission's goal of superseding the Taylor Law while avoiding the political debate attached thereto. However, whether bargaining is or is not required under Civil Service Law § 70(2) in cases of consolidation cannot be completely clarified until the New York State Court of Appeals addresses that exact issue. Because it is unclear as to whether the Court of Appeals would hear such a case in the near future and whether it or other courts would rule the same as the courts in *Vestal* or *Nickels*, the Lundine Commission wants some practical certainty in allowing employers to make transfers without bargaining by amending the Taylor Law and enacting consolidation legislation that explicitly supersedes it.

Public Policy versus Collective Bargaining Interests

In *Vestal* and *Nickels*, the courts subordinated the Taylor Law to Civil Service Law § 70(2), eliminating the employer's requirement to bargain over the decision to consolidate. Courts have subordinated the Taylor Law to another section of Civil Service Law in other cases by invalidating collectively bargaining contracts that violate the furtherance of public policy under Civil Service Law. The decisions in *Chautauqua* and *Long Beach*, although not about consolidation, further strengthen this key principle—some of an employer's Civil Service Law-driven, managerial rights trump labor-management Taylor Law rights. Together, the cases negate the Lundine Commission's idea that unions are able to thwart the act of consolidation by calling upon their Taylor Law rights.

In *Chautauqua v. Civil Service Employees Association* (CSEA), the New York State Court of Appeals addressed a collectively bargained approach to layoffs that conflicted with Civil Service Law § 80, which outlines how employers shall reduce competitive-class civil service positions.[62] The court held that even though the Taylor Law requires

public employers to collectively bargain with unions over contracts and gives the parties wide freedom to negotiate, bargaining is subject to "the absence of 'plain and clear' prohibitions in statute or controlling decisional law, or restrictive public policy."[63] The court stated that it would prohibit arbitration in this case if it could examine the collective bargaining agreement and Civil Service Law § 80 and conclude that "the granting of *any* relief would violate public policy."[64]

If the collective bargaining agreement's layoff provisions were applied, Chautauqua would relinquish its managerial right to decide which positions were essential and which positions should be dissolved. The court held that the county is not legally permitted to give up that managerial right, as that right was created for the public's benefit and cannot be changed by agreement with the union.[65] Therefore, the court ruled in favor of the county and permanently stayed arbitration on the matter.

Chautauqua was an important case because it emphasized the role of Civil Service Law as a protector of public policy and that certain procedures and rights cannot be changed or waived simply because parties agreed during collective bargaining to change them. Although nothing in the Taylor Law prohibits collective bargaining over issues such as those in *Chautauqua*, the right of unions to collectively bargain with employers over issues stipulated in Civil Service Law ends when bargaining clashes with preexisting law. The same is true for consolidation cases. Since new legislation has been enacted that gives municipalities more leeway in consolidating their governments and services, the Taylor Law's requirement of a negotiated agreement over the transfer of unit work would hinder governments' abilities to carry out their powers to consolidate under the New N.Y. Government Reorganization and Citizen Empowerment Act. Therefore, an employer's rights under the Act would supersede the Taylor Law's requirement for the employer to collectively bargain over consolidation.

The New York State Court of Appeals in *Long Beach v. CSEA* faced a conflict between the rights of provisional city employees as defined in Civil Service Law and in the City of Long Beach's contract with the CSEA.[66] The court had to determine whether claims made by terminated provisional employees could be arbitrated and whether the contract or Civil Service Law could be applied. The court held that the terminated provisional employees' claims were not arbitrable because allowing the claims to go to arbitration would violate Civil Service Law and public policy.[67] Civil Service Law stipulates that provisional employees may only hold their positions for a maximum of nine months and outlines clear timelines for filling the positions permanently, thereby disallowing provisional employees to have tenure rights.[68] The court held that Civil Service Law does not grant provisional employees the

contract's promise of continued employment and, further, they are not entitled to be transferred to an open position for which they are qualified upon termination.[69] *Long Beach*, like *Chautauqua*, makes very clear the precedence of Civil Service Law over the Taylor Law, when provisions of collective bargaining agreements clash with the furtherance of public policy under Civil Service Law.

Considering the courts' holdings in *Vestal*, *Nickels*, *Chautauqua*, and *Long Beach*, the courts have provided a framework, or at least dicta, allowing consolidation actions to supersede the Taylor Law's requirement for bargaining over the decision to transfer unit work.[70] Although one cannot conclude that every legal decision to consolidate will be absolved from collective bargaining based on these cases, several statutes have been enacted to govern specific cases of consolidation, and the legislature has addressed collective bargaining concerns directly in that statutory language. The following example of the consolidation of the State's Unified Court System is more specific than the New N.Y. Government Reorganization and Citizen Empowerment Act because it spells out exactly what will happen to unionized employees involved in the consolidations, whereas the new Act is silent on the issue.

Consolidation of the State's Unified Court System

The State legislature enacted the Unified Court Budget Act in 1978, which transferred funding for the State's court system from individual counties to the State.[71] Providing for how all administrative and procedural aspects of the county court systems would be transferred to the State's financial jurisdiction, the law also provided that the employees transferred from the county to the State's employment would retain all of their terms and conditions of employment, maintain the same collective bargaining agreements as before the transfer, and remain in their same bargaining units.[72]

In order to get union buy-in for the transfer and therefore buy-in from legislators to approve the measure, the bill had to include the above collective bargaining provisions.[73] The collective bargaining provisions of the law were added only several hours before the law's passage.[74] Without assurance that their bargaining rights would be protected, unions affected by the transfer would not have cooperated and would have used their supporters in the legislature, many of whom they helped elect, to politically stall the transfer.

The consolidation of the judicial system was a large-scale and unique event. Its collective bargaining outcomes, however, show how much unions cherish the maintenance of the status quo, even when it is not the most cost-effective result for their employers. The result of bargaining over the decision to transfer the courts' financial administration to the State was incorporated into the legislation to ensure the bargained provision would be followed.[75] Based on this example, amending the

Taylor Law would not prohibit unions from seeking political support to incorporate union-friendly provisions into consolidation legislation. The political power of unions is strong enough to help them avoid monetary losses that result from removing the ability to bargain over consolidation, as per the Lundine Commission's recommendations. Therefore, the Commission will have a very difficult time actually enacting any consolidation legislation that would explicitly supersede the Taylor Law, which is why a thorough interpretation of case law and Civil Service Law § 70(2) by the Court of Appeals is required.

Enacting Consolidation Laws that Supersede the Taylor Law

Incorporating language in new consolidation legislation that is similar to the Unified Court System collective bargaining clauses would run counter to the Lundine Commission's goal of containing costs by eliminating the collective bargaining status quo, as the Commission is looking for the renegotiation of all collective bargaining agreements after consolidation. The Commission may hope that eliminating the mandatory duty to negotiate over the decision to consolidate and renegotiating labor contracts will eliminate the political pressure that unions wielded during the Unified Court System consolidation. However, the removal of such collective bargaining rights on a statewide level would face fierce opposition from the State's large public employee unions, which would negotiate with legislators instead of employers to avoid cuts to compensation due to consolidation. The right of employees to engage their employers in impact bargaining would be enormously difficult to remove in the political arena. The court system negotiations likely began because of the employer's duty to bargain over the transfer's impact, but negotiations certainly ended outside of the traditional collective bargaining relationship, which demonstrates both the strength of employee unions and the fruitlessness of amending the Taylor Law to avoid such post-consolidation gains for organized labor.

If municipalities undergo consolidation without reaching agreement with the unions involved or by enacting legislation to guide the consolidation, unions may seek relief from PERB by filing an improper practice charge against the employer for failing to negotiate the decisions or their impacts. Until a court finds legislative provisions illegal, PERB defers to legislative intent for any improper practice matters that come before its jurisdiction. PERB would interpret the employer's decision to consolidate in light of the Taylor Law's requirement for bargaining over the transfer of unit work and its impact.[76]

To better understand an employer's current obligations to its employees in cases of consolidation, one must examine what has happened in recent consolidation cases around New York State. In the following section, this paper examines a specific consolidation

plan, process, and outcome from the Town of Clay police department consolidation and draws conclusions about the roles of various constituent groups, political forces, local officials, and citizens in the final consolidation result. This paper then determines whether Taylor Law amendments would have helped the consolidation process go more smoothly and whether Civil Service Law § 70 and PERB's input would have played a role in the consolidation's outcomes.

Case Study: Town of Clay Police Department Consolidation

The Town of Clay, a suburb of Syracuse with a population of about 60,000, decided to merge its police department with the Onondaga County Sheriff's Department in 2008.[77] The consolidation occurred when the Town of Clay abolished its police department and subsequently entered into a cooperation agreement with the Sheriff's Department to provide police services in Clay. Onondaga County Executive Joanie Mahoney and former Clay Town Supervisor Jim Rowley jointly proposed the consolidation and claimed that its purpose was to create cost savings estimated at $16 million over ten years,[78] which would allow the town to reduce taxes by 20 percent, equivalent to a $50 tax cut for a house valued at $112,000.[79] Rowley emphasized that the consolidation would lower costs while allowing service delivery to remain the same, saying that without the consolidation, the Clay police department would be unable to sustain the demand for its services without incurring greater operational costs.[80] Included in the consolidation plan was the stipulation that all of the sixteen full-time Clay police officers would be able to keep their jobs and transfer to the Sheriff's Department.[81]

Mahoney and Rowley made the plan public in March 2008, and the Clay Town Board voted soon after in favor of the consolidation plan. In May, the Onondaga County Legislature voted in favor of the merger.[82] Final approval of the merger, however, was needed by the citizens of Clay, and a referendum was set for June 2008.[83] The citizens voted overwhelmingly in support of the consolidation, 69 percent in favor and 31 percent in opposition.[84] The terms of the five-year consolidation agreement included that Clay officers had the option to keep their jobs and transfer to the Sheriff's Office; the County would provide two patrol cars in Clay at all times; Clay would pay the County $1.3 million in the first year to cover the officers' salaries and the cost of keeping them on patrol; and the transferred officers would be based in Clay for at least the first year of the agreement.[85]

Legal Process for Consolidating the Police Departments

The Clay consolidation was guided by several state statutes. The

abolishment of the Clay police department was subject to the guidelines of Town Law § 150. Section 150(4) permits a town board to abolish a police department and requires it to be subject to a permissive referendum.[86] The text of Town Law § 150 is silent on whether collective bargaining is required over a decision to abolish a police department. The Town's formation of the municipal cooperation agreement with Onondaga County was subject to the guidelines of Article 5-G of the State's General Municipal Law. Article 5-G stipulates that in order for a municipality to share services or contract to provide or receive services from another municipality, both municipalities must have the ability to perform the service on their own.[87] The cooperation agreement can be a maximum of five years and usually addresses the cost structure, service expectations, and other issues relevant to the consolidation plan.[88] The governing body of the municipalities must approve the consolidation plan by a majority vote, but governing bodies are not required to put the issue out to a citizen referendum.[89] The Office of the New York State Comptroller urges that agreements formed under Article 5-G incorporate methods for employing and compensating personnel.[90] It remains unclear, however, whether those methods must be negotiated with the bargaining units involved in the consolidation.

The Clay police department consolidation would be also guided by Civil Service Law § 70, and based on *Vestal* and *Nickels*, the unilateral decision to consolidate would not be subject to collective bargaining. According to Civil Service Law § 70(5)(a), upon the consolidation or dissolution of a police department and subsequent contractual transfer of its functions to another police agency, the provisions of Civil Service Law § 70(2) apply.[91] Therefore, as held by the courts in *Vestal* and *Nickels*, the Town's decision to enter into a service agreement with the County after the abolition of the Town's police department, which was a right legislatively bestowed upon the Town, was not subject to mandatory negotiation with the Clay Police Benevolent Association (PBA).

Opposition from the Clay Police Union

Aside from the differing opinions of Clay's citizens, the main opposition to the consolidation plan was the Clay PBA. PBA President Fred Corey voiced the union's concerns to the public. He contended that the increase in personnel for the County would eliminate the cost savings for taxpayers and that the current police shifts of three to four cars would be decreased to two cars and therefore compromise safety.[92] The PBA's strongest argument to maintain the status quo was that the Clay Police Department was the most efficient police department in all of Onondaga County, a statement with which the Town agreed.[93] Clay Town Supervisor Rowley continued to engage in a public relations battle with the PBA and questioned the union's claims, saying they were not backed by financial calculations or other evidence.[94]

Before the referendum, the Town and PBA negotiated over the salary

the officers would receive at the Sheriff's Office. The Town made a small concession and agreed to pay the transferred officers the difference in salary they would receive once they transferred to the lower pay scales at the Sheriff's Office.[95] Corey noted that bargaining over only the salary would not be sufficient, as there were many other terms and conditions of the transition that were unsatisfactory to the union that were not addressed during bargaining.[96]

After the referendum was approved, the PBA filed an improper practice charge with PERB, alleging that the decision to consolidate without negotiating the decision or its impact with the union was a violation of the Taylor Law.[97] The PBA argued that Rowley publicly announced in March that the Town had been privately working on a consolidation agreement since October 2007 that would transfer the PBA's bargaining unit work to the Sheriff's Office.[98] The union claimed that the consolidation discussion was kept secret from the PBA and that the Town was obligated to bargain over the transfer of unit work under the Taylor Law, which the Town did not do.[99] The PBA alleged that the Town did not completely go out of the business of providing certain levels of police service through contracting with the County, and the PBA asked PERB to order that the Town cease and desist from the transfer of unit work without negotiations.[100]

In the Town of Clay's answer to the improper practice charge, the Town alleged that its actions did not constitute an improper practice and should therefore be subject to the collective bargaining agreement's dispute resolution procedures.[101] The Town argued that the decision to consolidate was its managerial prerogative, and because it has no control over Sheriff's Office operations, the Town is no longer in the business of providing police services and therefore was not required to bargain over the decision under the Taylor Law.[102] The Town of Clay also stated that it did make an attempt to bargain over the impact of the consolidation decision with the union,[103] which is evidenced by negotiations over the officers' salaries mentioned above.

Whether PERB's Decision Could Have Impacted the Consolidation

The Lundine Commission reported that litigation over whether a public employer should bargain with its union about the decision to consolidate would stall the consolidation process,[104] likely because of the time it takes to reach resolution for improper practice charges and any ensuing appeals. PERB has the authority to issue cease and desist orders in most cases involving the transfer of unit work.[105] In cases in which violations of the Taylor Law are grounded in legislation, however, PERB's cease and desist awards have been reversed by the courts, as was the case in *Webster* cited by the court in *Vestal*, which held that a school district's ability to subcontract services to a BOCES superseded an employer's duty to bargain under the Taylor Law.[106]

The Clay PBA improper practice charge settled before going to a hearing before an Administrative Law Judge at PERB, but the case raises the issue of whether PERB's decision could have influenced the outcome of the consolidation referendum and whether a PERB ruling in favor of the union would "undo" the consolidation that had already taken place. An article on the Clay consolidation claimed that Town Supervisor Rowley and Clay PBA President Corey both agreed that PERB's decision would not affect the outcome of the vote.[107] PERB has ordered municipalities to reverse unilateral subcontracting decisions that violated the Taylor Law, but it is unclear whether PERB would use that same approach regarding consolidation decisions that were subject to a vote from citizens and that retained the officers' jobs, especially since the parties engaged in limited impact bargaining. Considering that the police department consolidation has been in place for over a year, a cease and desist order from PERB would likely be overturned on appeal simply due to impracticality.

Adhering strictly to the Taylor Law's requirements, PERB could have ruled that the Town of Clay made the managerial decision to go out of the business of providing police services to its residents, which is a decision that does not have to be negotiated with the Clay PBA but would require impact bargaining with the union. An order to require the Town to fully engage the union in impact bargaining would have the potential to negate cost savings, as the Lundine Commission fears. Amending the Taylor Law to eliminate impact bargaining in cases of consolidation, however, would not have changed much of the consolidation's actual outcomes, considering the Town conceded to pay the difference in salaries between the two police departments, most likely to quell resentment from the PBA and citizens in opposition rather than to fulfill the Town's impact bargaining duties. The elimination of impact bargaining would seek to avoid such a concession from being made in the future, but the PBA was able to exert enough political and media influence to lower cost savings, even when the Town insisted it need not bargain over the consolidation and refused to bargain over other impacts.

Lessons from the Town of Clay

The amendments to the Taylor Law recommended by the Lundine Commission would change the ability of unions to file improper practice charges in cases of consolidation. This would have saved the Town of Clay time and money negotiating over salaries for transferred police officers but would not have changed the outcome of the consolidation itself, especially since the Town proceeded with the consolidation after the improper practice charge was filed. If the case had not settled, PERB could have seen it fit to issue a cease and desist order to reverse the illegal transfer of unit work, which would prove problematic for any

instance in which the consolidation already occurs before PERB issues a decision. PERB could have also ruled that more thorough impact bargaining should have occurred, whether or not the decision to abolish the police department was a managerial prerogative under Town Law § 150. No matter PERB's ruling, the losing party would likely appeal to the state courts, which may look to Town Law § 150 and Civil Service Law §70(5) to determine if they absolve the Town from bargaining over its decision to abolish the police department and the impact of that decision. Looking to *Vestal*, *Nickels*, *Chautauqua*, and *Long Beach* as discussed above, one can determine that the managerial right bestowed upon the Town of Clay to enter into a cooperation agreement with Onondaga County, as per Town Law § 150, supersedes the Taylor Law's requirement to negotiate over the transfer of unit work resulting from the consolidation but may not absolve the Town from engaging in full impact bargaining with the PBA.

Collective bargaining under the New N.Y. Government Reorganization and Citizen Empowerment Act could follow the same bargaining path as the Clay consolidation under Town Law § 150—legislation granting a government entity the power to consolidate supersedes the requirement for the entity to bargain over the decision with its unionized employees. The entity would likely have to engage in some kind of impact bargaining, which may reduce cost-savings. If impact bargaining were to be legislatively eliminated in cases of consolidation, however, such an elimination may still not be powerful enough to ensure that post-consolidation cost savings remain maximized and that unions cannot successfully use politics, public relations, and the legislative process to bargain over consolidation to their fullest advantage.

The Future of Collective Bargaining as a Barrier to Consolidation

Due to the uncertainty of how courts and PERB will approach the myriad of consolidation cases, the Lundine Commission encourages the use of legislation to regain some level of certainty as to how public employers can choose to consolidate.[108] It sees amendment of the Taylor Law or at least the enactment of consolidation legislation that supersedes the Taylor Law as the only certain ways to avoid bargaining over the transfer of unit work and its impact, especially since it may take years for the Court of Appeals to be faced with those exact issues and then for it to make clear rulings based on whether bargaining obligations interfere with the public policy the court must uphold. However, even though amending the Taylor Law may be the only way to clarify the unease with which public employers view their relationships with employees during and after consolidation, the amendments themselves may create a new kind of uncertainty if

passed.

Crafting statutory language to amend the Taylor Law will prove a huge obstacle to ensuring the amendments accomplish the Lundine Commission's goals. Without a doubt, the major public employee unions in the State will have their leaders and lobbyists working overtime to ensure that organized labor is not unfairly impacted by the legislation. The biggest hurdle will be crafting exact statutory language to ensure that it defines consolidation clearly enough to avoid eliminating the right to bargain over the decision to subcontract, which was a major gain for employees in the recent past. Problems stemming from drafting the legislation may serve to increase union resistance, which will compromise whether such a bill would eventually be passed in the legislature.

If public employers need not bargain over the transfer of unit work in cases of consolidation, the incentive will arise for employers to consolidate to avoid costly collective bargaining agreements, which they lacked the political power to avoid during negotiations. Legislation to eliminate mandatory bargaining over the transfer of unit work would increase consolidation at the procedural level, but it would not increase consolidation for the sake of efficiency. Rather, municipalities would use consolidation to rein in the power of public sector unions. If employees are formally denied their rights during consolidation cases via Taylor Law amendments, there will be no incentive for employers to compromise with labor when considering consolidation. The statutory and explicit elimination of bargaining obligations as recommended by the Lundine Commission would encourage governments to clandestinely use consolidation to undermine unions' power that cannot be harnessed through mere collective bargaining—the result being consolidation without engaging unions in decision-making that leads to greater enmity between labor and management.

Reading the few court cases on collective bargaining over consolidation, *Vestal* and *Nickels* imply that public entities can avoid bargaining over the transfer of functions, but impact bargaining would still be required. Eliminating impact bargaining in cases of consolidation would seriously interfere with the well-being and morale of weaker public employee unions across the State. However, it would also result in the increased use of political power by stronger unions to make financial and political gains that would compensate for gains that could no longer be made under impact bargaining. The dynamic between labor and management would shift and would result in a situation similar to how the unions involved in the consolidation of the State's Unified Court System used their political power to maintain the status quo.

In support of the major consolidation bill proposed during the most recent legislative term, the State's Attorney General Andrew

Cuomo publicly emphasized the need for consolidation to occur and for legislation to be enacted to allow those changes to occur.[109] The New N.Y. Government Reorganization and Citizen Empowerment Act accomplished just that for procedural consolidation issues. The legislation did not, however, attempt to avoid the potential labor relations obstacles that have been identified by the Lundine Commission by including provisions to allow the legislation to supersede the Taylor Law. Then again, this author's interpretation of previous consolidation cases suggests that the consolidation law itself may be enough to allow government entities to exercise their consolidation rights without interference from bargaining obligations regarding the consolidation decision.

If the PERB case on the Town of Clay's bargaining obligations over its police department's dissolution had gone to a hearing, it would have provided great insight into how PERB would approach consolidation. The case study proved that a major hurdle for consolidation is the political voice of public employee unions but also that such a voice may not completely defeat consolidation attempts in the legal arena.

Although the Lundine Commission has valid reasons to be concerned with an employer's duty to bargain over both the decision to transfer unit work and the impact of that decision in cases of consolidation, legal amendments to the Taylor Law and the enactment of consolidation laws that supersede the Taylor Law may not sufficiently address the alleged barriers to consolidation. The several court cases that seem to indicate that a public employer already has the ability to transfer unit work during consolidation without bargaining, in instances where the employer is consolidating via statutory provisions, are not strong enough precedent for an employer to comfortably make the decision to consolidate without bargaining, at least until the New York State Court of Appeals issues a black and white decision on consolidation legislation versus the Taylor Law. Even if legislation is introduced that outlines consolidation procedures and their effect on unions, the traditional labor-management relationship will be moved from collective bargaining to the political arena, where the power of public employees and their unions can be better harnessed in helping draft legislation than when individual bargaining units face individual employers. The more evenly-matched political relationship in lobbying the State legislature will preclude the Lundine Commission's desired legislation to amend or supersede the Taylor Law from being enacted. A clear definition of employer rights during consolidation can only be outlined by neutrals at the highest levels of the State's court system, and until then, local government consolidations will never occur without bargaining in either the collective bargaining or political arena.

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The views expressed herein are the personal views of the author and are not intended to reflect the views of The Port Authority of New York and New Jersey.

