MAXIMIZING DISABILITY: THE ROAD TO EXTRACTIVE FEDERALISM

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Of the many alarmist commentaries on U.S. disability benefits in recent memory, few have explored state and local governments' efforts to channel needy residents toward disability-based income support programs—and to thereby shift the cost of care onto the federal government. This Essay documents the rich history of such efforts, going back to the 1980s.

This Essay also emphasizes an inflection point in this history: Starting