Endnotes

1 *Public Employees' Fair Employment Act (Taylor Law), N.Y. Civ. Serv. Law* § 200-214 (1967).
2 Regardless of whether a public employer must negotiate over a decision to transfer unit work, it is obligated to negotiate over the impact of that decision on the terms and conditions of employment of its public employees. "Impact Bargaining." Chap. 7.19 in *Public Sector Labor and Employment Law*, edited by Jerome Lefkowitz et al. Albany: New York State Bar Association, 2008.
3 Office of the New York State Comptroller Division of Local Government and School Accountability. *Intermunicipal Cooperation and Consolidation: Exploring Opportunities for Savings and Improved Service Delivery*. Albany: New York State Office of the State Comptroller, 2003, 2.
4 Ibid.
5 Ibid., 3.
6 Spitzer, Governor Eliot. "Establishing the New York State Commission on Local Government Efficiency and Competitiveness." *Executive Order No. 11*. Albany, April 2007, 1.
7 For this reason, the Commission is often referred to as the "Lundine Commission."
8 Spitzer, *Executive Order*, 2.
9 Ibid., 3.
10 New York State Commission on Local Government Efficiency & Competitiveness. "21st Century Local Government: Report of the Commission on Local Government Efficiency & Competitiveness." Albany, 2008, 10.

11 Another estimate, from New York State Attorney General Andrew Cuomo, counted 10,521 local government entities. The varying estimates of the number of local government entities further prove how complex New York's government structure has become. Spector, Joseph. "A.G. Wants Laws to Facilitate the Consolidation of Governments: Plan to Ease Property Taxes, Budget Woes." *The Ithaca Journal*, December 12, 2008.
12 New York State Commission on Local Government Efficiency & Competitiveness, *21st Century Local Government*, 10.
13 Ibid., 1.
14 Ibid., 2.
15 Clarkson, John. Interview by author. Telephone. Albany, July 31, 2008.
16 Ibid.
17 A transfer of unit work occurs when work that has historically been performed exclusively by employees of a bargaining unit is transferred outside of the bargaining unit.
18 New York State Commission on Local Government Efficiency & Competitiveness. "Consolidation and Collective Bargaining." Staff Brief, Albany, 2008, 1.
19 Ibid.
20 Derosia, Darrin. Interview by author. Telephone. Albany, December 12, 2008.
21 Ibid.
22 Ibid.
23 Office of the New York State Attorney General. "Attorney General Cuomo Applauds New York State Senate Passage of Historic Government Consolidation Measure to Reduce Waste and Save Taxpayer Money." Albany: Office of the New York State Attorney General, June 3, 2009.
24 *New N.Y. Government Reorganization and Citizen Empowerment Act, N.Y. Gen. Mun. Law* § 750-793 (2009).
25 *N.Y. Gen. Mun. Law* § 767.
26 Governor's Blue Ribbon Commission on Consolidation of Local Governments. *Report of the Governor's Blue Ribbon Commission on Consolidation of Local Governments*. Albany: New York State, 1993, 17.
27 Ibid.
28 New York State Commission on Local Government Efficiency & Competitiveness, *Prior Local Government Commissions*, 1.
29 Governor's Blue Ribbon Commission on Consolidation of Local Governments, *Report of the Governor's Blue Ribbon Commission*, 57.
30 Ibid.
31 Ibid., 58.
32 New York State Commission on Local Government Efficiency & Competitiveness, *Prior Local Government Commissions*, 1.
33 Governor's Blue Ribbon Commission on Consolidation of Local Governments. *Report of the Governor's Blue Ribbon Commission*, 59.
34 PERB is charged with interpreting and applying the Taylor Law to improper practice charges, petitions for representation, and strike allegations filed by New York State's public employee unions and public employers. *Public Employees' Fair Employment Act (Taylor Law), N.Y. Civ. Serv. Law* § 205.
35 "Subcontracting." Chap. 7.13 in *Public Sector Labor and Employment Law*, edited by Jerome Lefkowitz et al. Albany, New York: New York State Bar

Association, 2008.
36 Crotty, John. "The Taylor Law Implications of Government Consolidation." Informational Report, Public Employment Relations Board, Albany, 2, citing *Niagara Frontier Transportation Authority*. 18 PERB 3083 (Public Employment Relations Board, 1985).
37 *Manhasset Educational Support Personnel Assn. v. Manhasset Union Free School District*. 39 PERB 4610 (Public Employment Relations Board, 2006).
38 Crotty, *Taylor Law Implications*, 2, citing *Niagara Frontier Transportation Authority*.
39 *Niagara Frontier Transportation Authority*. 18 PERB 3083 (Public Employment Relations Board, 1985).
40 Crotty, *Taylor Law Implications*, 4, citing *Tonawanda City School Dist*. 17 PERB 3091 (Public Employment Relations Board, 1984) and *City of Watertown*. 10 PERB 3008 (Public Employment Relations Board, 1977).
41 Ibid., 4, citing *Town of Oyster Bay*. 12 PERB 3086 (Public Employment Relations Board, 1979).
42 This does not mean that the employer is also free to abstain from impact bargaining but rather only over the decision to consolidate.
43 It is important to note that those cases cannot be extrapolated to encompass all cases of consolidation, as they are based on specific statutory language, but the courts' dicta may be used by future courts to allow employers' decisions to transfer unit work in consolidation cases to supersede the Taylor Law's requirement to bargain over those decisions.
44 Some interpretations of the set of cases discussed below lead others to agree with the Lundine Commission's need to amend the Taylor Law to overcome the perceived labor-related obstacles to consolidation, but this author uses this legal analysis because the significance of these cases has yet to be determined and, therefore, still has the potential to be strong precedent on which to decide consolidation cases.
45 *N.Y. Civ. Serv. Law* § 70(2).
46 Groenwegen, Nancy. *Consolidation of Local Government Service: A Guide to the Rights of Civil Service Employees*. Informational Report, Municipal Service Division, Albany: New York State Department of Civil Service, 2007, 5.
47 Ibid.
48 Impact bargaining would still be necessary, however, to address other issues not addressed in the law, such as bargaining over the impact of layoffs.
49 *Vestal Employees Assn. v. PERB*. 94 N.Y.2d 409 (New York State Court of Appeals, 2000).
50 Although this case used the term "subcontracting" to describe what occurred between the school district and BOCES, it is more appropriate to think about the case as a cooperation agreement, which is a form of consolidation promoted by the Lundine Commission.
51 *Vestal*, 94 N.Y.2d at 414.
52 *Vestal*, 94 N.Y.2d at 415, citing *Webster Cent. School Dist. v. PERB,* 75 N.Y.2d 619.
53 *Vestal*, 94 N.Y.2d at 416.
54 Ibid.
55 Ibid.
56 This does not also absolve the school district from impact bargaining.
57 *Nickels v. NYCHA*, 208 A.D.2d 203 (Supreme Court of New York Appellate

Division, 1995).
58 *Nickels*, 208 A.D.2d at 207.
59 *Nickels*, 208 A.D.2d at 208.
60 Ibid.
61 Ibid.
62 *Chautauqua v. CSEA*, 8 N.Y.3d at 516 (New York State Court of Appeals, 2007).
63 *Chautauqua*, 8 N.Y.3d at 518.
64 *Chautauqua*, 8 N.Y.3d at 519.
65 *Chautauqua*, 8 N.Y.3d at 520.
66 *Long Beach v. CSEA*, 8 N.Y.3d at 469 (New York State Court of Appeals, 2007).
67 *Long Beach*, 8 N.Y.3d at 470.
68 *Long Beach*, 8 N.Y.3d at 470, 471.
69 *Long Beach*, 8 N.Y.3d at 472.
70 To reiterate, it does not eliminate the duty to bargain over the impact of the decision.
71 Bloustein, Mark. "A Short History of the New York State Court System." *Seminar on the Unified Court System of the State*. Albany: New York State Office of Court Administration, 1985, 10.
72 *N.Y. Jud. Law* § 39(6) (1977).
73 Sullivan, Dennis. Interview by author. Tape recording. New York, NY, September 12, 2008.
74 Ibid.
75 Note, however, that the initial legislation enacting the transfer of the Unified Court System to the state was found by the Court of Appeals to have certain provisions that unconstitutionally infringed upon employees' vested contract rights. Therefore, those provisions were considered optional and effected employees could opt to receive accelerated payments from their employing county for cashing out on some accumulated leave balances. New York State Commission on Local Government Efficiency & Competitiveness, *Consolidation and Collective Bargaining*, 4.
76 After consolidation occurs, PERB may also be charged with determining whether the post-consolidation employer must recognize and/or negotiate with the bargaining units of the pre-consolidation employers, applying what is know as the "successorship doctrine" to reach its determination. PERB may decide to accrete members of one bargaining unit into another, maintain the separate bargaining units that existed before the consolidation, or keep the bargaining units separate after consolidation. If a statute is enacted to initiate a consolidation and contains language on how to address collective bargaining issues, PERB will apply that statutory language. This ability of PERB to determine the post-consolidation bargaining unit may also play a role in post-consolidation cost savings.
77 St. Meran, Iris. "Law Enforcement Consolidation in Clay." *News 10 Now*. Syracuse, New York, March 24, 2008.
78 Kerr, Darlene. "Pro and Con: Clay Police Merger." *The Post-Standard*, June 19, 2008.
79 St. Meran, *Law Enforcement Consolidation*.
80 "Clay Town Board in Favor of Police Merger Plan." *News 10 Now*.

Syracuse, New York, March 25, 2008.
81 St. Meran, *Law Enforcement Consolidation*.
82 Phelps, Giselle. "County Backs Clay Police Merger." *News 10 Now*. Syracuse, New York, June 4, 2008.
83 "Fate of Clay Police Department in Voters' Hands." *News 10 Now*. Syracuse, New York, May 28, 2008.
84 Leo, Tom. "Clay Votes to Abolish Its Police Department." *Syracuse.com*. Syracuse, New York, June 23, 2008.
85 Ibid.
86 *N.Y. Town Law* §150(4) (1960).
87 *N.Y. Gen. Mun. Law* §119 (1960).
88 Center for Governmental Research, Inc. "Consolidating Police Services in Whitestown, New York: Options for the Future." Final Review Draft, Albany, 2007, 49.
89 Ibid., 50.
90 Office of the New York State Comptroller, *Intermunicipal Cooperation and Consolidation*, 16.
91 *N.Y. Civ. Serv. Law* § 70(5)(a).
92 Phelps, Giselle. "Bayberry Hosts Meeting on Police Merger." *News 10 Now*. Syracuse, New York, June 9, 2008.
93 Ibid.
94 Rowley, James. "Pro and Con: Clay Police Merger." *The Post-Standard*, June 19, 2008.
95 Leo, Tom. "Clay, PBA Negotiate Salary Issues with Merger." *The Post-Standard*, June 5, 2008.
96 Ibid.
97 "Clay Police Union Seeks to Block Dissolution Plan." *News 10 Now*. Syracuse, New York, April 6, 2008.
98 *Clay PBA v. Town of Clay*. U-28471 (settled) (Public Employment Relations Board, July 14, 2008), 2.
99 Ibid.
100 Ibid.
101 *Clay PBA v. Town of Clay*. C-28471 (settled) (Public Employment Relations Board, August 28, 2008), 1-2.
102 Ibid., 2-3.
103 Ibid., 3.
104 New York State Commission on Local Government Efficiency & Competitiveness, *Consolidation and Collective Bargaining*, 2.
105 Lefkowitz, Jerome. Email to author, December 12, 2008.
106 Ibid.
107 Leo, *Clay Votes to Abolish Its Police Department*.
108 The Lundine Commission maintained an office and staff after issuing its report in order to carry out its legislative proposals and guide local governments in the consolidation process. Due to the state's budgetary problems, the Commission was dissolved in May 2009. It is unclear whether the Commission's staff will continue to propose legislation to further the Commission's recommendations.
109 Spector, Joseph, *A.G. Wants Laws*.

The Silent Dropouts: Does the GED Encourage Qualified Students to Quit High School?

Jesse McCree

ABSTRACT
The relationship between dropout prevention and the General Educational Development (GED) exam is complex. For years, students who dropped out of high school to take the GED were considered transfers for the purposes of school districts' performance reports, not dropouts. Years of research and literature have shown that the labor market potential and postsecondary education prospects for GED students are much lower than those who are high school graduates. Administrators promote the GED as a positive step for non-credentialed dropouts, but are careful not to be too zealous in encouraging students to pursue an educational alternative with lower returns on investment for those who might have been capable of gaining a regular diploma. The new material provided in this paper is a statistical analysis of demographic data of GED test takers from the Tompkins-Seneca-Tioga County region of New York between 2005 and 2008. These results, combined with existing literature on the subject, provide strong evidence that the availability of the GED may encourage some students to drop out of high school in order to gain what is perceived to be an equivalent degree outside of the formalized education system.

Problem Statement

The relation between the General Educational Development (GED) exam and dropout prevention is a largely under-studied area of education policy. While both the GED and dropout prevention policies have been individually studied at length by educators, economists, and policy makers, little research has been done on the interaction between the two. In recent years, school districts have felt an increasing pressure to accurately measure dropout rates in their schools due to No Child Left Behind (NCLB) policies that stress Adequate Yearly Progress (AYP). States and local school districts may be encouraged to artificially lower dropout rates by transferring at-risk students to alternative educational programming, such as GED preparatory classes. While research shows that obtaining a GED does not prepare a person for postsecondary education or future labor market potential as well as a diploma, it is uncontested that it is preferable to no degree at all. The

dilemma for administrators is to balance between promoting the GED for struggling students who may not get any educational credential while not effectively discouraging students from completing a high school diploma program. This paper will show that there is evidence that students have strong behavioral reactions to changes in the perceived difficulty of the GED exam in comparison to the difficulty of obtaining a regular diploma. It will also show that some students who did not finish high school but who took the GED exam represent a fascinating snapshot of "silent dropouts" who were presumably talented enough to finish high school but opted for the GED test instead.

The hypothesis for this paper is that the GED test may encourage students to drop out of high school; its popularity may reflect an inability of the local school system to provide individualized, alternative approaches to education for many at-risk students. The first section of the paper discusses how the nation-wide methodology for measuring dropout rates is widely regarded to be inconsistent and inaccurate. The literature review section of this report examines how administrators, politicians, and think tank/advocacy groups are attempting to reach a consensus on how dropout statistics are measured, and how these policies compare with current standards set forth in the TST region.

The second section of the paper is a comprehensive statistical analysis of TST Board of Co-operative Educational Services (BOCES) students and GED test takers at BOCES' sites from 2005 through 2008. This dataset provides new information to the educational advocates in the tri-county region on a subset of the population who "failed" in regular high school but subsequently took the GED exam. The analysis is driven by the question, "Who are the students that drop-out, and what are they doing in the years after they make this decision?" While a complete answer to this question cannot be fully answered without some qualitative data (which will not be covered in this paper), a quantitative analysis will shed some light as to the subset of the dropout population that decided to re-engage in their education through adult or alternative education programs such as the GED. This analysis attempts to provide new data evaluation in two key areas: 1) identifying who takes the GED; and 2) determining which population subset needs the most in-depth focus. The findings support many administrators' assumptions that there is a growing population of students who are not being served by their regular high schools' programming, yet are able to pass the GED exam with little difficulty. This subset of the population must be studied carefully to find common trends or patterns so that schools may be better able to serve this cohort.

Literature Review: The GED and Dropout Methodologies

The GED (General Education Development) exam is becoming an increasingly popular way for students to obtain their high school equivalency credentials. In 1960, only 2% of all high school credentials were awarded through equivalency exams – by 2001 that figure had grown to nearly 20%.[1] Although the decision to drop out of high school and take the GED exam occurs relatively late in the "dropout prevention spectrum", new literature shows that students react strongly to changes in GED requirements. In a recent article published by University of Chicago Economics Professor James Heckman, exogenous increases in the GED testing requirements were shown to lower the overall dropout rate in a statistically significant manner. Heckman argues that many states' GED policies (particularly in terms of requirements for passing the exam) are strong indicators of high school continuation rates, and thus, higher graduation rates.[2] The 1997 GED policy changes (in which passing requirements were increased to a minimum score of 400 and a mean score of 450 for each subject) forced some states to alter their policies while other states kept their requirements the same. Heckman exploits this exogenous variation in the GED policy changes and finds that a six-percentage point increase in GED passing requirements led to a "statistically significant 1.3 percentage point decline in the overall dropout rate," which translated into roughly 40,000 fewer dropouts for the 1997 cohort.[3]

Heckman also utilized the policies from the State of California to measure the effects of introducing the GED program. In 1974 California was the last state to award a high school equivalency diploma to those who passed the GED test. Before the introduction of the GED, dropout rates in California were lower than in the rest of the United States – once the program was started, that differential rates plummeted by 3 percentage points compared to trends across the county.[4] Heckman's study is particularly significant for later-stage dropout prevention. If the GED is perceived (albeit, incorrectly) as the educational and professional equivalent to a high school diploma, and is seen as "easier to obtain than a high school diploma," students can be expected to alter their decisions to drop out if the GED is made more difficult. While there are a myriad of factors that influence a student's decision to drop out of school, a 2002 National Center for Education Statistics (NCES) report by the Education Longitudinal Study (ELS) shows that 40% of interviewed students who had not received a regular diploma stated that "they thought it would be easier to get a GED."[5]

Recent research has begun to probe the relatively understudied implications of whether the GED is an effective path toward post-secondary education as compared to a high school diploma. John

Tyler of Brown University and Magnus Lofstrom of the Public Policy Institute of California published a study[6] that analyzed the test scores and academic performance of at-risk students in 8th grade. Over the course of five years, one cohort graduated with a diploma and the other group obtained a GED after dropping out of high school. Tyler and Lofstrom' s findings confirmed some well-known theories of dropout prevention. First, at-risk eighth graders who dropped out of high school and pursued their GED had similar test scores as those who ended up finishing their degree. Second, the group that finished high school had much better post-secondary education outcomes than did the GED group, including matriculation rates in postsecondary education, two-year versus four-year degree programs, and time it took to complete the programs.[7] Tyler and Lofstrom are careful to note that these results are difficult to measure because it is impossible to compare one student who both dropped out to take the GED and graduated from high school. Their caveat is that the results could show an unobserved heterogeneity already present in the students in eighth grade that was not yet manifested. Another explanation is that the "dropout shocks" that caused the decision to leave high school in the first place persisted throughout their life.[8] However, they argue that to the extent to which their results show an inherent problem with the GED test's negative impact on affecting dropout rates, a major solution to fixing the dropout problem is more about changing the GED test or supplementing its curriculum so as to not negatively affect postsecondary education plans than it is about focusing on "dropout shocks" outside of the classroom.[9]

Two Theories for Measuring the Effectiveness of the GED

According to the GED Testing Service Survey from 2001, two out of every three adults taking the exam reported that their motivation for taking the exam was to position themselves for further training and educational opportunities beyond high school (postsecondary).[10] Fundamentally, the decision to drop out of high school and enroll in a GED program is an economic cost-benefit evaluation: if the immediate benefits of entering the work force before completing high school are higher than the perceived benefits of obtaining a diploma, students may be enticed to drop out of school. The challenge for administrators is to properly educate their students about this decision. They must balance explaining the negative effects of dropping out of high school while also making the GED a viable option for certain students. Policy makers also must grapple with this fundamental problem: while research has clearly shown that the benefits to earning a diploma outweigh the "equivalency" degree of the GED in terms of lifetime earnings and labor market earning potential, an at-risk student enrolling in a GED program is certainly better off than not pursuing any educational credential at

all. Two theories, human capital investment and economic signaling, can be used to frame some of these problems and help administrators decide the extent to which the GED exam is "too accessible," thereby enticing students to drop out who may not recognize the long-term workforce benefits of obtaining a high school diploma.

Human capital investment, argues Vanderbilt University Professor Thomas Smith, is not only a framework to examine whether an individual student should enroll in a GED program, but also whether state administrators and government officials should support the programs as well. If the expected gains in productivity from a job training or supplemental education program (such as the GED) outweigh the costs of providing the program, one should expect a government or organization to support the service.[11]

The long-term labor market disadvantages of obtaining a GED instead of a high school diploma have been widely researched (see Cameron and Heckman 1993; Maloney 1991).[12] While the GED Testing Service claims that 95% of employers in the United States consider GED graduates as equivalents to high school diploma graduates in hiring, wages, and promotion opportunities,[13] the labor market studies have shown that for those students who earn no higher than a high school diploma, the lifetime earning potential of GED graduates is much closer to non-credentialed dropouts than it is to high school graduates.[14] In addition to this, although two-thirds of GED test takers claim that they are taking the exam for future educational opportunities, Smith's study of a cohort of Texas high school students about to enroll in a two-year Associate's Degree program shows that GED students complete postsecondary schooling at much lower rates than high school graduates (1.6% versus 8.1%, respectively for Bachelor's degrees; 12.2% and 24.8%, respectively for Associate's degrees).[15] Smith shows that the preparation time (in median hours) students spent studying for the exam is less than the amount of hours needed to graduate from high school and to adequately prepare for postsecondary education.[16] Under these current circumstances, Smith argues that the GED as it is currently administered does not meet the minimum human capital investment requirements to justify supporting the GED.

Economic signaling theory, according to Smith, measures the extent to which GED recipients are more highly skilled (e.g. literacy and basic math) than other dropouts and would gain a GED in order to signal to employers their higher competence. Longitudinal studies from the National Adult Literacy Survey (NALS) clearly show that GED recipients have literacy rates that are very comparable to high school graduates and well above those scores for non-credentialed dropouts.[17] A series of studies done by Cameron (1994), Cameron and Heckman (1993), Garret et al. (1996), and Maloney (1993) also present longitudinal data that show GED recipients with more developed cognitive skills than

dropouts with no further education and comparable cognitive skills to those with high school diplomas. Thus, the GED exam provides a means for non-high school graduates with higher cognitive skills than non-credentialed dropouts to "signal" to potential employers.[18]

Who is a "Dropout"?

A well-known study funded by the Gates Foundation in 2006, "The Silent Epidemic," noted how the dearth of accurate dropout statistics across the nation has made it nearly impossible for policy makers at the local, state, or federal level to determine who is dropping out of America's schools:

> [N]o one knows exactly how many students drop out of American high schools because the vast majority of states do not follow individual students over time, but merely report annual enrollments. There are often a number of categories in which students are not counted as dropouts, even if they never graduated. One state counts students who go to jail as transfer students, for example. More commonly, students receiving or studying for a GED are not counted as dropouts, though they have left school and are pursuing a different and much less valuable credential. Under these circumstances [...] it is not unusual for a school to report a 10 percent dropout rate when the number of graduates is 70 percent lower than the number of ninth graders who enrolled four years ago.[19]

Since the passage of No Child Left Behind (NCLB) in 2001, dropout statistics and the methodology for gathering them have come under intense scrutiny because they carry such weight in Annual Yearly Progress (AYP) formulas which heavily impact funding streams. While "The Silent Epidemic" helped to shed light on the disturbing lack of accountability among schools in tracking their own students, much of the literature dating back to 2002 has centered on the deficiency of standardized, accurate dropout data across the county and the implications of this methodological confusion.[20]

The inconsistency between states in measuring dropout rates is astounding. Some states use completion calculations, others use graduation figures and longitudinal data, while others count transfers as graduates, and some even count students in jail as being transfers. The diversity in methodological approaches has led to tremendous confusion about which is the proper way to measure graduation, completion, and dropout rates, and the high level of disparity between

states' reported graduation figures. A recent study found that two dozen states had over-reported graduation rates by 10% or more, while five states had over-reported by more than 20%.[21]

A number of studies since 2002 have been conducted by national educational organizations, think tanks, and agencies dealing with the very problem outlined in "The Silent Epidemic": how do states measure who is a drop out, and is there a consensus on what the appropriate methodology should be? The National Center for Education Statistics (NCES) published a report in 2005 as a direct response to the wide-ranging criticism about a lack of accurate methods for measuring graduation rates. The task force was charged with examining which of the Graduation, Completion, and Dropout (GCD) Indicators can "serve both school system needs and broader community-level needs" and whether the current NCES methodology for measuring GCD indicators is adequate.[22] The recommended formula for GCD Indicators took the following generic form:

$$\frac{\textbf{Students in } Y_c \textbf{ cohort for whom the specified outcome occurs by } Y_i}{\textbf{(Students in } Y_c \textbf{ cohort) - (Students excluded from } Y_c \textbf{ cohort)}}$$

The task force's recommendations focused on the above generic form as the best way to measure graduation, completion, and dropout rates in terms of cohort-based, cumulative methods; however, for each specific category, there were a number of alternative considerations NCES raised in order to keep "perverse incentives" from causing schools to manipulate graduation, completion, and transfer rates to artificially lower dropout rates. For example, the NCES realized that if schools were transferring students who were at a high risk for dropping out to adult or alternative educational programs, the methodology would not capture these transfers in the graduation rate.[23] Therefore, the task force proposed a more "harsh" alternate methodology for measuring dropouts, but one that would seem to eliminate these perverse incentives to transfer failing students, with *P* being the size of the cohort and *Y* being a given academic year:

$$\frac{\textbf{(Size of } P \textbf{ during } Y\textbf{)} - \textbf{(Exclusions from } P \textbf{ during } Y\textbf{)}}{\textbf{(Members of } P \textbf{ remaining throughout } Y\textbf{)}}$$

Another widely used methodology that came to popularity in 2003 amid the cries for statistical reform was the Cumulative Promotion Index (CPI), created by Christopher Swanson, then of the Urban Institute. The CPI "approximates the probability that a student entering the 9th grade will complete high school on time with a regular diploma."[24] Swanson takes the number of 10th graders in one year and compares that figure to the number of 9th graders the previous year,

thereby calculating a percentage of those who were promoted to the next grade. This is repeated for grades 10th to 11th, from 11th to 12th, and from 12th to graduates in order to come up with a ration that approximates likelihood of graduation. According to this CPI methodology, the State of New York should have reported a graduation figure of 61% in 2003 instead of the 76% that was actually reported by the State.[25]

Project Methodology

The statistical analysis of this study will provide the empirical evidence of who is taking, and passing, the GED exam in the Tompkins-Seneca-Tioga (TST) region of New York. This analysis will focus on many of the statistical categories highlighted in prior research listed in the literature review. Score reports were taken from two different sources. First, TST Board of Co-operative Educational Services (BOCES) reports the scores (individual subject and total scores) for those people who took the exam at a BOCES site but were not necessarily a current BOCES client (that is, partaking in an Adult or Alternative Education program). These reports also list age at the time of the test, and what preparatory courses were taken to prepare for the exam. The second source of data was from the BOCES database of clients. This information contained all the information listed above, as well as test-takers' level of educational attainment (usually last year of high school completed), whether they were on public assistance, and their labor market status (e.g. seeking employment, working part-time, full-time). A total of 259 BOCES clients who took the exam between 2005 and 2008 were examined; 553 people who took the exam during the same time period who reported scores to BOCES (but were not necessarily BOCES clients) also were examined. The data categories available for the latter group were age, preparation type (whether they were enrolled in a formal preparatory program), and total/subject scores, while BOCES clients had supplemental information including last year of high school attended and types of public assistance they were receiving at the time of the GED exam. The need to control for variables such as age and preparation stems from the human capital and economic signaling theories: in an effort to better understand why and how young students drop out of school, it is important to analyze their individual cost-benefit decisions to pursue a GED, particularly for those who seem quite capable of obtaining a diploma on their own based on their extremely high test scores.

The analysis first examined the entire population of GED test takers and looked at mean and median scores (with standard deviations for each). Then, scores were examined by age group: Under 20, 20-24, 25-29, 30-39, and over 40 years old. Because prior research suggested that the majority of GED test takers took the exam between the ages of 16-

24, another secondary analysis was done for each age between the years of 16 and 24. Next, the analysis examined scores by preparation time for all clients and test takers, then non-preparation scores by age and preparation scores by age. The purpose of this analysis was to determine whether students instinctively "knew" they could pass the exam before taking it. In other words, isolating the variables of preparation, scores, and age helps to reveal whether younger people needed to prepare as much to pass the exam as older students did.

Another crucial aspect of the methodology was isolating the variables of failed subject scores across age and preparation. Scores were analyzed for subjects that were deciding factors in failing grades, and trends were viewed according to preparation time and age. Each GED score has five subject scores – Math, Reading, Science, Social Studies, and Writing. In light of the human capital investment and economic signaling theories, this analysis also examined the labor market status and level of public assistance for each student taking the GED (where this data were available). This data was again isolated across age, preparation, and GED score across subject areas.

Statistical Analysis of GED Test Takers

The analysis of GED test takers and BOCES clients revealed a number of trends and patterns that seem to support the initial assumptions of local administrators and advocates. Most notably, there are some data that support the hypothesis that the GED exam induces certain students to drop out when they might otherwise have been able to obtain a regular high school diploma. First, mean and median test scores, as well as passing rates (in percentages) for 16 and 17-year olds were significantly higher than any other age group, including 18-24 year olds. Mean total scores for ages 16-17 were more than 150 points higher than the mean total scores for the next highest cohort. Second, mean and median subject scores for each of the five subjects were significantly higher for those students with *fewer than 40 hours of preparation time*. Third, the vast majority of students scoring above a 3000 (roughly in the top 10th percentile) were 19 years old or younger. In addition, those who scored one full standard deviation above the mean were, on average, six years younger than those who were one full standard deviation below the mean. Finally, 72% of GED test takers were considered to be "economically disadvantaged"; 39% were on some kind of public assistance; and 28% were not employed and not seeking work. There was a significant employment discrepancy between those students who scored well and had fewer hours of preparation time and those who did not score well and had significant amounts of preparation time: unemployment for the latter was three times as high as the former.

Data Analysis

Table 1a: Median Subject Scores by Preparation Type

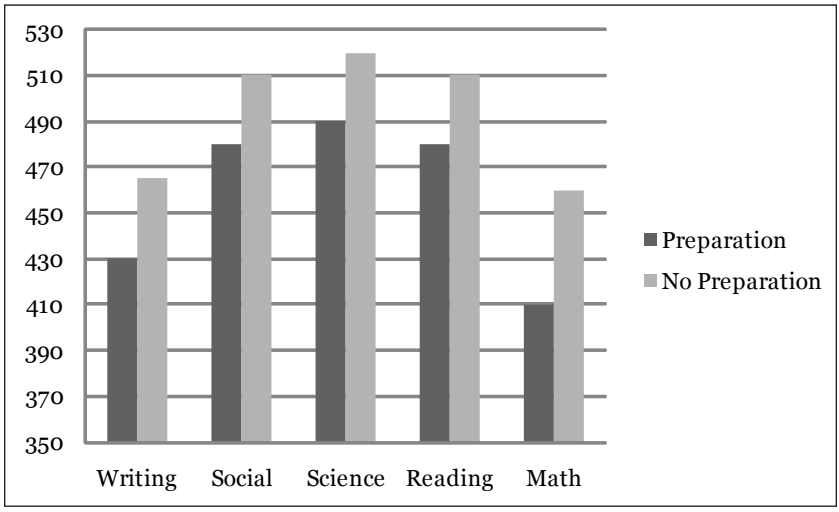
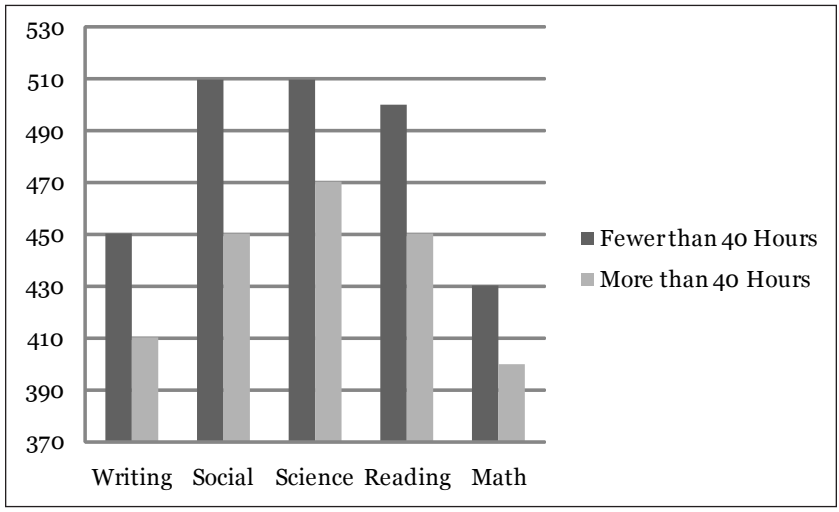


Table 1b: Median Subject Scores by Amount of Preparation Hours



Tables 1a and *1b* illustrate a peculiar truth about preparation time as an indicator for passing the GED exam. Both charts control for median subject scores by category (Preparation or No Preparation) and by number of hours spent preparing for the exam. The results show that the

median test-taker with fewer than 40 hours of preparation scored 220 points higher on the total score than the median test-taker with more than 40 hours of preparation hours. Mean scores reveal similar results. Two-hundred-twenty total points on the exam represents more than half a standard deviation from the mean, a tremendously significant figure on a test where, as Heckman showed, a 60 point increase can lower the dropout rate by 1.3% nationally.

The scores indicate that there is a complicated relationship between time studying for the exam and how well a student does on the exam. The statistics seem to indicate that those who feel well prepared for the exam recognize their high level of preparedness, and make choices about optional preparation accordingly; conversely, those who recognize that they need to prepare in order to pass the exam do in fact seek out help. In many cases, students are required to seek formal help due to behavioral problems or as a prerequisite for receiving other types of public assistance. These figures may have been even more skewed if 16-year-olds who dropped out of high school were not required by state law to participate in an Alternative Education program in order to take the GED exam. In fact, 71.4% of all 16-17 year olds in this study were enrolled in an Alternative programming class, and this demographic was actually the most likely to *pass* the exam. Age does not seem to have much bearing at all on these significant differentials in preparation time: the average age for "No Prep" status was 26.3 years old, while the average for the "Prep" status was almost identical, at 26.7 years old. This strongly suggests that preparation time is an independent variable that highly impacts the likelihood of whether a student will pass the GED exam or not.

Table 2a: Percentage of Passing Scores by Age Group (2005-2008)

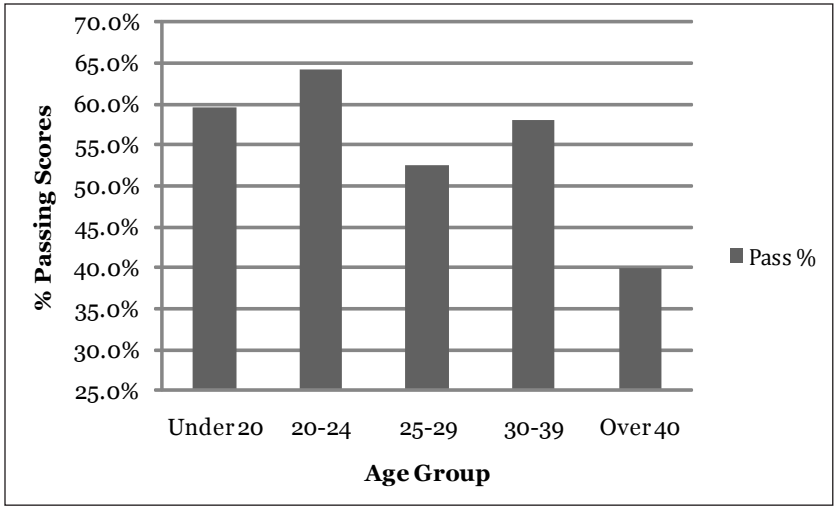


Table 2a presents an interesting complement to the statistics listed in *Tables 1a* and *1b*. While median and mean test scores for those under 20 are significantly higher than those in the next oldest cohort, the passing rate percentages are lower in the Under 20 group than in the Age 20-24 cohort. Part of the reason this occurs is that the range of test scores among the Under 20 group is greater than those in the next two oldest cohorts. The standard deviation for the youngest cohort was 415, while the Age 20-24 and 25-29 standard deviations were 372 and 328, respectively. The large range of scores for the Under 20 cohort indicates that those who passed the exam (many of whom scored over 3000) far exceeded most other test takers, while those who failed did so with relatively low scores. What this shows is a distinct fragmentation within a group that dropout prevention advocates will be most interested in: for those students who are well prepared, taking the GED test is actually an easier option than staying in a regular high school diploma track, and those who are not at all well prepared may be enticed by the prospect of gaining an equivalent degree with less preparation time.

Table 2b: Percentage of Test-Takers by Age Group with Some Form of Preparation (2005-2008)

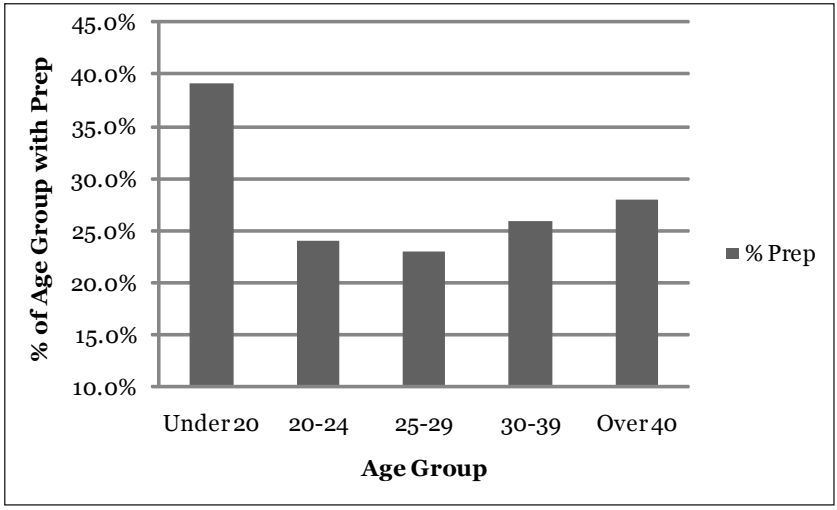


Table 2b shows that nearly 40% of test takers under 20 had some kind of preparation. Since 16-year-olds are required to be enrolled in some kind of Alternative Education program if they are not in regular high school, the figure for 17-20 year-olds (therein excluding 16-year olds) is closer to 20%. This figure also needs to be considered in light of previous graphs which show little correlation between preparation

time and success on the GED exam. Once alternative or adult education becomes optional for GED preparation (usually 18 and older), there is a significant drop off in percentage of students choosing to prepare for the exam, as well as a decline in how successful those students are on the exam.

Table 3a: Percentage Passing Scores for Ages 16-24 (2005-2008)

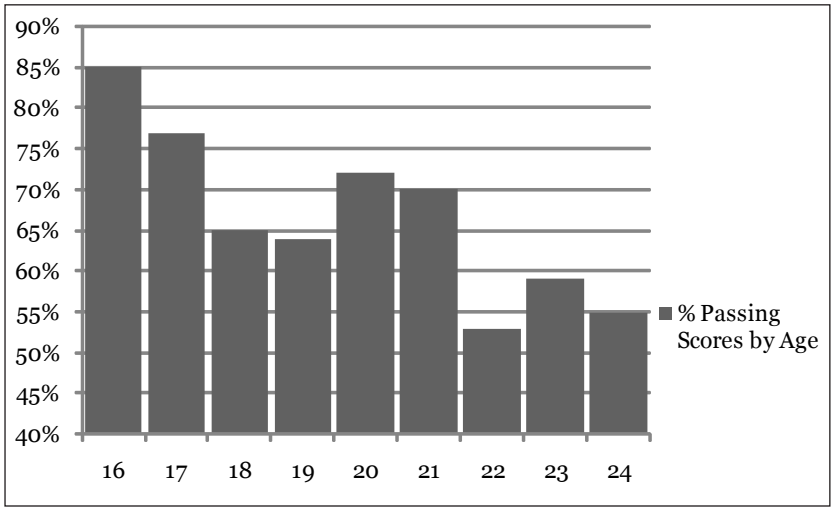
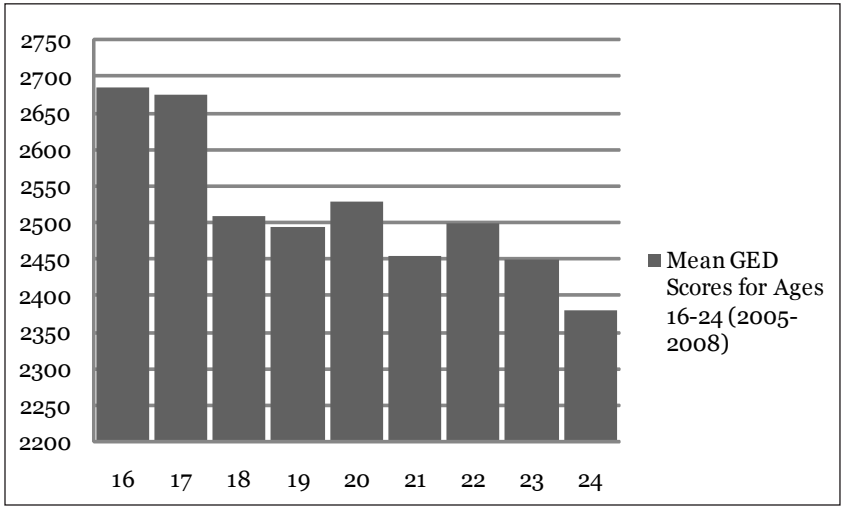


Table 3b: Mean GED Scores for Ages 16-24 (2005-2008)



Tables 3a and *3b* closely examine the age range between 16 and 24, an important age group to analyze considering the sheer number of students between these two ages taking the GED, as well as the interest among dropout prevention advocates about how to shape policies that best capture the performance of this at-risk demographic group. Between the years of 2005 and 2008, the mean and median test scores of test takers ages 16 and 17 were significantly higher than all other ages. Additional data from this study show that the mean and median ages of those scoring more than one Standard Deviation higher than the mean total score (22.3, and 19) were exactly five years younger than those scoring 1 standard deviation lower than the mean total score (27.3, 19). Although there may be a variety of reasons why these scores decline over time, the chronological proximity to their last year of formal schooling may play a major role in explaining why these test scores were so high.

Analysis of Economic Signaling

An analysis of BOCES clients shows that 72% of all students taking the GED exam between 2005 and 2008 were considered "economically disadvantaged." Part of the motivation for economic signaling among at-risk high school students may be the incentive to earn income in the labor market instead of going to school, and this may help explain why some 16 and 17-year-olds may opt for the GED route even though their exam scores may clearly show that they are capable of obtaining a regular high school diploma. In future studies, this data can be examined in conjunction with variables such as preparation time in order to study trends and patterns related to the issue of the demographic makeup of the dropout students who decide to gain high school credentials.

Although 28% of all GED students in this study were unemployed and not seeking work, those students who scored well on the GED exam (between one-half and one-full standard deviation above the mean) were overwhelmingly successful in keeping a job. Only 14% of all GED test-takers who scored well on the exam were unemployed at the time the data was collected (or in the case of BOCES clients, when the database was last updated). This is not surprising given the context of economic signaling theory, or in light of the fact that students who score well on exams are more likely to be employable. However, when preparation hours are isolated are compared against employment data, a striking pattern emerges: for those test-takers with more than 40 hours of formal test prep, the unemployment rate was 21%, while the unemployment rate for those with fewer than 40 hours of prep time was only 7%. This is more evidence that the students who are inclined to engage in "economic signaling" and take the GED are talented, employable, and perhaps not getting what they need from regular high school.

Conclusions

Both *tables 2a* and *2b* reveal a noteworthy trend about dropouts, GED test-takers, and preparation time needed to pass the exam. While it seems counter-intuitive that exam scores would display an inverse relationship to preparation time, these figures begin to shed some light on why those who prepared for less than 40 hours (or not at all) had significantly higher test scores, both mean and median, than those who prepared for more than 40 hours. This report suggests that the discrepancy is due to the "silent dropout" problem – that is, those at-risk students who do not demonstrate strong behavioral problems or borderline intellectual functioning, but instead find that high school does not meet their educational needs. This cohort of students' performance demonstrates higher cognitive abilities on the GED exam, which indicates that many, if not all, would be able to meet requirements for a regular high school diploma if given a more supportive, personalized educational environment that is more conducive to their abilities. Indeed, it appears that many of these "silent dropouts" are themselves aware that they have the cognitive abilities to pass the GED without preparation time.

On the other end of the spectrum, students with many hours of preparation time may have been referred from a supporting agency, such as the Department of Social Services, and may not be at all prepared to take the exam. According to some local educational experts, many of the students who have greater preparation times attend job training programs or employment support services that count as "preparation hours" required to receive public assistance dollars, such as Supplemental Security Income (SSI). In such cases, receiving these benefits is contingent upon participation in preparatory programs. These students often test at much lower reading, writing, and math levels. Thus, the gap between those with high and low preparation times may be an indication that there is a significant skill set differential between those who can pass the exam without preparation (and who may be more likely to be employed) and those who are more likely to be receiving public assistance with lower cognitive skills.

The high performance of test takers ages 16 and 17 might be explained by their chronological proximity to their last year of regular high school, the long preparation hours at alternative educational programming, or by an economic signaling method whereby they attempt to show potential employers that they have similar cognitive skills (and therefore are equally qualified for a job) as do high school graduates. Figures show, unsurprisingly, that the older test-takers are, and the more time has elapsed since their last year of school, the worse the GED scores will be. Those in the youngest cohort have the smallest time gap since their last year in high school – in fact, some may be

still enrolled in high school at the time of the exam. Preparation hours do not seem to have any correlation with how well students do on the GED exam for any age cohort, so it is unlikely that students aged 16 and 17 are gaining higher scores due to the alternative programming. Were that the case, we might expect to see other age groups obtain similar scores as they increase preparation time. The third option is that these students are part of the "silent dropout" group, those who would likely gain a diploma, but are anxious to leave formal high school and so instead opt for the GED route. The fact that the data show a significant drop-off in test scores after age 17 indicates that many students that are scoring well on the GED exam are staying in high school only up until the compulsory age, then opting for the alternative high school credential.

These findings speak loudly in light of human capital investment/economic signaling theories, as well as Heckman's study about the behavioral impacts of changing the GED requirements. If a 17-year old dropout scores in the top 10th percentile on the GED without taking any time to prepare for the exam, one could argue that his or her economic signaling would be strong (they are aware that they have the mental capacities to pass the exam easily), but their human capital investment would be low (the lack of a diploma and fewer preparation hours will not bode well for postsecondary education or long-term labor market success).

The large gap in preparation time between GED test takers represents a worrisome trend for administrators who are concerned with equipping their students with a strong investment in human capital. Smith argued that there is a tremendous gap in preparation time between regular high school students and those who *prepare* for the GED exam, let alone for those who did not prepare for the exam. Heckman's hypothesis also raises the question, "Would these students have opted for the GED had the requirements been more stringent?" These answers may come only with more in-depth study on this "silent dropout" cohort.

The major conclusion is that the demographic description of a dropout may not reflect common assumptions about who these students are and what they do after they dropout. There is a subset of the at-risk population that seems to be more identifiable due their participation in alternative or adult education programs, job training services, or other social assistance programs. Many of these students receive social assistance benefits such as SSI that require recipients to attend these service programs. These students are more likely to prepare for the GED exam, but are much less likely to pass. The subset of the at-risk population that needs more attention is the group that has dropped out of high school, yet demonstrates a solid cognitive ability to pass the GED without preparation time. These students are more

likely to be employed or attend post-secondary education programs. They represent a true skill set differential between those who drop out without any educational credentials and those who gain a GED. They also represent a failure on the part of the public schools to keep them enrolled in a regular diploma program.

Recommendations

Recommendations for Future Study

The time constraints were too limited and the scope of the project too broad to fully examine the implications of 1) who takes the GED; 2) what these dropouts have done since their last year of formal school; and 3) how administrators shape appropriate policies to keep students who perceive the GED to be an easy alternative to staying in school enrolled. There are a number of specific areas that can use more in-depth study to shed more light on these questions. Researchers may conduct a more thorough study of the impact of preparation time on labor market potential and postsecondary education decisions. For example, those students who scored well on their GED exam without preparation signal that there is a potential problem with public schools keeping these students engaged. Questions may be: Why did they drop out? Did they have a stronger skill set than those who prepared more for the exam? What have they been doing since they dropped out, and what events precipitated the return for adult or alternative education credentials? Future research should also conduct a more thorough study of the impact of preparation time on labor market potential and postsecondary education decisions, as well as comparing these results in rural and urban areas. Ultimately, more qualitative research should be done on those students under 20 who scored more than 1 standard deviation away from the mean (total scores over 2900) without preparation time.

National and State-Level Policy Recommendations

One of the major recommendations of this study is the creation of a methodology or indicator that properly measures the work that schools are doing to appropriately place students in alternative and special education. Before the major methodological reforms, large loopholes in the formulas allowed schools with "perverse incentives" to ship students off to alternative programs (sometimes unnecessarily) in order to preserve low dropout rates. The shifting methodology has illustrated that those who do not finish a regular high school diploma with their 9th grade cohort will be considered *de facto* dropouts. Policy on a national level will only maintain political footing if states can begin to agree on a set of mutually agreeable standards. Forums such as National Governors' Association (a meeting of all 50 U.S. governors) are ideal for

discussing the disparate and often flawed methodologies with a purpose of gaining some kind of consensus about dropout measurements. The methodologies listed in the Appendix all calculate the national graduation rate to be between 68% (PPI) and 71.7% (NCES), which are remarkably similar results. One or more of these methodologies may become part of a set of standard measurements, allowing states to choose which they will use while maintaining accuracy.

States may see the need to change their policy on graduation requirements, but they may be unwilling if there will be negative corresponding effects on their funding streams from the federal level. Revising dropout methodologies means getting more accurate dropout data, and this means lower actual graduation rates. If states feel as though these newly revised methodologies will yield lower rates which will yield less funding from federal levels, they may be less likely to pursue policy changes. If reforms in measuring graduation rates across the country are going to be effective, the federal government may need to put a temporary policy in place that will not penalize states for revamping their graduation rates to more accurately reflect the effectiveness of each state. This temporary ban of funding cuts based on newly lowered performance measures could help phase in a standardized methodology of measuring graduation rates.

Local Policy Recommendations

It is important for schools and communities to recognize that the four-year cohort formula is the commonly preferred method for measuring graduation rates. It is also important to realize that a substantial subset of the at-risk population, such as those enrolled in an alternative education program such as a GED or vocational diploma, will not be included in the four-year cohort study. Students that need alternative education also must have an alternative method for measuring how effective a school is providing for their learning needs. Understanding that methodological reform does not happen overnight, some suggestions can be made on a school-by-school level to help lessen the impact of current graduation, completion, and dropout indicators on alternative education students. Thus, school districts should begin to (or continue to) track GED, vocational, special education, and other non-high school credentialed programs over a five-to-seven year range. In addition, minimizing transitions between school districts between 6th grade and 12th grade is crucial for stable educational programming as well as proper tracking to best understand a student's individual needs. Ultimately, community-wide input is needed to develop a comprehensive list of agreed-upon "red flags" or "dropout indicators" that may show early signs of risk for dropping out of high school. These indicators may occur inside or outside of school, thus broad-based input is needed to properly monitor each individual's progress.

Local administrators should continue to equip guidance counselors

and educational administrators about the diminished value of obtaining a GED instead of a high school diploma. Some local experts suggest that key members of school systems who help guide and inform students through crucial decisions are under-educated about the realities of dropping out of school to obtain a GED credential. TST BOCES and the Ithaca P-16 Dropout Prevention group should both invest more time and resources examining the "silent dropout" cohort. In addition, alternative schooling options should be regularly evaluated at the district level for its academic rigor, relevance to student interests, and effectiveness in keeping at-risk students in school.

Measuring who drops out of high school can be quite a complicated task. Local districts must be aware that significant investment in effective data systems is key to capturing the real story behind the "silent dropouts." Databases that are confidential, standardized, powerful, and easy to integrate within communities are not cheap, but they are increasingly becoming essential for administrators to combat these complex problems of high school retention.

There is significant room for improvement in local policy focusing on the "silent dropouts" group that gains higher GED scores with fewer preparation hours. Administrators will be more likely to focus on the group that demonstrates at-risk behaviors, such as lower test scores, less developed cognitive skills, or current enrollment in alternative education programs. This group that is not enrolled in job training, employment support, or other public assistance programs is not as visible – these dropouts may have a stronger skill set and were better able to secure employment after dropping out. An important set of questions to answer is why they decided to drop out and what they have been doing since they have dropped out, as well as why they decided to pursue higher educational credentials and what series of events precipitated that decision.

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APPENDIX

Author/ Institution of Model	Name of Model	Mathematical Model	Notes
Mortenson (Pell Institute)	Mortenson	Compares enrollment of 9th graders with number of graduates four years later	Applicable to national, state, and district levels (National = 69%)
U.S. Department of Education' NCES	NCES	Averages enrollment figures from 8th-10th graders, then compares to graduates four years later	Applicable to national and state levels (National = 71.7%)
Greene (Manhattan Institute)	Greene	Same as NCES, but also adjust for population	Applicable to national and state levels (National = 70%)
Swanson (Urban Institute)	Cumulative Promotion Index (CPI)	Calculates percentage of grade promotion (from 9th to 10th and so on), then multiples all four ratios together	Applicable to national, state, and district levels (National = 69%)
Balfanz and Letgers (Johns Hopkins University)	Promoting Power Index (PPI)	Compares 12th grade enrollment with 9th grade enrollment four years earlier	Most applicable to individual schools; not a graduation rate (National = 68%)

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Empirical Analysis of the Effects of South Korea Development Bank's Industrial Credit Policy

Hosung Sohn

ABSTRACT
The purpose of the present study was to analyze empirically the effects of the South Korea Development Bank's (KDB) industrial credit policy. Two indices are considered: quantitative development (i.e., production capability) and qualitative development (i.e., value addition and trade performance). The analysis suggests that the KDB's industrial credit policy did not have a positive effect on quantitative performance, except with respect to production in the heavy-chemical industry. Furthermore, the influence on qualitative performance was negligible.

Considerable evidence exists supporting a causal relationship between development in the financial industry and economic growth.[1] Thus, the role of finance as a new catalyst for economic growth is being given increasing importance. South Korea's financial market, however, is considered underdeveloped and is certainly not competitive on the global stage. This is despite the fact that Korea ranked 11th among world economies (by per-capita gross domestic product [GDP]) in 2007.[2] To break into the world's top ten, the Korean government insists upon the necessity of financial reform. One significant economic reform policy that has also been an issue of contention was privatization of the South Korea Development Bank (KDB).

The KDB provides long-term capital for equipment financing to establish and promote industry at the initial stages of economic development. More specifically, when Korea was promoting an unequal and rapid growth policy with greater focus on export and heavy-chemical industries, especially during the 1960s and 1970s, the KDB played a supply-leading role;[3] as such, it mobilized large volumes of capital and thoroughly invested them to strategic sectors to promote economic development. As a development strategy, the KDB's industrial finance policy justifies governmental intervention in the financial market.[4] Moreover, from the early 1970s to the mid-1980s, the KDB's support focused on the heavy-chemical industry, to increase exports; this, in turn, had the effect of establishing an export-driven economic structure.[5] Thus, an analysis of the effects of the KDB's industrial finance policy should precede any privatization.

To that end, this paper analyzes the KDB's financing behavior during Korea's developmental period, when the heavy-chemical industry[6] had been fostered; it empirically analyzes how the KDB's policies affected the real economy, both quantitatively and qualitatively. With respect to quantitative aspects, the present study will analyze the effect of the KDB's sector-specific concentration of loans on production volume (i.e., production ability). As for qualitative aspects, the effect of the KDB's concentration of loans on value addition (i.e., productivity increases) will be investigated. If the KDB's selective financing had contributed to increases in production volume and productivity, I can conclude that the KDB had distributed the resources efficiently. Furthermore, since one of the KDB's objectives was to form an export-driven economic structure that focused to a great extent on the heavy-chemical industry, the effect of the sector-specific concentration of loans on the chemical industry's trade performance index will also be analyzed. Provided that the Korean heavy-chemical industry's comparative advantages have improved, I can conclude that the KDB's was successful.

To analyze these effects, the present study analyzed the KDB's outstanding loans by industry, between 1975 and 2005. Moreover, analysis was conducted using both the heavy-chemical industry and light industry. Studying the effect of the KDB's industrial finance policy on each industry is a matter of great importance, given that the KDB is considered the first in line for privatization.

Review of Previous Research on the Effect of Industrial Financing

A number of previous studies have examined the effect of industrial finance policy in Korea. These studies often have contradicting views; for example one school of thought contends that it has incurred a positive influence on national economic development,[7] while another argues that it has not been successful and should be considered a government failure.[8]

There are numerous studies that are skeptical of the effects of industrial financing: Odedokun (1996)[9] analyzed the effect of a development financial institution's business size on the efficiency of resource distribution. Using a panel data of 38 developing countries from 1960 to 1989, he found that an increase in business size decreases productivity. When investigating Japan's industrial finance policy, Beason and Weinstein (1996)[10] used the Development Bank of Japan (DBJ) ratio of Loan amount/Total loan amount by industry, among four indicators of policy measures that assess priority support for each industry.[11] The results of their empirical analysis show that this ratio negatively correlated with both the growth rate by industry and the degree of increasing returns to scale. This result implies that the DBJ's

industrial finance policy was not successful in terms of efficiency of resource distribution, for it did not have a positive effect in increasing total factor productivity.

On the other hand, there is also empirical research that asserts that industrial financing has had positive effects. Kwon (1994)[12] argues that among developing countries, Korea and Japan were successful in using industrial finance policy and achieved industrialization and economic development success. Moreover, Gerschenkron (1952)[13] and Diamond (1957)[14] each assert that industrial financing played a large role in the industrialization of Europe and Japan. Examining Japan's machine-part industries, Calomiris and Himmenlberg (1995)[15] empirically analyzed which companies had received industrial financing support and whether the policy actually increased investments; their results found that among industries with a high investment rate that were capital-intensive and had a high growth rate, there was a higher likelihood of receiving financial support. Furthermore, financing from government-run banks had a positive effect on investments, and the effect was more pronounced than that from private banks. Noland (1993)[16] empirically analyzed the effect of Japan's industrial finance policy on trade patterns and the possibility of welfare improvements. With respect to the mining industry and 14 specific manufacturing industries, he conducted regression analyses using capital grant, effective rate of protection, and R&D grant figures as independent variables and net export by industry as a dependent variable. The results showed that the lending program had a positive effect on trade pattern. Noland's research indicates that Japan's industrial finance policy was effective in increasing net exports and promoting trade specialization. Finally, by using data, categorized by business type, of Korea's 52 manufacturing industries, Zeile (1993)[17] analyzed the determinants of increases in productivity. His results showed that Korea's credit policy contributed to industry growth, export enlargements, and a decline in import dependency.

While only a few empirical studies have investigated the relationship between financing and investment, some researchers have conducted preliminary research. For example, to analyze the effect of finance on an object-based economy, Maisel (1968)[18] divided the effect of finance into credit cost and credit availability and tested the relative significance of each. As a result, he found that financing, as a method of increasing investment expenditures in specific sectors, had both credit-cost and credit-availability effects. In contrast, Cohen (1968)[19] argued that there is a problem of correlation between these two variables. Accordingly, he separated the two variables and tested the model again; his research findings showed that the effect of the credit availability variable is larger than the interest rate variable. This result shows that credit financing *per se* can have a positive effect on investment, even when there is no interest grant. Similarly, following the work of Maisel and Cohen, Lee,

Lee, and Kim (1987)[20] and Yoo (1991)[21] analyzed the effects of credit cost and credit availability with respect to Korea's financing policy, and their results also showed that the policy-lending program had both credit-cost and credit-availability effects with regards to investment.

Table 1 lists the results of previous research regarding the effect of industrial finance policy.

Table 1: Summary of Previous Research

Author	Contents	Result
Odedokun (1996)	Negative relationship between development financial institutions' business size and productivity of investment	Effect of industrial financing policy on economic growth: (-)
Beason and Weinstein (1996)	Negative correlation between DBJ's loan and growth rate by industry as well as increasing returns to scale	
Gerschenkron (1952) Diamond (1957)	Industrial financing played a large role in Europe and Japan's industrialization	
Calomiris and Himmenlberg (1995)	Government-run financing had a positive effect on Japan's machine part industry's investment	Effect of industrial financing policy on economic growth: (+)
Noland (1993)	Japan's industrial finance policy had a positive effect on net export of mining and 14 manufacturing industry	
Zeile (1993)	Korea's credit policy contributed to the industry's growth, export enlargement, and decrease in import dependency	
Maisel (1968)	Financing on specific investment expenditures has both the credit cost and credit availability effect	
Cohen (1968)	Credit support without interest grant per se can raise investment	
Lee et al. (1987) Yoo (1991)	Policy financing on investment has both credit cost and credit availability cost	

Data and Model Specification

The purpose of the present study was to determine the degrees of "increase in production ability," "creation of value added," and "improvement in trade performance" among specific industries that had received the KDB's concentration of loans. Therefore, the independent variable used here is the KDB's inter-sector financing. Specifically, the present study used the KDB's outstanding loans by industry. Previous research often used variables such as loan amount by industry, loan amount by development banks, average interest rate of loan amount by industry, bad-loan ratio, and scale of the lending program. In the present study, however, the KDB's outstanding loans-by-industry is used. More specifically, I used sector-specific concentration of loans, rather than the absolute amount of loans by industry. The sector-specific concentration of loans value measures the ratio of loans that have been made to a specific industry to the relative size of that of such industry.[22] The variable is calculated as follows:

$$\text{Sectoral Concentration of Loans on } t \text{ Industry} = \frac{\dfrac{\text{KDB's Loans on } t \text{ Industry}}{\text{KDB's Loans on Total Manufacturing Industry}}}{\dfrac{t \text{ Industry's Current GDP}}{\text{Total Manufacturing Industry's Current GDP}}}$$

Unlike many independent variables used in previous research, the independent variable used in the present study has the advantage of determining more accurately the aspects of financial institutions' resource distribution. Moreover, it is easier to interpret the meaning of changes to a variable: if I use only the loan amount by industry without considering the ratio of its industry to the total economy, it would be impossible to reflect upon the characteristics of each industry. When the sector-specific concentration of loans to *t* industry is >1, I can conclude that *t* industry has received more financial support than its size within the total economy would seem to warrant. Data on the KDB's outstanding loans—by industry for the entire manufacturing industry and for each industry—were obtained from the *KDB Monthly Bulletin*.[23] GDP data for each industry and manufacturing industry were collected from the Bank of Korea's (BOK) webpage. The data period for both is 1975–2005.

To analyze the effect of the KDB's selective financing on the degree of "increase in production ability," "creation of value added," and "improvement in trade performance," the present study employs three regression models that each use different dependent variables. The first model uses the "industrial product index," which estimates the increase in production ability for each industry. This index indicates changes in output of the mining industry over time, using the base year

and setting 100 as its output. Therefore, the index allows us to compare outputs over time by comparing a certain year's output to the base year's output. As dependent variables, previous research has used the following variables: profit by industry, growth rate, degree of increasing returns to scale, and increase in total factor productivity; each of these variables has some disadvantages. For example, increase in total factor productivity has a disadvantage, in that it can vary according to how one measures it.

Using the "industrial product index" as a dependent variable, the first model tested is as follows:

$$\textbf{Model 1: } PI_i = \beta_0 + \beta_1 PPRICE_i + \beta_2 \ln BANKLOAN_i + \beta_3 \ln GDPC_i + \beta_4 LFP_i + \beta_5 \ln RND_i + \beta_6 KDBLOAN_i + \varepsilon_i$$

In the above model, *PI* represents the industrial product index, while *PPRICE* indicates the production price index (PPI; base year, 2000) of industrial products. I included the index, calculated by the Bank of America (BOA), as it could affect the outputs.[24] Quarterly data have been used in the model. The second control variable is *BANKLOAN*; this variable indicates the outstanding facility-oriented loan amount of deposit money banks (DMBs).[25] This variable has been included in the model, to control the effect of financing from other deposit banks on the industrial production index. It is probable that even if the KDB's financing did not increase, the production ability by industry would increase as loan amounts from private banks increased. Since data are available only from 1993 onwards, the present study uses the loan amounts of the total industry, rather than amounts to each industry. This data have been obtained from KOB's database. *GDPC* indicates the per-capita GDP; it is natural to control the effect of *GDPC*. The data were obtained from the World Bank. *LFP* represents the labor force participation rate. Since *LFP* affects production ability, its effect was controlled in the first model. *LFP* data were obtained from the database of the Ministry of Labor. *RND* is the number of research and development (R&D)-related institutions. Economic theory argues that not only labor and capital but also technology variables affect production. Variables such as the size of R&D-related labor force, number of R&D-related institutions, and total R&D investment cost by industry affect technology; in the present study, the number of R&D-related institutions has been used to control the effect of technology. These data were obtained from the Korean Statistical Information Service (KOSIS). Finally, *KDBLOAN* represents the sector-specific concentration of loans.[26]

The second model uses the amount of sales surplus by industry as

the dependent variable. This variable represents the ratio of a producer's added value to that of the entire industry. By using this variable, the second model can estimate the effect of the KDB's sector-specific concentration of loans on the qualitative aspects of production. Sales surplus data were culled from the BOK's National Account Statistical Report. The second model is as follows:

$$\textbf{Model 2: } PS_i = \beta_0 + \beta_1 PPRICE_i + \beta_2 \ln BANKLOAN_i + \beta_3 \ln GDPC_i + \beta_4 IWH_i + \beta_5 \ln RND_i + \beta_6 KDBLOAN_i + \varepsilon_i$$

The difference between Models 1 and 2 in terms of independent variables is in the variable weekly working hours, by industry. This variable has been used, rather than labor-force participation rate, to deduct the amount of labor factor income from the created value added, as sales surplus indicates only the producer's ratio. Data on the weekly working hours were obtained from the International Labor Organization (ILO).

The variable indicator of comparative advantage (ICA), by industry, is used in Model 3. This index considers both exports and imports and allows us to determine the comparative inter-industry advantage. According to classical international trade theory, each country can raise its level of welfare by specializing in comparatively advantageous sectors. While they may not initially have a comparative advantage, they can foster strategic industries based on dynamic comparative advantage theory; in this way, strategic resource allocations are possible in the long run.

Based on this theory, the KDB designated the heavy-chemical industry as a strategic export industry during the 1970s and helped create an export-oriented economic structure. Accordingly, the present study will evaluate whether or not the comparative advantage of the industry that received financing has improved. By evaluating improvements—or lack thereof—it is possible to evaluate whether the KDB's export financing was successful as part of the KDB's industrial financing portfolio. While many indices can be used to determine comparative advantage by industry—such as the comparative advantage index,[27] trade specialization index,[28] and effective rate of protection—the present study adopted the comparative advantage index as a dependent variable. The index is calculated as follows:

$$\text{Comparative Advantage Index} = \left(\frac{X_i}{X} - \frac{M_i}{M} \right) \times 100$$

where *Xi* and *Mi* represent the amounts of exports and imports, respectively, by industry, and *X* and *M* indicate the amounts of exports and imports, respectively, for all manufacturing industries. Thus, the index suggests a relative trade performance index, where the ratio of the amount of exports for *i* industry to the total amount of imports for the manufacturing industry is compared to the ratio of the amount of imports for *i* industry to the total amount of exports for the manufacturing industry. Therefore, the larger the index value is, the more of a comparative advantage the industry has. To calculate the index, by-industry import and export figures were obtained from the Korea Trade Investment Promotion Agency (KOTRA). Using ICA as a dependent variable, the third tested model is as follows:

$$\textbf{Model 3: } ICA_i = \beta_0 + \beta_1 TTI_i + \beta_2 \ln BANKLOAN_i + \beta_3 \ln GDPC_i + \beta_4 LFP_i + \beta_5 \ln RND_i + \beta_6 KDBLOAN_i + \beta_7 ER_i + \varepsilon_i$$

Slightly different variables have been controlled in Model 3, compared to Models 1 and 2. Most of the previous research into comparative advantage empirically analyzed the Heckscher-Ohlin Model, and most of those studies divided factors of production into labor and capital. Furthermore, various factors—such as the concept of human resources, the degree of technological innovation, and scales of economy—have been added as independent variables, and they determine comparative advantages.[29] Hence, in the present study, variables related to labor, capital, and technological innovation have been used as control variables; as with Models 1 and 2, the DMBs' outstanding facility-oriented loan amount, the number of R&D-related institutions, and the economic activity participation rate have been adopted to represent them, respectively. The main difference between the two previous models and Model 3, however, is that Model 3 has a variable, exchange rate on the U.S. dollar that is expected to affect the amounts of exports and imports. Data on the exchange rate were obtained from KOSIS and are based on standard selling/buying prices. Additionally, rather than use the producer price index—which is used in each of Models 1 and 2—the export-import price index is used in Model 3, as it reflects the export and import items. Therefore, in Model 3, I controlled the net commodity terms of trade index, which reflects the export-import price index.[30] This index is calculated by dividing the export price index by the import price index, and it represents the amount of imports that one can import from one unit of exports. The more this index increases, the more the trade surplus increases. In other words, an increase in this index positively affects the comparative advantage indicator.

The variables used in the three models are listed in Table 2.

Table 2: Summary of Variables

Name of Variable			Definition	Source	Unit
Independent Variable	$KDBLOAN_i$		KDB's sectoral concentration of loans	KDB	%
Dependent Variable	PI_i		Production Index by industry	KOSIS	unit
	ICA_i		Indicator of comparative advantage	KOTRA	%
	PS_i		Sales surplus by industry	KOSIS	%
Control Variable	Price Variable	$PPRICE_i$	Producer Price Index	BOK	unit
		TTI_i	Index of net commodity terms of trade	BOK	%
	Exchange Rate Variable	ER_i	Exchange rate on the U.S. dollar	KOSIS	₩/$
	Capital Variable	$\ln BANKLOAN_i$	Deposit money bank's outstanding facility-oriented loan amount	BOK	₩
	Growth Rate Variable	$\ln GDPC_i$	Gross domestic production per capita	World Bank	$
	Labor Variable	LFP_i	Economic activity participation rate	ILO	%
		IWH_i	Labor hours per week by industry	ILO	hour
	Technology Variable	$\ln RND_i$	Number of R&D related institutions	KOSIS	unit

In the present study, to estimate the effect of the KDB's industrial financing, examinations were restricted to the manufacturing industry. The reason for this restriction is that the manufacturing industry is homogeneous; in contrast, the agricultural, marine, mining, electricity/gas/water, and service industries have unique characteristics that make direct comparisons inappropriate or impossible. For example, the electricity, gas, and water sectors are run by the government or government-owned companies, and agricultural sectors are impacted by factors such as food security, making them difficult to approach from a more general point of view. Moreover, to observe the effect of the KDB's industrial financing of the heavy-chemical industry and light industry, the manufacturing industry has been divided into these two industries. This division was made because the KDB's financing had concentrated mainly on the heavy-chemical industry, especially in 1972–79. The classification standard for industries is based on the Korean Standard Industry Classifications: Food, tobacco, textile, clothing, footwear, wood, printed books, and printing businesses comprise light industry, while the petrochemical, nonmetallic mineral, primary metal, and metal-processing industries comprise the heavy-chemical industry. Machinery, equipment, and other industries are excluded from the analysis.

Empirical Results

1. Descriptive Statistics

Table 3 shows the descriptive statistics for all the variables used in the present study. According to Table 3, the average sector-specific concentration of loans to light industry and the heavy-chemical industry were 0.5359 and 1.368, respectively. These figures indicate that the KDB's financing has been focused on the heavy-chemical industry sectors. The industrial production index has been continually increasing since 1975; meanwhile, the index of net commodity terms of trade has shown a decreasing trend, which I can interpret as symptomatic of a deterioration of Korea's terms of trade. The exchange rate on the U.S. dollar was highest in 1997, the per-capita GDP rate of increase was lowest in 1998, and the economic activity participation rate was highest in 1997. These three phenomena reflect the fact that Korea was under the control of the International Monetary Fund (IMF) at the end of 1997. The DMBs' outstanding facility-oriented loan amount shows a gentle increase. The labor-related variable, labor hours per week, shows an average for the heavy-chemical industry of 47.19 hours, whereas the figure for light industry was 51.43 hours. These numbers imply that light industry is more labor-intensive. The number of R&D-related industries increased 51.52% during 1999 and 2000 compared with the previous year, because there was an information technology boom in Korea at that time.

Table 3: Descriptive Statistics

Variable Name	Sample Size	Min	Max	Mean	Standard Deviation
Concentration of loans (LI)	31	0.25	1.04	0.536	0.244
Concentration of loans (HCI)	31	0.94	1.87	1.368	0.223
Concentration of loans(MI)	31	1.50	2.45	1.992	0.251
PPRICE	31	26.63	115.60	76.090	23.520
TTI	19	100.00	175.30	146.710	25.155
ER	19	679.60	1,415.20	980.780	245.740
lnBANKLOAN	31	272.70	84,488.10	15,262.420	17.639
lnGDP	31	608.23	16,308.90	6,454.600	4,653.450
LFP	31	54.65	61.80	58.554	2.240
IWH (LI)	31	46.90	55.72	51.429	2.675
IWH (HCI)	31	38.96	54.78	47.196	6.133
lnRND	31	553.00	7,761.00	2,740	2,246.000
PI (LI)	31	20.53	236.60	101.305	31.534
PI (HCI)	31	6.80	121.40	61.576	32.421
PI (MI)	31	4.20	115.60	41.987	31.765
PS (LI)	31	420.20	9,068.60	3,998.37	2,903.060
PS (HCI)	31	226.10	31,487.50	9,574.48	8,984.910
PS (MI)	31	860.50	68,037.00	21,804.98	20,643.64

Note: LI denotes light industry, HCI denotes heavy chemical industry, MI denotes manufacturing industry.

The absolute PPI, by industry, is higher for light industry. However, in terms of sales surplus by industry, the increase in the amount is higher for the heavy-chemical industry. Since the 1990s, the ICA has changed to become positive, and it has been continually increasing to the present day. Table 4 shows ICA calculations from 1988 to 2006.

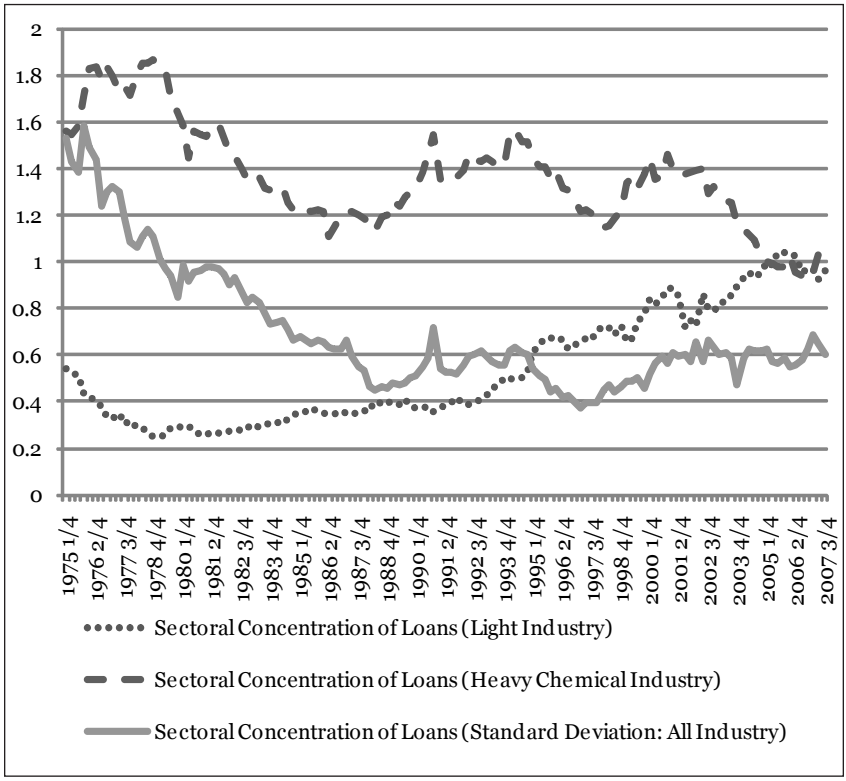
Table 4: Indicator of Comparative Advantage (ICA)

Year	Export (Total Manufacturing Industry)	Export (Heavy Chemical Industry)	Import (Total Manufacturing Industry)	Import (Heavy Chemical Industry)	ICA
1988	60.6	33.6	51.8	34.9	-12.053
1989	62.3	34.5	61.4	40.9	-11.335
1990	65.0	36.7	69.8	46.9	-10.704
1991	71.8	43.1	81.5	54.4	-6.863
1992	76.6	48.1	81.7	53.1	-2.133
1993	82.2	54.4	83.8	54.3	1.305
1994	96.0	66.0	102.3	69.8	0.572
1995	125.0	90.9	135.1	93.8	3.230
1996	129.7	93.1	150.3	100.1	5.178
1997	136.1	98.6	144.6	92.2	8.670
1998	132.3	97.0	93.2	59.3	9.551
1999	143.6	111.4	119.7	79.9	10.806
2000	172.2	139.5	160.4	107.2	14.193
2001	150.4	121.7	141.0	91.2	16.238
2002	162.4	134.3	152.1	100.5	16.564
2003	193.8	164.4	178.8	119.6	17.945
2004	253.8	221.3	224.4	150.9	19.974
2005	284.4	254.9	261.2	172.7	23.510
2006	325.4	295.2	309.3	199.0	26.375

2. Characteristics of KDB's Resource Allocation in Terms of Sectoral Concentration of Loans

Since the 1990s, the KDB has been increasing the ratio of financing to light industry. Accordingly, as can be seen in Figure 1, the sector-specific concentration of loans to light industry has seen an increasing trend. In contrast, the sector-specific concentration of loans to the heavy-chemical industry shows a general decline; this is because the KDB had shifted the bulk of its financing from the heavy-chemical industry to light industry during the development period—during which the heavy-chemical industry had been fostered intensively – however, this focus has since ended. Furthermore, the fact that the standard deviation of the KDB's sector-specific concentration of loans is decreasing over time implies that the degree to which the KDB has been financing any one certain industry, to the detriment of others, is diminishing. Compared to the financing situation of the 1970s and 1980s, the KDB has been financing each industry equally; this, in turn, reflects the fact that the KDB is gradually supporting financial institutions focused on industry.

Figure 1: Trend in KDB's Resource Allocation



3. Regression Analysis

Model 1

In Model 1, production index by industry is the dependent variable; producer price index, DMBs' outstanding facility-oriented loan amount, per-capita GDP, economic activity participation rate, and R&D-related institutions are the dependent variables. The period of analysis is 1975–2005. Table 5 shows the results of regression analyses of light industry and the heavy-chemical industry; the variables that had effects on the production index of light industry were producer price index, DMBs' outstanding facility-oriented loan amount, per-capita GDP, and the economic activity participation rate. To be more specific, the production index increases as the producer price index decreases, while DMBs' outstanding facility-oriented loan amount and per-capita GDP increases. The interesting part of this analysis is that while the coefficient of the DMBs' loan is statistically significant at the 10% level, the coefficient of the KDB's loan is not. To put it differently, the KDB's financing of light industry did not help increase light industry's production; rather,

financing from private sectors was more helpful in increasing production. Thus, I can conclude that in terms of production increases, financing from private sectors was of greater help to light industry than financing from the KDB.

Table 5: OLS Results (Model 1)

Variable	Coefficients	Standard Errors
Light Industry		
PPRICE	-0.642**	0.216
ln BANKLOAN	17.490*	8.791
ln GDP	29.387**	12.125
LFP	- 3.933*	2.058
ln RND	- 1.401	7.181
KDBLOAN	- 54.637	12.197
Sample Size	31	
Adjusted R^2	0.926s	
Heavy Chemical Industry		
PPRICE	0.437*	0.243
ln BANKLOAN	0.783	9.329
ln GDP	6.514	13.719
LFP	1.641	1.791
ln RND	14.488**	6.546
KDBLOAN	17.294**	9.099
Sample Size	31	
Adjusted R^2	0.956	

Note: *** denotes significance at the 1% level, ** denotes significance at the 5% level, * denotes significance at the 10% level.

An analysis of the heavy-chemical industry shows that the variables that affected the production index were producer price index, the number of R&D-related institutions, and the KDB's concentration of loans. The findings listed in Table 5 help us confirm that the KDB's concentration of loans had a positive effect on production index. Hence, it is probable that the KDB's industrial financing of the heavy-chemical industry between 1975 and 2005 contributed to increases in production. As a variable, the number of R&D-related institutions also had a positive effect on production index; this is because the number of institutions, on average, had increased—by 19.07% since 2000.

Model 2

In Model 2, the dependent variable is sales surplus by industry. The independent variables are the same as those in Model 1, except that the variable economic participation rate has been replaced by the variable labor hours per week. As shown in Table 6, the variable DMBs' outstanding facility-oriented loan amount was statistically significant. The estimated coefficient is 0.508, and it was statistically significant at

the 5% level. As with Model 1, the KDB's concentration of loans did little to affect the creation of value added in the production sectors of light industry. No other variables were statistically significant.

Table 6: OLS Results (Model 2)

Variable	Coefficients	Standard Errors
Light Industry		
PPRICE	0.006	0.006
ln BANKLOAN	0.508**	0.239
ln GDP	0.085	0.238
IWH	0.017	0.028
ln RND	- 0.009	0.200
KDBLOAN	0.007	0.390
SAMPLE	31	
Adjusted R^2	0.964	
Heavy Chemical Industry		
PPRICE	0.012**	0.004
ln BANKLOAN	0.365**	0.172
ln GDP	0.276*	0.148
IWH	0.020**	0.008
ln RND	0.417	0.249
KDBLOAN	- 0.221	0.214
SAMPLE	31	
Adjusted R^2	0.992	

Note: *** denotes significance at the 1% level, ** denotes significance at the 5% level, * denotes significance at the 10% level.

When the analysis had been conducted of the heavy-chemical industry, it was found that many variables affected the sales surplus. The variables that were estimated to be positively associated with the sales surplus were producer price index, DMBs' outstanding facility-oriented loan amount, per-capita GDP, and labor hours per week. All of the variables were statistically significant at the 5% level, except per-capita GDP, which was significant only at the 10% level. Similar to the analysis of light industry, the KDB's concentration of loans was not statistically significant. While the KDB's loans to the heavy-chemical industry had had positive effects on the production index in Model 1, it did little to help increase the sales surplus. As with Model 1, the loans from the private bank also had a positive effect with respect to sales surplus.

Model 3

The period of analysis for Model 3 was 1988–2006. The sole subject of the analysis was the heavy-chemical industry, given that the KDB's financing had concentrated on it, on account of it comprising

strategic export industries. The results of the ordinary least squares (OLS) analysis are shown in Table 7. The variables that were statistically significant with respect to the ICA of the heavy-chemical industry were exchange rate on the U.S. dollar, DMBs' outstanding facility-oriented loan amount, per-capita GDP, economic activity participation rate, and the number of R&D-related institutions. The estimated coefficient of the exchange rate was 0.014, and it was significant at the 1% level. It is quite natural to expect that as the exchange rate increases, the amount of exports will increase, which will in turn result in an increase in terms of trade index. The total amount of the DMBs' outstanding facility-oriented loans is positively associated with the ICA: The coefficient was 8.855, and was significant at the 5% level. As with Models 1 and 2, this variable is consistently significant and has positive effects on the dependent variables. In previous research, the variables related to technological innovation—such as the number of R&D-related institutions—has had positive effects on ICA; similar results were found in the present study, with Model 3. This result indicates that variables related to technological innovation promote a comparative advantage.

An interesting fact is that the terms of trade index variable were not significant at the 10% level. While it is obvious that the amount of exports will increase if the terms of trade are improved, it should also be the case that the ICA will improve. The present study, however, shows that this is not necessarily the case. As with Models 1 and 2, the KDB's financing had little effect on the ICA. While the KDB had intended to improve the trade performance of the heavy-chemical industry, I can conclude that its role was ultimately ineffective. However, since the period of analysis for Model 2 is short, I should be careful in interpreting OLS results.

Table 7: OLS Result (Model 3)

Variable	Coefficients	Standard Errors
TTI	0.135	0.086
ER	0.014***	0.003
ln BANKLOAN	8.855**	2.937
ln GDP	18.811**	6.122
LFP	- 3.878**	1.526
ln RND	6.943*	3.323
KDBLOAN	- 4.014	3.883
SAMPLE	19	
Adjusted R^2	0.978	

Note: *** denotes significance at the 1% level, ** denotes significance at the 5% level, *** denotes significance at the 10% level.

Conclusion and Policy Implication

In the present study, I empirically analyzed how the KDB's industrial financing affected indices of production, sales surplus, and comparative advantage, by industry. The concentration of the KDB's financing, by industry, had been calculated in terms of a "sector-specific concentration of loans," which is derived from the ratio of loans that have been made to a specific industry to its relative size within the whole of its industry.

A summary of the analysis is as follows. First, in Model 1, an increase in the KDB's concentration of loans had a positive effect on the production index by industry, in terms of the heavy-chemical industry. However, for light industry, its effect was insignificant. The reason behind this is that KDB's absolute amount of loans and concentration of loans increased after 1990 and financial support on light industries was small before this period. On the other hand, the DMBs' outstanding facility-oriented loans amount was positively associated with the production index for light industries. Namely, I can conclude that in terms of production increases, financing from private sectors was of greater help to light industry than financing from the KDB. In Model 2, the KDB's concentration of loans had little effect with respect to sales surplus. In contrast, the effect of the DMBs' outstanding facility-oriented loans was statistically significant and was positively associated with sales surplus for both industries. This implies that in increasing the sales surplus by industry, the private banks' role was much more effective than that of government-run banks. Finally, in Model 3, an increase in the KDB's concentration of loans to the heavy-chemical industry did not bring about changes to the ICA in heavy-chemical sectors.

In conclusion, although it had a positive effect on heavy-chemical industries' production, overall, the KDB's industrial financing was unsuccessful in improving the quantitative performance indices therein. Moreover, since it had little effect on either sales surplus or trade performance, I can conclude that the KDB's industrial credit policy was not successful in terms of efficient resource allocation among industries.

The reason why KDB was ineffective in increasing the quantitative and qualitative performance of industries is because KDB failed to properly provide financial support. Previously, due to government pressure, the KDB had given undue value to helping provide a safety net to key industries, rather than seeking business profitability. Because of its dependent role, KDB has been directly providing financial support on a specific industry that is essential for governmental economic policy. However, not only does this kind of financing behavior reduce efficiency of KDB's financing, but also acts as a friction factor with respect to the

World Trade Organization. Accordingly, the KDB's previous financing behavior has been frequently cited as hampering the transparency of Korea's financial market.

Therefore, there should be reforms *vis-à-vis* the KDB's resource allocation function. To be more specific, KDB should depart from this kind of direct policy financing, and should engage in on-lending method. On-lending method indicates that although KDB establishes the qualification that is needed for the industry to receive policy financing, the selection of companies and specific financing enforcement will still be deputed to private financial institutions. Adopting the on-lending method would allow KDB to make the best use of the know-how of private sectors in selecting the qualified industries as well as late inspections of the industries. This in turn will raise the efficiency of KDB's financing.

Currently, the Korean government has set the goal of privatizing the KDB before 2012. A bill has been passed, in support of dividing the KDB into two parts: a holding company that would act as an investment bank, and the Korean Policy Bank Corporation (KPBC), which would take complete control of financing policy. KPBC will continue the public function that KDB has been doing, so I expect the findings of the present study to be suggestive, in that they can provide direction as to how the KPBC should be operated and supported. For example, since the regression results in Model 2 and Model 3 indicate that KDB was unsuccessful in providing comparative advantages and increasing sales surplus, KPBC should be reorganized to promote these two factors. Furthermore, KPBC should not adopt the KDB's financing behavior. It should select the industry that is to be financed and provide financial support based on market-friendly ways.

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26 i represents the time index and ln indicates the natural logarithm; the latter has been taken to narrow the range of the variable, which in turn makes estimates less sensitive to outliers on the independent variables.
27 Revealed comparative advantage (RCA) refers to the ratio between the proportions of certain exported products (including services) in relation to the world's total export market, to the proportion the product takes in a certain country's domestic market; it is widely used to determine a comparative advantage for a certain product. If the number is >1, there is a comparative advantage.
28 Trade Specialization Index = (Total export amount of the product – Total import amount) ÷ (Total export amount + Total import amount). If the figure is 0, the comparative advantage is average; if the figure is 1, it is perfectly export-specialized, meaning there are no imports and only exports; if –1, then it is perfectly import-specialized, meaning there are no exports and only imports. This index is used as an international competitiveness index. When the value is >0 and <1, the product or the industry has a trade surplus and strong international competitiveness; as the number draws nearer to –1, its competitiveness in the international market decreases.
29 Kang, H.J. and Park, K.Y., "An Empirical Study of the Effects of Industrial Patent Application on the Comparative Advantage," Korea Trade Research Association, 32, No. 2, (2007): 293-311.
30 Export and import price index refers to the index used to determine, in advance, price fluctuations of import/export goods and the effect price has on domestic price; to do so, at the beginning of each month, the BOK examines prices from the whole of the previous month. Also, this index value is used to determine an exporter's profitability and import-cost burden. The index is converted into KRW, to facilitate an understanding of the effects on domestic prices. In the present study, I used the KRW index as the base, with 2005 set to 100.

THE CURRENT
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VIEWS & REVIEWS

Perspectives on and analyses of current public policy discourse

Interview with John P. Walters

Christina G. Tawtel

John P. Walters was director of the White House Office of National Drug Control Policy (ONDCP) from December 2001 to January 2009. During this time, Walters oversaw federal drug policy and programs as the nation's "drug czar." He also served as assistant to the secretary and chief of staff at the U.S. Department of Education under the Reagan Administration. Mr. Walters joined the Hudson Institute as their executive vice president in January 2009.

The Current (TC): How did you see US drug policy before you arrived to the White House Office of National Drug Control Policy (ONDCP), during your time there, and after you left? Have your views about the goals of ONDCP changed over time?

The drug problem has gone through a series of periods of more and less intense focus. It is something I think, history shows. From the late 1970s or before that, to the present, is very sensitive in the dimension of use to what young people perceive as cultural attitudes and what even young adults see, which is the place where it (substance abuse for most Americans) starts in adolescents. If you don't start illegal drugs and alcohol and cigarettes up through age 20, you have a much more reduced risk of going on and using afterwards, and if you do go on to use afterwards, you have a reduced risk of becoming dependent.

The low point in overall use, especially by young people, was about 1992. It had gone from a peak in about 1978. None of these measures are perfect, but we measure these by national surveys, usually self-reported use. There are other kinds of indicators that are available today. Generally though, the peak of use was about 1979. Use then, overall, fell very steadily until 1992, and one exception within that was while overall use was declining, cocaine and crack use rose in the early 1980s up through about 1986-1988.

We've had some ups and downs in the 1992-2009 period. From that low point in 1992, drug use by teens had virtually doubled in the mid 1990s (not back to the 1978 rate, but it was quite high). Between about 2000 and 2007, we also had a huge increase in amphetamine use that then fell.. We also had an increasing percentage of the overall drug problem in prescription drug use, led by prescription pain killers. Overall, though, drug use is still down from what it was.

I think the opportunities now in Mexico are quite dramatic andhave changed the future of the American drug problem because of the amount

of arms supplied that come through Mexico from South America, or directly manufactured in Mexico.

And lastly, it is a problem at somewhat early stages: Afghanistan is now over 90 percent of the world's opium production. If you can change the availability of opium and heroin from there, it will affect the worldwide picture for the first time in decades.

So, overall I think it got better in some dimensions. We've learned some things about addiction as a disease and I think that is how to address this in the future—by understanding the healthcare dimension, and understanding important public health measures, such as screening, and building it into the healthcare system as well as into the education system and employment system.

TC: What are the measures used and what ought to be the criteria for examining success and examining progress in the drug war?

It is very important to have clear measures and indicators. Most of the time, what we have had as measures have been self-reported surveys—surveys done nation-wide—with a sample of the population. We know that has problems and that not everyone tells the truth; people have a tendency to underreport. The general view is that it's not a census; it's an indicator of trends, so it doesn't give you the absolute number.

The second problem is that if the bulk of the drugs are being used by people who are heavy and addicted users, they don't tend to show up on the surveys. The largest survey done by the federal government is people in households age twelve and above, and of course, many of those who are addicted will not be candid about their use. And many people don't live in households, they might be living on the streets, some are in the criminal justice system—many people fall through the cracks.

There have been efforts to try to create models to estimate those populations. There are a couple national surveys that focus on young people. The "Monitoring the Future" survey done by the University of Michigan is done annually. In the last decade, it started being done for eighth, tenth, and twelfth graders. This is a self-reported survey. Generally speaking it shows higher rates for confidential surveys in schools as opposed to confidential surveys in the household. The presumption is that the presence of parents may cause kids to be less candid. The other survey done, largely in schools, is the Youth Risk Behavior Survey—it's used for a number of public health issues.

The central issue with drugs, I think it is fair to say, is how many people are using illegal drugs. It would be nice to have more precision, though. There is a lot of resistance in the government to supplement the self-reported surveys with a voluntary drug test. It helps you adjust

the survey to bias and reporting. The use of bio markers to help to adjust other survey models or to give a baseline is very important. It could also be quite cost effective, as running self-reported surveys are very expensive and have significant limitations. The real future is to be able to take different sets of data, push them together and see what correlations you get – each correlation gives you a perspective, and not the whole picture. As we see this more as a public health problem, we'll being to see more people thinking about this as less of an issue of personal choice, and more of an issue of a personal disease.

TC: What is the appropriate terminology for these issues being looked at? Gil Kerlikowske [current Director of the Office of National Drug Control Policy] states that the"War on Drugs" terminology is not appropriate anymore. What do you think?

The war on drugs phrase came from back in the Nixon administration when the drug problem became a more visible national policy issue in the last couple generations. That was coined to say that we ought to take it seriously as a national threat in the way we did a foreign enemy, and we ought to mobilize the country in the way we do in times of such a threat. It is subsequently used by critics to say that it's a war on the American people, which was never the way it was coined. What we have talked about, when I was in the Office, is the drug problem. The Office's name is the Office of Drug Control; I really do think this is a matter of policies to reduce the consumption of drugs and the consequences of that consumption both for us and for other countries around the world.

TC: What are the bureaucracies involved in drug control policy in the US? Who is fighting drugs? And who matters in Congress?

It's a problem that's not entirely unique, but you see this dimension of it in some of the efforts by the Obama administration to appoint "czars." What it represents, I believe, is an area of national concern that cuts across the usual department agency structure of the government. When the drug office was created in 1988, it was decided that you could not create a department of drug control, pulling out parts of the interdiction agencies, like the Coast Guard and national security agencies, pulling out police agencies, pulling out education, health research, and put it all in one place. These were going to have to be left in individual departments. So, the State Department and Defense Department play a big part, as do the Justice Department with the Drug Enforcement Agency, the FBI, Homeland Security, alongside CBP [U.S. Customs and Border Protection] and ICE [Immigration and Customs Enforcement].

On the demand side, the biggest mainline demand reduction agency in terms of its actual activities is actually the Veterans Administration

Hospital System, which is the largest hospital system in the country, and does do treatment and intervention. On the demand side, more of the overall budget is grants through educational institutions to do prevention, grants to states to provide treatment, reimbursements through the Medicare system, and now Medicaid, to provide screening for substance abuse in the healthcare system.

So, the goal in creating the Office and the fact that you have multiple agencies that need to work together in some coherent way was to create something that was modeled on the National Security Council or the Domestic Policy Council in the White House to bring together different agencies by leaving those programs within those agencies and to forge, first, a coherent policy and then to get adequate resources to implement policies in a coordinated manner. So, the Office also reviews budgets of drug control agencies and certifies whether or not they are consistent with the policy level for the drug control strategy, which it has to promulgate for the President or with the President's approval.

There has been debate about how much federal spending is supply versus demand. The reason that a large percentage has always been supply is that on the supply side, the federal government has unique responsibilities. All foreign activities funded by the federal government, all interdiction activity at and away from our border, all federal law enforcement is funded by the federal government. Most of the prevention and treatment activities are actually carried out by states and localities.

It is hard to capture overall spending sources, though, because of the multitude of sources contributing to it. Part of the reason for the title *Office of National Drug Control Policy of the White House* rather than *Office of Federal Drug Control Policy* was an attempt to convey new responsibilities to coordinate both government and non-government, to work with faith-based community groups that do prevention and treatment, work with insurance companies and others who have a role to play in the private sector. If you believe there are certain principles that will make us effective overall, you want to embed those principles in as many institutions as possible, even if they do not have direct reporting or management obligations for the federal government.

TC: What would you describe as the ONDCP's main accomplishments during your time there? What were the forces and institutions that supported you and opposed you?

I think the greatest movement forward is in promulgating the consequences of understanding addiction. Science allows us to see that this is a disease of the brain, and see the way in which onset, dependence, impairment of judgment occur. We've had a kind of self-defeating debate about drugs as if it were choice or an expression of freedom. Drugs were considered a "life-style" choice. Once you begin to see alcohol, drugs, and cigarette smoking as something that involves dependency, and as

something that is a public health problem, we more properly begin to create an understanding in the public debate that helps us form policy, and inform the youth that it is not about risky, exciting and coming-of-age behavior in the U.S. That understanding is a big part of dealing with issues like stigma, screening, and this has important and far-reaching implications.

People think that some of the biggest obstacles are some of the agencies and the natural bureaucratic friction. I did not find that to be the case. I found, as Director, agencies wanted to be serious about this issue. The other big obstacle that did not exist when I worked in the other two administrations, Reagan and the elder Bush administration, is a very heavily funded pro-legalization effort, led by George Soros, funding many groups not only in the U.S., but internationally too. This is particularly misguided and dangerous when we understand what the disease is, and when so many parts of the world are much more interconnected and can move much more easily. We have always had problems with the supply coming from out of the U.S. to a great extent, but now it is much easier, given the large amount of commerce, ease of moving money, and the movement of people and things in such quantities. Frankly, I do think we also see, and maybe we did not have the experience in 1979 with how bad the drug problem would be (and we certainly did not have the experience in 1982 with how bad cocaine and crack would be), but now that we do have that experience, it is highly irresponsible to suggest that more drugs is going to be something that society ought to accept to eliminate the costs of drug control.

No administration is going to legalize drugs. Both the president and vice-president have enough experience and have lived with the consequences of that. I used to work with now Vice President Biden. He was Chairman of the Senate Judiciary Committee, the principle committee in the Senate that my office worked with. He understands what the costs are. While there are certainly fears that because George Soros is such a large donor to democratic causes, that he would have influence on weakening drug enforcement. I do think that while there are decisions that still need to be made, Director Kerlikowske has said we are not going to legalize marijuana.

TC: Looking at the global war on drugs, what are your thoughts on Plan Colombia? How successful do you think it has been, and what lessons can we learn from it? To what extent might the U.S. develop a program like Plan Colombia for Afghanistan?

I think that Plan Colombia is one of the most successful bilateral relationships for both security and drug control that has ever been mounted. I recognize I'm on the part of the spectrum that is very enthusiastic and there are people who are critical, and those who are

less enthusiastic. [Colombian] President Uribe used the aid of the U.S., but also mobilized the people of Colombia and reduced the killing, kidnapping, massacre, brought economic growth, and dismantled the right-wing paramilitaries. He has weakened the FARC [Revolutionary Armed Forces of Colombia] dramatically, and desertions have been extremely high. It is an enormously important success story, and a success story of someone who cooperated with the U.S. while dealing with President Hugo Chávez in Venezuela, motivating President Morales in Bolivia, working with the Castros in Cuba, and is now pushing allies in Nicaragua, Ecuador, and maybe in Honduras. At a time when the strategic importance of Colombia has never been greater, President Uribe showed us how we could go after drugs, aggressively, and with serious enforcement.

At the end of the day, the Colombian pressure on the infrastructure of processing and shipping cocaine has been the principle reason for success. I do think that Plan Colombia is underappreciated as a major success. One of the lessons from that is the importance of leadership. The U.S. has a lot of partners trying to help with common problems. Money enables leadership, but doesn't substitute for leadership.

When you look at how this applies to the situation in Afghanistan, obviously it's a different environment. I also think that you don't have the strong leadership that you have in Colombia. That's not to say President Karzai hasn't done a lot of things. We have to remember that poor Afghanistan did not have a history of democratic history, and Colombia did, and how far the problem had gotten in Afghanistan. In Afghanistan, we're dealing with both insurgency and the level of armed conflict and disorder, as well as the opium problem—cocaine was never as big a part of the economic reality in Colombia as opium is in Afghanistan.

Few people recognize that over half of the thirty-four provinces in Afghanistan are largely poppy-free, led by the North and the East. As security has come to those areas, opium has declined, and more rule of law. The concentration of opium is in the southwest, where violence is greatest, and where there has been much greater resistance by the Taliban and the Taliban use of opium to corrupt local officials and others. With the right leadership, I think, you can change the future. The investment of the people in this crop is highly problematic.

TC: We have a serious consumption problem in this country. How are these remarkable amounts of cocaine continuing to appear within our borders even though we are putting billions of dollars into interdiction capabilities on the U.S.-Mexico border, aircraft and seacraft interdiction, strengthening the border's security, etc.?

Think about it in the context of overall border flow. If all cocaine came through only in cars, for the sake of proportion, the cocaine would be 1 in 60,000 cars crossing the border. This is not a ratio where you can stop and search every car. We go after the production and the infrastructure for supply. We try to go after the product itself and the people who move it in the delivery to market. We try to go after the demand, both in terms of those who start using and treating those who are addicted, who are the largest volume users. When we do a balanced strategy of both demand and supply reduction, we can not only get change, but we can hold the change that we get. If you just reduced supply, and did not change demand, more dollars would tend to generate more supply. If you just reduce demand, then cheaper, more plentiful, purer cocaine would have to regenerate that demand.

In the mid 1990s, we got less worried about the problem, and especially for young people, if they think that this is an interesting thing that people do, many are led to make mistakes.

TC: What changes do you foresee in the new administration's approach to addressing drug issues? How do you see the National Drug Control Strategy changing?

There are issues that can be pushed forward, such as effective screening in the healthcare system. Through screening, we also reinforce that this is not a lifestyle choice, but a disease that we expect to be able to treat. They can push that forward in both the public pay system, and we were pushing it forward in the private pay system as well, helping more insurers see the value of covering these things as a part of regular medical care.

I think they can do more to engage Mexico and follow-through. It's not something new, but it's an opportunity to stand with President Calderón. The implications of rule of law and the importance of destroying this violent, dangerous threat are great for the United States and for Mexico—making the countries able to see a future for our people that will not be the same if their ungoverned space is on our own border, taken over by drug mafias.

I think the administration has inherited an opportunity, with regard to Colombia, to pass the [North American] Free Trade Agreement and to help Colombia continue to finish the job on cocaine and the criminal groups that are also involved in marijuana and heroin. There has been a tendency to turn our back on Colombia, especially with the treatment

of the Free Trade Agreement, which is all in our favor. Almost all the barriers that would drop on our side are already down. We would get a similar action by the Colombia government to open markets. It is tied up with unfortunate dimensions of union politics in the Democratic Party, which I hope the President will provide some leadership in overcoming.

There are great opportunities in Afghanistan. The U.S. is now providing a level of security, committing the troops to help bring the pressure to bear. I've met and worked with General [Stanley] McChrystal [top commander of American forces in Afghanistan], and I think we've reached an understanding in our own government and other governments that insurgency and narcotics have to be treated together, and that they're not antithetical to each other as a threat.

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A Tactical Withdrawal from the War on Drugs

Jonathan Wellemeyer

ABSTRACT
In the last 30 years, the "War on Drugs" has failed to curtail the use and sale of illicit drugs in the United States. Furthermore, the war has caused significant damage to certain populations and geographic localities (particularly Black and Hispanic citizens in cities). Current drug laws contribute greatly to the country's record high prison population, a fact that is not only socially damaging, but prohibitively expensive in a time of economic crisis. We are entering a time of transition and optimism, and as such opportunities for progressive change abound. Alterations to existing drug laws are being made or discussed with more seriousness than has been seen in decades, in response to both the economic and political climate. With states acting as laboratories, there is hope for future, progressive drug policy.

There are essentially two logical paths to addressing drug enforcement in the United States, both of which require drastic change. The first is to bring a sense of equality and an increased intensity to the existing War on Drugs. Eliminating the race, class and space-based disparities in drug enforcement would demonstrate a true commitment to curtailing drug use. When gangbangers and stock brokers share prison cells in Sing Sing, the Criminal Justice System will truly represent its middle name.

The second path is to bring a sense of equality to the prosecution of the War on Drugs by arresting non-Whites and the poor with the same frequency and for the same crimes as wealthy Whites. In other words, Option Two leads to decriminalization and, perhaps ultimately, legalization and regulation. This path—the only path seriously discussed throughout this report—involves a seismic shift in perception. It involves abandoning the tropes of warfare and commitments to zero-tolerance. It involves adopting community and prosperity. Most of all it requires that we regard drug use as a social issue that focuses on health, harm-reduction and science instead of regarding it as a criminal issue that focuses on containment, isolation and moral hysteria.

It may not be politically feasible to create new, socially responsible drug policy over night. However, by identifying long-term policy goals and realizing short-term gains, it is possible to lay the foundation for the kind of comprehensive examination required to develop effective *urban* policy (of which drug policy is but one component). Participants from all sides of the debate tend to agree that drug abuse can have

catastrophic effects on individuals, families and communities and that any drug policy must be centered on the prevention and treatment of substance abuse. Overwhelming evidence shows that the 30 year-old "War on Drugs" is not only ineffective, but a contributor to urban destruction. An alternative begins with a shift in rhetoric, transparent, scientifically-motivated research, and continues by encouraging state-level experimentation.

But, before discussing where we are going, let us first recall where we have been and why we need a new direction. Overall, however, it's helpful to note Kevin Casas-Zamora's recounting of the recent Brooking's commission where one, Moisés Naím, eloquently stated that the real and primary task at hand is to"[end] the prohibition to think."[1]

Background

It is safe to say that the morally-fueled War on drugs began when President Nixon rejected the scientific findings of the National Commission on Marijuana and Drug Abuse (1972)—a report he, himself, commissioned. The Nixon Administration chose to impose the strictest possible control over cannabis despite statements from the commission's chair, Raymond P. Shafer, including,

> [T]he criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behavior which we believe is not appropriate. The actual and potential harm of use of the [marijuana] is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only with the greatest reluctance

and,

> While the judiciary is the governmental institution most directly concerned with the protection of individual liberties, all policy-makers have a responsibility to consider our constitutional heritage when framing public policy. Regardless of whether or not the courts would overturn a prohibition of possession of marihuana for personal use in the home, we are necessarily influenced by the high place traditionally occupied by the value of privacy in our constitutional scheme.[2]

Despite these learned apprehensions, "Control" was itself achieved through the Controlled Substance Act, which is part of the broader Comprehensive Drug Abuse Prevention and Control Act of 1970. While the Act as a whole is a relatively liberal piece of legislation[3] (that, after 30 years' worth of amendments has become a strikingly punitive body of law) the CSA is the specific federal policy that regulates the manufacture, importation, possession, use and distribution of certain substances. Additionally, the CSA established the system of "scheduling" drugs that still dictates a multitude of federal policy regarding specific substances. For example, in order to be placed in Schedule I, a substance must satisfy the following conditions:

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.[4]

Schedule I drugs are prohibited by law, and individuals who are convicted of multiple counts of trafficking those substances (which can occur at a single hearing, depending on the quantity and variety of drugs) may receive life sentences.

The CSA outlines four other schedules (Schedules II through V) that correspond to a declining "potential for abuse," possible medicinal application and precipitously less severe repercussions for abuse. In other words, all "scheduled" substances are federally controlled to varying degrees, and all substances not found under Schedule I may be sold, purchased and consumed according to the prescribed requirements. The higher up a substance is on the scheduling scale (with schedule I being the highest, the more dangerous the federal government considers it to be, and consequently, the more severe the response is to illegal possession, distribution, importation or manufacturing of that substance.

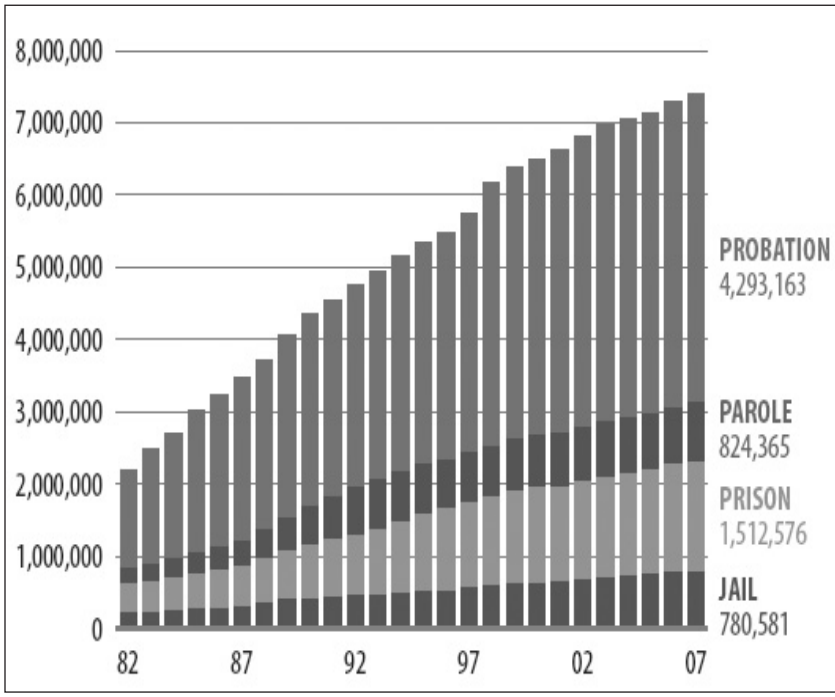
While only the federal government can schedule or reschedule a drug—either through the Drug Enforcement Agency, the Food and Drug Administration or the Office of the Attorney General—individual states vary widely on their methods of prosecution and regulation. For example, numerous states have created their own "Schedule VI" in order to control other substances that may be abused recreationally (such as inhalants found in spray paint). Extremes include the decriminalization of cannabis, such as in Alaska, where there is no penalty whatsoever for the possession of one ounce or less. On the other end of the spectrum, the mere possession of paraphernalia in Florida can result in a one-year prison sentence and a $1,000 fine.

The War on Drugs has been a generally popular policy in the US, as evidenced by the increasingly punitive amendments that have been attached to the original Comprehensive Drug Abuse Prevention and Control Act (including The Psychotropic Substances Act of 1978, The Controlled Substances Penalties Amendments Act of 1984 and The Domestic Chemical Diversion and Control Act of 1993). The prevalence of mandatory minimum sentences and even the possibility of the death sentence under certain extreme circumstances (it should be noted that there is no one on death row only for drug crimes) have reflected national anxiety over crime: according to a 2004 survey, 55% of Americans falsely believe the crime rate is rising and 85% believe the justice system is too soft on crime.[5] We are now, however, embarking on a new period of history. Whether as part of a national gestalt of change and reform or as a result of increasing economic pressures and an embarrassingly large prison population, a country-wide debate over drug policy is gaining a momentum and a level of seriousness not seen in decades. Intellectual news media, from *The Atlantic* to *The Economist*; premier think tanks from the Brookings Institute to the Cato Institute; Politicians from Senator Jim Webb to Governor Arnold Schwarzenegger: representatives from both ends of the political spectrum are seriously discussing progressive drug policy reform. New York's Rockefeller Laws have been repealed and California is considering a cannabis crop tax. Whatever tectonic shifts have occurred, whatever stars have aligned, now is the time to put forward a new federal drug policy.

The Problem

Although a unique set of circumstances is creating room for debate, the arguments have long been prepared. Chiefly: The War on Drugs is an abject failure by almost any reasonable measure. Despite arraying a veritable arsenal of anti-drug weapons, we have failed to curtail the use, marketing or manufacturing of drugs, and have instead inflicted a tremendous amount of collateral damage—largely in our cities.

Figure 1: Correctional Population Over the Course of 25 Years



Source: Bureau of Justice Statistics Correctional Surveys available at http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm.[6]

Note: Due to offenders with dual status, the sum of these four correctional categories slightly overstates the total correctional population.

There is, however, one significant winner in the War on Drugs—the U.S. prison industrial complex, which now hosts the largest number of prisoners in the world. Despite possessing only five percent of the world's population, the U.S. hosts nearly a quarter of the world's prisoners. According to a recent Pew Center on the States study, one in every 31 adults is either in prison or on parole.

This drastic increase in prison population is, revealingly, a somewhat recent phenomenon. Since 1980—when President Reagan reinvigorated the War on Drugs (and the first lady pushed her "Just Say No" campaign)—the number of U.S. inmates has increased by 274 percent or by an additional 1,680,661 prisoners. The number of those prisoners incarcerated for drugs shot from 41,000 in 1980 to a current half-a-million. In total, 55 percent of the federal prison population and 21 percent of the state prison population are in for drug convictions.[7] These numbers might begin to approach sanity if they were a response to an increasingly violent and drug fueled American populace. They might

make sense if, as a part of the larger War on Drugs, they indicated that mass incarceration curtailed drug use, drug abuse or violent crime by a significant margin. On the contrary, since the War on Drugs began, violent crime has decreased,[8] drug use has remained steady and even increased in some cases,[9] and drug overdose fatalities have increased (though this last figure is largely a result of increased prescription drug overdoses).[10]

Indeed, as a Pew Center author asserts in a recently published study,

> Serious, chronic and violent offenders belong behind bars, for a long time, and the expense of locking them up is justified many times over. But for hundreds of thousands of lower-level inmates, incarceration costs taxpayers far more than it saves in prevented crime. And new national and state research shows that we are well past the point of diminishing returns, where more imprisonment will prevent less and less crime.[11]

The excellent Pew report proceeds to demonstrate that the cost-to-benefit ratio for imprisoning drug offenders is dismally low. By assessing a dollar amount calculation for the already inflicted damage and the potentially inflicted damage of individual prisoners in Washington (for example), researchers discovered that for every dollar invested in prison beds for drug offenders, tax payers only realize 37 cents in averted crime.[12] Further,

> More recently, scholars have explored the tipping point concept in incarceration on a 50-state basis. A 2006 study suggests that, after exceeding a threshold in the range of 325 to 430 inmates per 100,000 residents, incarceration fails to reduce crime—and may even increase it. Imprisonment was more useful, the authors argue, when state incarceration rates hovered around 111 per 100,000 in the 1970s, or around 207 per 100,000 in the 1980s, than when they accelerated to 397 per 100,000 in the 1990s. Today, of course, the national rate of imprisonment is significantly higher—506 per 100,000.[13]

Alternatively, a study by the RAND Corporation found that every additional dollar invested in substance abuse treatment saves taxpayers $7.46 in societal costs. Or, put another way, additional domestic law enforcement efforts cost 15 times as much as treatment to achieve the same reduction in societal costs.[14]

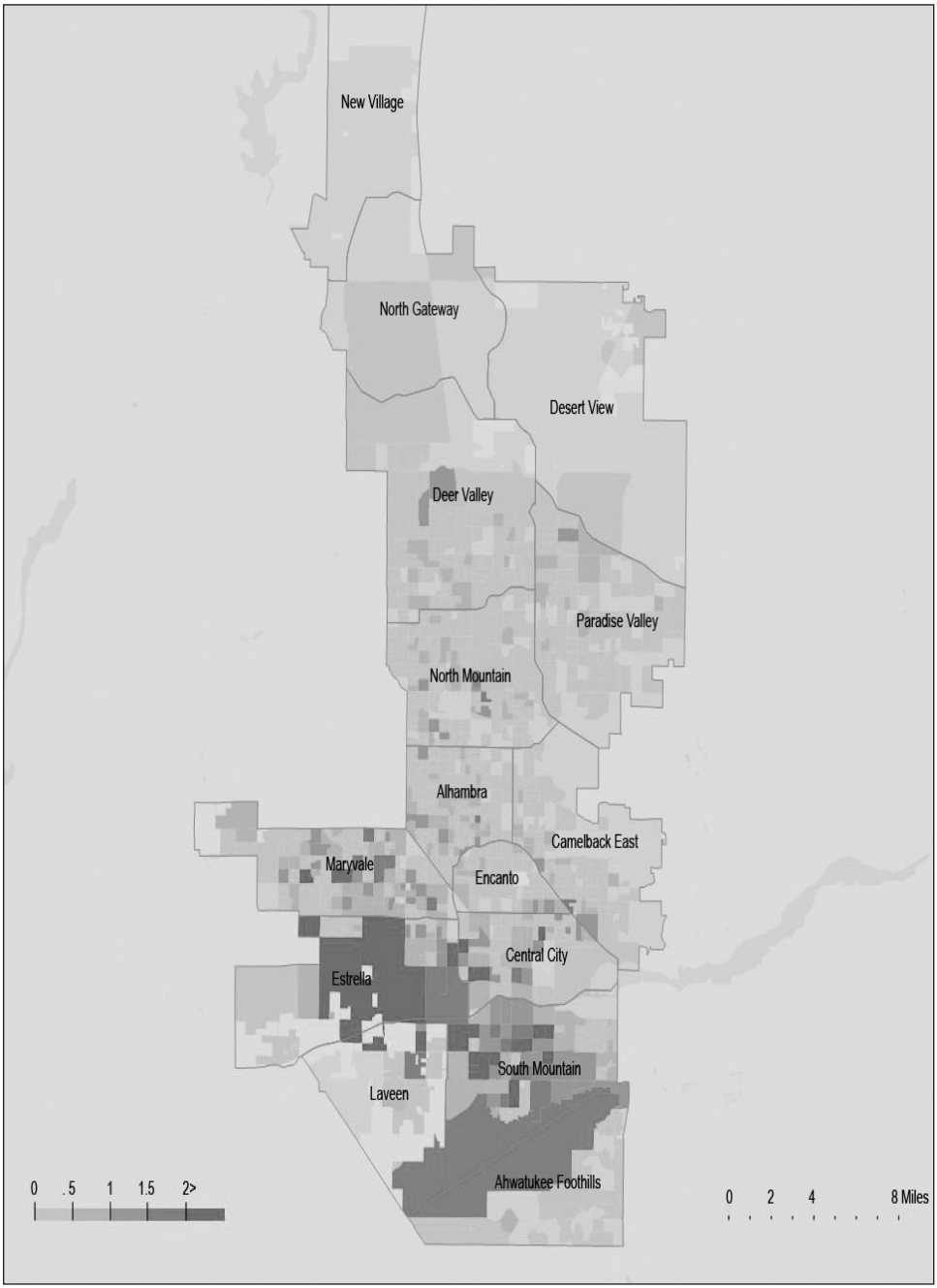
But what are the actual monetary costs of the War on Drugs? The combined budgets for state and federal prisons are estimated at over $52 billion—a more than 300 percent increase in spending over 20 years.[15] If that number is cut in half (recalling that 55 percent of all current inmates are drug offenders) and added to the estimated $40 billion the U.S. spends annually in an attempt to eliminate the supply of drugs,[16] we arrive at a $66 billion annual expenditure. If we eradicated this expenditure alone, the $900 billion stimulus package could be recouped in slightly more than three presidential terms. There are, of course, myriad other costs associated with the War on Drugs: salaries and pensions for additional law enforcement personnel, medical costs attributed to the improper use of drugs, or the use of wildly impure drugs, high-tech weaponry and surveillance equipment, loss of productivity (through incarceration), or even the $1 billion the U.S. spent annually to drug test some 20 million workers in the mid-1990s.[17]

In conjunction with the Council of State Governments, the JFA Institute, and the Justice Mapping Center, the Columbia University Graduate School of Architecture, Planning and Preservation's Spatial Information Design Lab has identified a powerful way to demonstrate how these monetary costs intersect with the pervasive inequality inherent in the prosecution of the War on Drugs: a project called "Million Dollar Blocks." The group introduces the project:

> The United States currently has more than 2 million people locked up in jails and prisons. A disproportionate number of them come from a very few neighborhoods in the country's biggest cities. In many places the concentration is so dense that states are spending in excess of a million dollars a year to incarcerate the residents of single city blocks. When these people are released and reenter their communities, roughly forty percent do not stay more than three years before they are reincarcerated.[18]

Using "rarely accessible" criminal justice data, the group mapped these blocks from a handful of states using geographic information systems (GIS). The results are striking:

Figure 2: Prison Expenditures by Block Group in Millions of Dollars, 2004



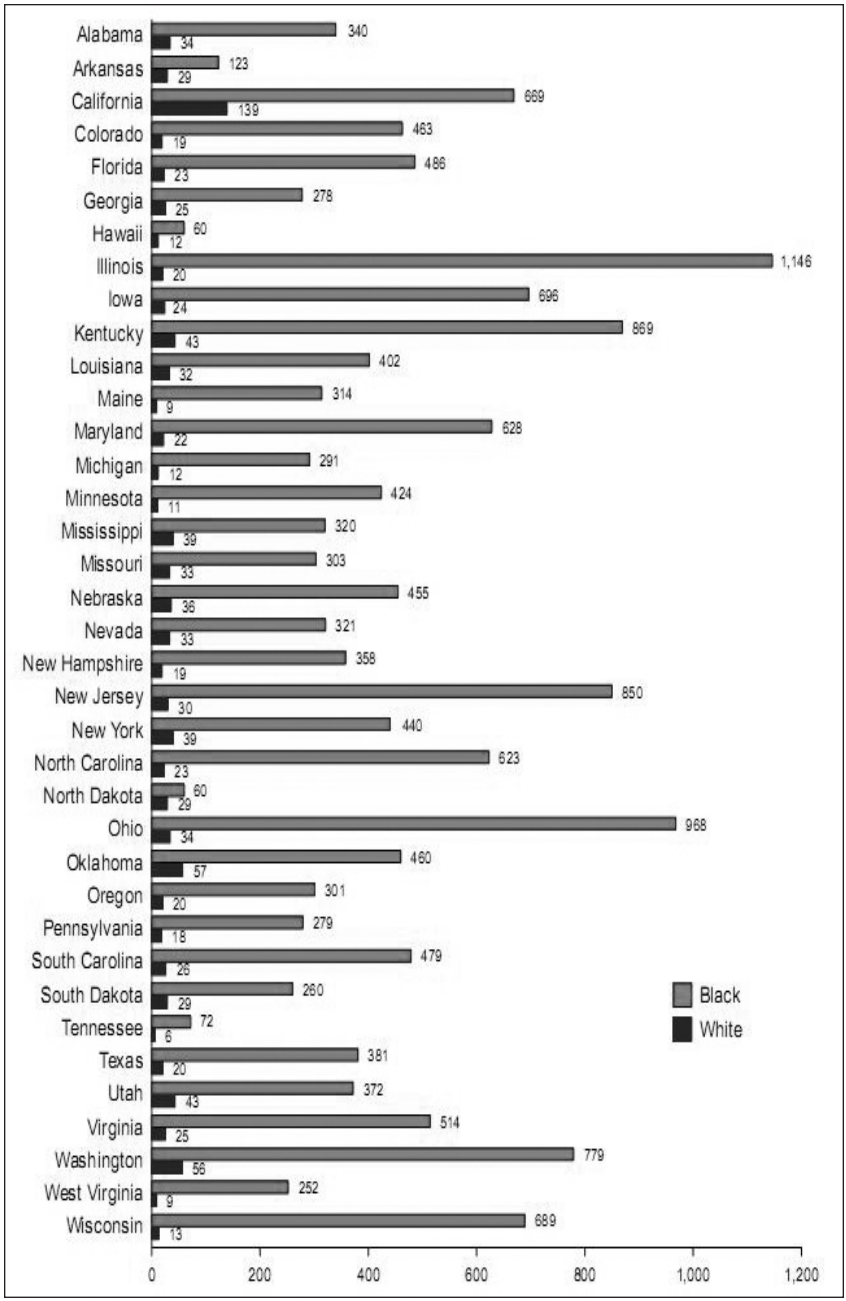
Source: Columbia University, "Million Dollar Blocks."[19]

By linking criminal justice data to specific geographic areas (in this case, Maricopa County, AZ) we can see dense, high-cost clusters, that actually exceed the titular $2 million. As the SIDL puts it:

The maps suggest that the criminal justice system has become the predominant government institution in these communities and that public investment in this system has resulted in significant costs to other elements of our civic infrastructure — education, housing, health, and family. Prisons and jails form the distant exostructure of many American cities today.

Indeed, the War on Drugs is not only an utter failure in terms of achieving its stated goals; it is an inherently racist and destructive policy. One in every 11 African Americans in the country are either in prison or on parole;[20] one out of every three Black men will have been imprisoned at some point in his life; and three-quarters of all incarcerated drug offenders are Black.[21] Despite the fact that African Americans only represent 13 percent of U.S. drug users, they account for 38 percent of those arrested for drug offenses and 59 percent of those convicted for drug offenses.[22] In other words, while they have very similar drug-use patterns, Black males are fifty times more likely to be incarcerated than White males.[23] Given that there is virtually no significant variation in drug-use rates among all ethnic groups, it is no surprise that critics call the War on Drugs the "New Jim Crow."

Figure 3: Prison Admissions for Male Drug Offenders by Race



Source: Calculated from National Corrections Reporting Program, 1996, and Bureau of Census, 2000 data.

In many cases, political expediency and moral convictions (not to mention structural racism) stand in direct conflict with health, safety and democracy. For example, although African Americans represent only 12.2 percent of the U.S. population, they account for 37 percent of all AIDS cases in the country, and of those cases, 44 percent are associated with intravenous drug use.[24, 25] Washington DC, meanwhile, a city whose population is 55.6 percent Black, has an HIV/AIDS infection rate of three percent, the highest in the country (one percent is considered a "generalized and severe epidemic" according to the CDC).[26, 27] Among the District's Black population, the infection rate is seven percent, a rate that is "on par with Uganda and parts of Kenya," according to Shannon L. Hader, director of the District's HIV/AIDS Administration.[28, 29] Yet, Congress has repeatedly prohibited the District from using local funds for needle exchange programs, because, according to Senator George Allan (R-Va, 2001-2007), "Giving a drug addict a clean needle is like giving an alcoholic a clean flask.[30] It just doesn't make any sense." Incidentally, after 69 percent of Washington's residents voted to legalize cannabis for medical use, Rep. Bob Barr (R-Ga, 1995-2003) sponsored a rider on the DC appropriations bill that not only overturned the vote, but permanently prevented the use of local funds to sponsor any future "medical marijuana" bills and, still further, prohibits the city from ever decriminalizing the use of Schedule I drugs—even for medical purposes. In 2002, 78 percent of the District's voters approved a measure that would replace jail time with drug treatment as a sentence for minor possession of Schedule II substances (such as cocaine). After being stalled in court, the measure was overturned in 2005 by three judges and Mayor Anthony Williams.[31]

Policy Suggestions

Federal Level

Rhetoric

In keeping with the emerging gestalt that rejects the Bush-era "all-or-nothing" rhetoric and embraces creativity and new ideas, the first step for any drug policy should begin with the elimination of the term, "War on Drugs." After decades of impotent verbal escalation that focused on law and order, it would be a welcome platform shift to rhetorically treat drug abuse as a social issue, a health issue, or—more positively—as an opportunity to heal our communities and rebuild "war" torn neighborhoods. Framing the debate as a method of creating productivity and reducing our country's financial and social burden (by reducing the number of prisoners and increasing the number of educated, connected citizens) may be a more palatable approach than directly demonizing a failed policy.

In addition to a shift toward positivity, there also needs to be

a shift toward science and rationality. As long as drugs and drug use are referred to as "evil" or "sinful," arguments based on morality will continue to trump more rational, scientifically based ones. While it is easy to claim that "fixing the drug problem" is a "moral imperative," this line of reasoning leads to an "us vs. them" frame. We need realistic acknowledgements and realistic solutions rooted in scientific research, not moral posturing.

There will, of course be a need to replace "The War on Drugs" as a term, a paradigm and a rhetorical avenue. Whatever success we have realized in the Iraq War has stemmed from our ability to create a better alternative to insurgency and terrorism. Through "nation building"—infrastructure, social and political support, we have (in some cases) provided a better alternative to terrorism. Unless that alternative is there, every insurgent that is killed or detained will be replaced by another, equally disillusioned, alienated individual. While "The War on Terror" is unlikely to be supplanted with a more positive phrase any time soon, we may be able to replace The War on Drugs with an effective Alternative to Drugs, or Competition with Drugs. Every time we disenfranchise our citizens, deny them effective education, refuse them social support or otherwise exclude them from the path to the productive citizenship enjoyed by so many Americans, we make the illicit, alternative economy of drugs a more attractive option (and in some cases, the only option). If we do not offer an effective alternative—by improving city schools, extending social support and creating opportunities where they are needed most—every drug user or drug dealer we imprison will be replaced by another, equally disillusioned, alienated individual.

Reexamine Drug Scheduling

In keeping with a renewed commitment to science, it is high time that we reexamine drug scheduling. There has been, for example, a great deal of promising research into medical uses for cannabis, not to mention the fact that the drug is already legally administered in many states (14 at time of writing). There seems to be little reason to maintain Schedule I status for cannabis, but strenuous, transparent research should be applied to this and other drugs to determine appropriate scheduling. Down-scheduling certain drugs is not only a first step towards legalization and regulation, it is also an action that can have immediate effects on sentencing and incarceration. Any act that can reduce the burdens on our legal and penal systems is worth considering.

Reexamine Mandatory Minimum Sentences

Abolishing federal mandatory minimum sentences would accomplish several goals. First and foremost, it would likely contribute to the broader goal of reducing incarceration rates. More indirectly, the action would signal a shift away from drug policy that focuses entirely on punitive

measures. Finally, removing a federally mandated sentencing system leaves states more room to maneuver and experiment.

Lead the International Discussion

Just as solving inner city problems requires a regional outlook, addressing drugs on a national scale requires an international outlook. Stemming from a recent Brookings Commission, Kevin Casas-Zamora, senior fellow at the Brookings Institute has called for the

> [...] launching a permanent hemispheric dialogue on illegal drugs. This dialogue, hopefully led by the U.S., should involve consuming, producing and transshipment countries and proceed at both the ministerial and operative levels. It would allow sharing experiences, identifying workable policies and finding concrete ways to coordinate counternarcotics efforts, on both the supply and demand sides. But most of all, it would allow for the Hemisphere's counternarcotics policies to be more attuned to the needs of different countries, to be something more than a particular approach that is foisted upon them.

> This dialogue is the materialization of the simple principle of co-shared responsibility for the problem, which should have been part of this discussion years ago. It really speaks volumes about the sorry state of the current discussion that the statements made by Secretary Clinton in Mexico a few weeks ago, when she acknowledged that drug consumption in the U.S. is at the base of the problem of drug trafficking and its consequences, could be so obvious and yet so ground breaking.[32]

The traditional suburbia/inner city tensions that are so familiar to planners and policy makers are, in a broad sense, replicated in the hemispheric drug trade.

State Level

Prioritize Health and Safety

There are a number of innovative and effective bills that states have used to move toward a more socially responsible drug policy. For example, in 2004, the state of Maryland enacted a "treatment-not-incarceration" bill that swaps out prison sentences for treatment for

all nonviolent drug offenders. Years later in 2009, Maryland passed a "Good Samaratan" law that allows people who overdose to use a 911 call as a mitigating factor in eventual criminal proceedings. In other words, the law encourages safety and harm reduction by essentially removing the legal ramifications of calling in accidental drug or alcohol overdoses. Such laws are signs of a state that is moving in the right direction. The federal government can encourage this behavior by awarding medical research grants to state facilities.[33]

Decriminalize, Promote Medical Marijuana

The federal government should work to provide political cover to states that wish to experiment with decriminalization or "medical marijuana." Thirteen states have already decriminalized cannabis through a variety of mechanisms. Massachusetts, for example, treats possession of one ounce or less of cannabis as a civil violation and a $100 fine. Alaska, on the other hand imposes no penalty or fines whatsoever for possession of one ounce or less. Many more states have legalized cannabis for medical treatment. This is beneficial because of the increasing success of cannabis-based treatments for pain relief, glaucoma and tumor retardation. Indirectly, legalizing medical cannabis makes it easier to treat drug abuse as a medical issue rather than a criminal one, opening a clearer path toward treatment and rehabilitation.

As more states continue down this path, it will become easier, politically speaking, for other states to follow suit. However, until a sort of tipping point is reached the federal government should provide political cover through rhetorical support or possibly federal research grants. Ideally, as decriminalization spreads, longer term goals of legalization and regulation will become possible.

Build Regional Coalitions to Deal with Prison Guard Unions

There is no organized lobby for prison reform. Meanwhile, the Prison Guard Union—which represents some of the only "winners" in the War on Drugs--is incredibly influential throughout the country (though California's is doubtless the strongest). Progressive cities and states can offer valuable support to each other and present and organized front. In order to encourage regional cooperation, the federal government can provide political cover, research money or increased autonomy.

Conclusion

The facts and figures that discount the War on Drugs are overwhelming, but for the most part, are by no means new. For the past quarter century, the biggest obstacle to a progressive drug policy has not been a lack of research, but an inability to dismantle trenchant moral attitudes, bigotry and willful ignorance. An insistence on zero-tolerance, all or nothing positions on drugs coupled with the need for political expediency has prevented any serious debate about policy reform. However, we exist at a bizarre crux of desperate necessity and bottomless optimism.

Thirteen states with wildly varying politics have decriminalized cannabis. Republican Governor Arnold Schwarzenegger has requested an official inquiry into the taxation of California's lucrative medical marijuana crop. The Rockefeller Laws have been overturned. Even the right-leaning Cato Institute has released a glowing case study that praises Portugal's successful experiment in legalizing all drugs. Writers from politically disparate publications are advocating for the same policy: legalization.

This exciting atmosphere lends itself to decisive action. Broad, federal urban policy cannot prescribe a model city for the entire country. Different cities and regions have different needs when it comes to housing, transportation, social services, economic development and infrastructure, and the federal government is severely limited when it comes to mandating such decisions. When it comes to drug policy, however, the federal government is in a unique position to make sweeping, unilateral change. Only the Federal government has the power to schedule and reschedule drugs (through the Drug Enforcement Agency and the Department of Health and Human Services) and no state has the power to negotiate drug treaties with other countries. Theoretically, the Attorney General could administratively place heroin in the same legal spectrum as Sudafed.

Nevertheless, short-term vision scheduled around election cycles is partially responsible for the original War on Drugs. Drastic, revolutionary change is certainly not a bad thing, and in such a unique moment in time as ours it is an absolutely necessary thing. However, without a (very) long-term plan for implementation, any revolution risks being relegated to footnotes or furious backlash.

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Interview with Susan N. Herman

Kristin Oberheide

Susan N. Herman was elected President of the American Civil Liberties Union (ACLU) in October 2008, after having served on the ACLU National Board of Directors for twenty years, as a member of the Executive Committee for sixteen years, and as General Counsel for ten years.

Herman holds a chair as Centennial Professor of Law at Brooklyn Law School, where she currently teaches courses in Constitutional Law and Criminal Procedure, and seminars on Law and Literature, and Terrorism and Civil Liberties. She writes extensively on constitutional and criminal procedure topics for scholarly and other publications. Recent publications include two books, *Terrorism, Government, and Law: National Authority and Local Autonomy in the War on Terror,* editor and co-author, with Paul Finkelman (Praeger Security International 2008) and *The Right to a Speedy and Public Trial* (Praeger 2006) (part of a series on the Constitution), and law review articles including "The USA PATRIOT Act and the Submajoritarian Fourth Amendment," 41 Harv. Civ. Rts.-Civ. Lib. L. Rev. 67 (2006).

Herman has discussed constitutional law issues on radio, including a variety of NPR shows; on television, including programs on PBS, CSPAN, NBC, MSNBC and a series of appearances on the Today in New York show; and in print media including Newsday and the New York Times. In addition, she has been a frequent speaker at academic conferences and continuing legal education events organized by groups such as the Federal Judicial Center, and the American Bar Association, lecturing and conducting workshops for various groups of judges and lawyers, and at non-legal events, including speeches at the U.S. Army War College and many other schools. She has also participated in Supreme Court litigation, writing and collaborating on amicus curiae briefs for the ACLU on a range of constitutional criminal procedure issues, and conducting Supreme Court moot courts, and in some federal lobbying efforts.

Herman received a B.A. from Barnard College as a philosophy major, and a J.D. from New York University School of Law, where she was a Note and Comment Editor on the N.Y.U. Law Review. Before entering teaching, Professor Herman was Pro Se Law Clerk for the United States Court of Appeals for the Second Circuit, and Staff Attorney and then Associate Director of Prisoners' Legal Services of New York.

TC: As a renowned Supreme Court expert, how do you view the recent induction of Justice Sonya Sotomayor?

Her induction does not change very much from my point of view. People talk about the liberal and conservative wings of the Supreme Court, but from my point of view there are no liberals on the Supreme Court right now; there are no Brennans or Marshalls. There are people who are moderate and people who are very conservative. Justice Sonya Sotomayor replacing Justice David Souter is not that likely to change the balance of power. If she votes the way David Souter voted which tended to be more on the moderate side, it doesn't change anything because there are still justices on the other side who could out vote her. If she doesn't vote the way David Souter voted it's just often one more person in a majority. So, there may be places where she takes a different position from her predecessor but there has to be more change on the Supreme Court before there's a likelihood of changing direction in any significant way.

Listening to the confirmation hearings, I was disappointed to hear her talking about Constitutional interpretation in the same way that conservatives have been taking about it for years. It is something that has no play in the joints, it's not flexible, the Constitution just tells you what to do, and, to me, I think that that's not accurate. I think that once Senators get in mind that that's what you have to say to be confirmed, it makes it much less likely that somebody more liberal will ever be confirmed. If you have to say certain things to be confirmed as a Supreme Court justice, you can't have certain opinions about Constitutional interpretation. What that means is we're limiting the approval of people who could be Supreme Court justices to people who only say the "right things." It also means that people who think that might be in their future might trim their sails and never say the thing that they believe but might cause them not to be confirmed.

The Current (TC): The American Civil Liberties Union's motto is "because freedom can't protect itself." Who are the adversaries in the mission of the ACLU?

Our opponents are not defined by whether one is Republican or Democrat; we are a nonpartisan organization. We never lobby for or against candidates for political office. However, at whatever level, whether it be federal, state, or local government, people in power often are tempted to try to impose their own will, or the will of the majority of their constituents, on a minority of people. We push back on behalf of people - whether they're a minority of people or a majority of people - when the government starts trying to limit people's ability to make their own decisions on things that the constitution says that we get to decide about ourselves. Our opponents are whoever is endangering the civil liberties and civil rights that we think need and deserve protection.

TC: In your Cornell Institute for Public Affairs Colloquium Series lecture, you mentioned the "Golden Rule." Could you expand on how this simple principle meshes with the mission of the ACLU?

I think many of the Bill of Rights' principles are based on the Golden Rule. For example, if you want to exercise your religion because it's what you believe, it takes just a small leap of empathy to understand that somebody who has a different religion might want to exercise their own religion. Similarly, the idea of free speech requires understanding that somebody else wants to say something that you might not agree with, and you should let them because you might want to say something that they might not agree with.

This seems simple, but if you live in a community where people who agree with you are in the majority, it becomes very tempting to not tolerate challenging ideas. I think this is true in a lot of places in the United States. You see religion intersecting with education, where community members want schools to only teach intelligent design because they don't want challenges to their values. We want our children to be comfortable in their faith and to be following what their parents think. We also see this happening with education and sexuality. When people live as a majority, they may elect school board officials that agree with their values, and then gay and lesbian children are treated differently. For example, there was just a case in Tennessee where the school board was trying to censor all internet sites that dealt with any LGBT issues.

This is where we come in. Our view at the ACLU is that the Constitution has laid out a tolerant view of different beliefs, be they majority or minority, for this country. We don't have, nor want, everybody doing the same thing and thinking the same thing.

TC: As you mentioned, civil liberties in the U.S. are tied to the Constitution and Bill of Rights. What about the concept of civil liberties on a global basis? Can the U.S. learn from other nations?

In addition to our Constitution, the United States is also a signatory to the Universal Declaration of Human Rights and to a number of other international treaties. I'll give you an example of how the ACLU has been using international law in our domestic Constitutional work. The 8th Amendment in the Bill of Rights prohibits cruel and unusual punishment. Does that mean that the death penalty is unconstitutional? Under 8th Amendment law now, it is not considered to be cruel and unusual to execute somebody for committing a crime, and the ACLU has been working on this issue, as we disagree. The Supreme Court has recently recognized that it is cruel and unusual to execute people who are mentally retarded, and also those who were juveniles when they

committed their crime.

In arguing on behalf of both of those kinds of cases, the ACLU, along with other organizations, used international human rights arguments. We talked about international law, international treaties, and their definitions of what is considered to be cruel and inhumane. Looking at examples from other countries, it turns out that virtually no other country in the world executed people who were mentally retarded or juvenile. We argued to the Supreme Court that the Court should pay attention to what the rest of the world thinks about basic norms of human rights in interpreting the 8th Amendment. So, international standards and norms should be brought to bear on interpreting what our rights and liberties are.

The United States does not live in isolation, so nor does the ACLU. Sometimes we partner with international organizations when we have common interests and goals in a particular case. For example, we have worked with international partners on Guantanamo prisoner issues, and are now looking at Bagram Air Base, as we think that Americans are doing things there that are inconsistent with our fundamental values. That's a concern to us even though it's happening outside the country because it is something being done by American agents with our tax dollar.

TC: Obama's immediate intention to close Guantanamo seemed to signal a fresh stance on the treatment of international prisoners. Could you expand on your concerns about the U.S. detention facility at Bagram Air Base in Afghanistan?

President Obama has set a good climate for talking about Guantanamo, but this does not alleviate all concerns. The Supreme Court decided that the attempt of President Bush to establish a law-free zone in Guantanamo was not acceptable because it is a territory that is controlled by the United States. In this decision, the Supreme Court said two things. First, that the detainees had to have some sort of a hearing in Guantanamo to try to determine if they're just innocent bystanders, and whether they should be detained at all. And, second, the Supreme Court also decided that the Guantanamo detainees should have the right to come to American courts to challenge their detention and have a judge, in a fair proceeding, look at the quality of the evidence against them to decide whether or not there is a sufficient basis for detention.

President Obama has just said that he agrees with the first part, that Bagram detainees should have some sort of proceeding to determine whether there are grounds for detaining them. But on the other hand, he said that he doesn't agree that people in Bagram should have any right to get a hearing in an American court. The people who might have been in Guantanamo are now at Bagram, and we are concerned that Bagram

could become the next Guantanamo.

American courts are on American soil. We have a very well established criminal justice system with laws perfectly capable of handling trials against terrorists. The ACLU believes it is important that the evidence against detainees be submitted through our normal route of due process because we have a fair system that we can be confident in. History shows that if you start jerry-rigging the system because you want to be sure of having a certain result, that's when countries get into trouble.

The International Council on Jurists set up an eminent jurist panel and spent three years doing interviews in countries that have had problems with terrorism. They discovered that every country which made major changes in their laws in response to the threat of terrorism have regretted it afterwards. Once you make exceptions to your principles, exceptions are very hard to confine. Special detention rules to hold people to prevent them from possibly doing harm, for example Ireland with the IRA, were found to be the best recruiting tool for the IRA because of the oppressive nature of the detention rules. If we make exceptions to principles so that we can be sure to hold a particular individual, we are taking a step in the wrong direction in the war on terror because we no longer have due process and global credibility.

TC: In regards to terrorism in the past decade, the ACLU has expressed their desire for accountability for government actions. What does this entail?

We want Congress to establish an independent commission to really look at what had happened and to make proposals for changes in the law going forward. A precedent is the Church Commission which happened in the 1970s in response to the abuses of surveillance powers where, for example, the FBI had been spying on Dr. Martin Luther King. The United States is signed on to the convention against torture. Congress is responsible for implementing our obligations under international treaties, and created statutes to that end.

Thanks to the ACLU's Freedom of Information Act efforts, we know that lawyers in the Bush administration at very high levels were, you might say, torturing the statutes. Congress should really want to know as much as possible about what was happening because, going forward, this is about them. They might want to redraft the statutes and tighten things up so that we have good definitions of what they mean by torture so that in the future we don't end up doing the same thing again.

We also think that there should be an investigation, a special prosecutor kind of investigation, to determine not just a group of policies but what individual people did. Attorney General Holder has said that he supports an independent prosecutor looking into violations of the terribly low standards that were established, but that doesn't go far enough. It seems to be very unfair to have prosecuted and sanctioned

low-level people when they were really just following policies that were condoned or inspired by people above them on the chain of command. If it turns out that you follow up that chain and it goes pretty high up into the Bush administration, I think that's an important thing for us to know in terms of writing accurate history. So, again, we can judge for the future how we want to behave.

Should those people, whoever they are, end up being prosecuted? President Obama could decide to pardon them, so investigation doesn't have to be prosecution. But, it seems to me, you do not start the process of finding out what happened because you're not sure whether or not you want the prosecution. First you find out what happened and then you make the decision about whether anybody should be prosecuted.

TC: I understand you are currently working on a new related project. Could you tell us about it?

I'm working on a book proposal now and my working concept is how ordinary Americans are impacted by the war on terror. This started when I had dinner with this woman who said "Why should I care about Guantanamo?" Besides the fact that I think she should have empathy, like the golden rule principle we discussed, she should also care about anti-terrorism measures, because a lot of them affect not only people in Guantanamo, but Americans on American soil. For example, under the Patriot Act ,the government has altered its surveillance powers so they don't need to get a court to look at what they're doing to see if it's justified. They don't actually have to have any particular justification other than "they're looking." And there are hundreds of thousands of people who are going to be or are already under surveillance. We don't know who we are.

I also want to tell the story of how ordinary Americans stood up to fight against excessive anti-terrorism measures when the branches of government were failing to check what President Bush and his administration were putting into place. Congress was quite negligent in not having sufficient oversight and the courts had all these procedural filters where they wouldn't hear cases. Ordinary people really who got it just stood up and said, "No, what's happening here is not good."

There's a person who we still know as John Doe four years later because he is not allowed to reveal his identity. He was an internet service provider and received a national security letter asking for information about his clients, such as what websites they visited. The provision in question also had an absolute gag order which stated that he was not permitted to tell anybody that the FBI had asked him for any information ever. He showed great personal courage and came to the ACLU and said, it seems to me I can't talk to you, I can't talk to a lawyer, I can't go to court. He wanted to have the ACLU go to court on his behalf to question whether this was constitutional. The judge ruled that it was certainly

unconstitutional to say that you can't talk to a lawyer, and in fact that law is now changed in that respect. This is only a partial success, but this John Doe is a hero to me.

The ACLU gave him an award at a dinner but he could not collect it in person due to him risking federal prosecution if he reveals his identity. When it was his turn, the lights dimmed, a video came on with an obscured face, and a voice said, "My name is not John Doe and this is not my voice." An actor had to do his acceptance speech so that there is no chance that anybody can figure out who he is. Now is that kind of freaky – this is America?

There is another man who converted to Islam and changed his name to Abdullah Al-Kid. He got a scholarship from a Saudi school to come and study Arabic and to study his religion. When he arrived to the airport, he was arrested, because he knows this other guy who was a webmaster for an Islamic organization and the government was charging this other guy with providing material support to terrorism. They locked up Al-Kid for sixteen days but never called him as a witness in the case. The jury acquitted that other guy. The government let Al-Kid go on the condition that he had to surrender his passport, stay within a three-state area, agree to have home visits whenever anybody wanted to visit him, and he lost his security clearance for his job and was fired. He brought a lawsuit against John Ashcroft for authorizing this pre-textual use of the material witness statutes. The case is still pending and we're still litigating.

He was just an American, in America, going about his business, whose life was drastically impacted because these statutes are being used so extensively. Another example: the no-fly list affected a whole lot of people; there were like a million names on the list. Thirty thousand people complained one year to the Transportation Security Administration that their names had been matched with names on the list and, therefore, they were either prevented from flying or seriously delayed. Also, if you contribute to the wrong charity, even if you have no intention of supporting any illegal activities, if the government deems that the charity you contribute to has some other arm that's involved in something illegal or terrorist, you can find yourself in a lot of trouble. The ACLU just did a report of government regulation on Muslim charities; Muslims are most afraid to give because the government may have a negative view of Islamic organizations, while one of the tenets of their religion is charitable contribution.

TC: Moving forward, what are the priorities for the ACLU?

We have many different issue area priorities. For example, one is over-incarceration. In addition to our use of the death penalty, for years, the United States has locked up a higher percentage of our people than almost any country in the world, and certainly more than in any other western nation. What we're thinking is that with the current

pressed economy, it's a very good time to talk to states about over-incarceration policy and alternatives to incarceration.

However, generally, we do think we need to look back over the past eight years now that we are entering the second decade of the 21st century. We need to absorb the lessons that we learned during the first decade – one of which is you can't just trust the government to make decisions for you. You can't just trust politicians because there is a lot of impetus for them to be tough on crime and terrorism in ways that don't often make sense, and are really unnecessary and unjust. Our priority is to have accountability and really get started on the process of restoring an America we can be proud of. As a country we need to establish or re-establish our principles firmly, so that the next time something scares us, we do not lose sight of our principles and apologize afterwards.

TC: How can public policy professionals and academics best contribute to the protection of civil liberties?

Consider becoming members of the ACLU. When we go to President Obama or Attorney General Holder, and say, "We want you to consider having more protections with the Patriot Act, or we want accountability for detainee torture," et cetera, what we say to them is "We represent some 550,000 members across the country." The more members we have, the stronger voice we have.

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Interview with Robert Goldenkoff

Michaela A. Stewart and Nancy L. Sun

Robert Goldenkoff has over 20 years of program evaluation experience with the U.S. Government Accountability Office (GAO). Currently, he is director of the GAO's Strategic Issues Team where he is responsible for reviewing the 2010 Census and government-wide human capital reforms. Prior research areas have included transportation security, combating human trafficking, and federal statistical programs. He received his B.A. (Political Science) and Master of Public Administration degrees from the George Washington University and was a Presidential Management Fellow.

The Current (TC): Could you describe the involvement of the GAO regarding the Evaluation of the 2010 Census Communications Campaign? Could you suggest some metrics that the Bureau should take into account?

We've just started to design our evaluation of the communications campaign, so I don't have many specifics at this point. However, given the campaign's importance to the success of the census, it's something that we'll look at closely. The Census Bureau's efforts are aimed at hard-to-count population groups such as minorities, renters, and children. Such individuals are more likely to be missed by the census than other demographic groups.

In particular, the communications campaign consists of partnerships with government, private sector, social service, and other organizations; paid advertising; public relations; and something called "Census in Schools," which is designed to reach parents and guardian through their school-age children. The Bureau had originally planned to spend around $410 million on the communications campaign, but this has since been boosted by an additional $250 million from the economic stimulus legislation that was enacted this past February.

So, with all that as background, while we haven't developed our specific approach yet, key areas we might focus on include how the Bureau is spending stimulus funds, the extent to which it is targeting its efforts toward hard to count groups, and aspects of the partnership program such as the program's management infrastructure.

For its part, a key metric the Bureau could take into account is the impact on response rates by various demographic ethnic groups. Moreover, it will also be important for the Bureau to examine how the communications campaign affected behavior. In past censuses,

the Bureau's research has found that while the majority of people surveyed were aware of the census, actual participation rates were far lower. Understanding how to convert awareness of the census into an actual response represents an important opportunity for the Bureau to improve participation in the future.

TC: What are some specific performance measures that the Census Bureau is taking into account in preparation for the 2010 Census?

The Bureau is taking a number of performance measures into account in preparing for the census such as cost, accuracy, and schedule. It will be important for the Bureau to have a comprehensive set of performance measures so that it can properly plan for the 2020 and future censuses. For example, there is a tension between cost and accuracy. An accurate census means counting everybody in the nation once, only once, and in the right place. However, because our nation is getting more difficult to count, achieving that goal has become increasingly costly. So, key questions for the Bureau include (1) what exactly are the key drivers of cost and accuracy, and (2) how can costs be controlled while maintaining or increasing accuracy?

TC: Controversy regarding the status of individuals who are living in the U.S. as illegal immigrants has also arisen. The previous sentence taken into account, will the 2010 Census consider these individuals as part of the census, and why or why not?

Yes—undocumented aliens will be included in the 2010 Census barring any last minute changes on the part of Congress. The Constitution identified who should be counted in the decennial census in Article 1, section 2, with the following language: The count "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons [slaves]."

Although the framers were specific about how to count (or not count) Native Americans and slaves, they were not specific about whom to count. Only one important criterion for eligibility was established: "persons" rather than "citizens" were to be counted, meaning citizenship was not to determine who should be counted. There was little reason to be more specific since the population in the 1780s was relatively homogenous, stationary, monolingual, and organized in stable household units. In the years since the framing of the Constitution, however, many of those conditions have changed, posing new philosophic and pragmatic issues, including how to count undocumented aliens.

Nevertheless, the effect of legislation and court decisions over

the past centuries is that the language of Article 1, section 2, is read at its most inclusive. All persons who are resident in the United States on Census Day, whether here legally or illegally, are to be counted.

TC: Are there any significant changes between the 2000 Census and 2010 Census that should be noted?

The Bureau instituted several changes since the 2000 Census aimed in part to improve accuracy and reduce costs. Perhaps the most notable change was the elimination of the long-form questionnaire. The 2000 Census consisted of both a short-form and long-form questionnaire. Every household was asked to complete the questions on the short-form, which asked questions about race, ethnicity, and gender. However, a 1 in 6 sample of the population received a long-form questionnaire that asked more detailed questions about population and housing characteristics that were used to help allocate federal assistance under an array of federal, state, local and tribal programs. Still, the response rate to the long-form was lower than the response rate to the short form. Further, the long-form data was only available every 10 years so it became obsolete after a few years.

Consequently, the 2010 Census will be a short-form only census. This will allow the Census Bureau to focus its efforts on obtaining the data needed for the constitutional purpose of apportioning and redistricting Congress as well as to control costs. The Bureau replaced the long-form with a separate, sample based survey known as the American Community Survey (ACS). Because data from the ACS are collected annually, the information is much more timely and useful to data users.

TC: Do you believe there will be any drastic shifts in the 2010 Census as a result of the current state of the economy?

It's hard to say at this point. It's possible that, because of current economic conditions and the hurricanes that have hit the Gulf Coast, the census may find that fewer Americans own their homes—there could be more renters and people living in non-traditional living arrangements such as motels. Further, the decennial will tell us more about the diversity of our nation both in terms of race and ethnicity as well as age and gender. The ACS, because it asks more detailed questions on population and household characteristics, would be more likely to pick up any demographic shifts.

TC: Do you believe that the Census is an accurate assessment of the United States?

The decennial census is frequently described as the most accurate data collection program in the country, and there is certainly nothing else like it in terms of scale or complexity. The Bureau goes to great lengths to ensure that everyone is counted once, only once, and in the right place. Although population data can also be collected by

periodic surveys, the decennial census is the only data collection program that provides information on a range of demographic characteristics for small geographic areas and populations.

TC: Understanding that the cost of the 2010 Census has escalated to over $14 billion, should this be considered a worthwhile investment?

As Congress has continued to fund the census, it can be argued that collectively, a societal decision has been made that it is indeed a worthwhile investment. Still, the cost escalation cannot be ignored, and Congress itself has expressed the importance of containing the rising expenditures on the decennial. The cost of conducting the census has, on average, doubled each decade since 1970 in constant 2010 dollars. If that rate of cost escalation continues into 2020, the nation could be looking at a $30 billion census. The bottom line is that the current approach to counting the nation's population may no longer be financially sustainable.

TC: It has been noted that both political power and the allocation of federal assistance is determined largely by who is accounted for in the census. What changes should be made so that the Census accurately addresses the populations who are currently undercounted?

Job one is first determining why certain demographic groups are less likely to participate in the census. In some cases, it's attitudinal: some people simply distrust or fear government, or guard their privacy. In other cases, people can be difficult to find because they live in less conventional dwellings such as migrant labor camps, tent cities, etc. One way of addressing this is through greater and more effective promotion and outreach. The Bureau is already taking action in this regard though targeted advertising and the use of "trusted voices" or gatekeepers for a particular community that can serve as a conduit for the Bureau and convince others to participate in the enumeration.

However, these efforts can only go so far, and it's quite likely that the nation has already reached the point of diminishing returns. The Bureau has, and should continue to explore, the use of administrative records (e.g. utility records, school records), especially to fill in data gaps on hard-to-enumerate populations. Such an approach could require new laws to enable the Bureau to access this information, and the recordkeeping would have to be of sufficient quality for the Bureau to be able to use it. The use of admin records might also generate opposition from various groups that might see the sharing of data as an invasion of privacy.

TC: What other political aspects are affected by the accuracy or inaccuracy of the census?

The drawing of election districts and the enforcement of civil rights laws also use census data. For example, in addition to being used to redistrict the U.S. House of Representatives, state and local governments use census data to draw local election boundaries. This is why it's important to not only get the count right, but to make sure people are counted in their correct locations. The enforcement of certain civil rights and anti-discrimination laws such as the Voting Rights Act, also rely on census data.

TC: From your point of view, what are some of the challenges for implementing the 2010 Census?

In March, 2008, the GAO added the 2010 Census to its list of high risk areas in the federal government. These are agencies or programs that are particularly susceptible to waste, fraud, abuse, or mismanagement, or might be in need of reforms because they are facing economy and or efficiency challenges. The GAO designated the 2010 Census a high risk area for three reasons. First, key operations were not tested under operational conditions. Such tests are important because the census is a complex machine with hundreds of moving parts that need to work in sync with one another. Furthermore, some census operations are new for 2010—they have never before been used in a prior decennial. Second, key information technology (IT systems) were not fully tested. And third, the Bureau lacks precise cost estimates of the total cost of the decennial. For example, key assumptions in the Bureau's cost model were not updated nor adequately documented.

Although the Bureau has made progress since March 2008 in addressing these and other issues, several internal and external challenges remain. For example, internally, uncertainties still surround IT management. Requirements and testing plans have not been finalized, it's difficult to gauge progress made in rolling out systems because of vague metrics, and certain systems face tight testing and implementation timeframes.

Externally, the big unknown is the mail response rate. Each percentage change in the mail response rate costs or saves the Census Bureau tens of millions of dollars. Further, there have been structural changes in the way people live in our nation. Because of the rise in foreclosures and as a result of Hurricane Katrina, there is more vacant housing, and more people are doubling up, living in tent cities, shelters, etc. Such individuals are at greater risk of being missed by the census.

There has also been a very public debate about immigration issues that might keep both documented and undocumented immigrants from responding to the census.

And finally, time is running out. By law, Census Day is April

1, 2010. By law, data for apportioning Congress need to be delivered to the president no later than December 31, 2010. A lot of work remains with little time to do it. Moving forward there are no timeouts, no reset buttons, and no do-overs.

TC: How do you expect the Census Bureau to meet these challenges?

So far, the Census Bureau has done a commendable job of addressing these challenges. The first step in solving a problem is recognizing that you have one, and to that end the Bureau has done an excellent job of identifying the risks and challenges it faces, and developing strategies to mitigate them. For example, in areas hit hard by Hurricane Katrina, the Bureau intends to hand deliver questionnaires to households rather than send them through the mail. This will help ensure that all residents will be included in the census.

I also want to stress that the decennial census is a shared national undertaking. That is, everyone in the country plays a role in ensuring a successful headcount. Perhaps the best and easiest way to do that is to simply ensure that you, your family, and friends, complete their census questionnaires when they are delivered early in 2010.

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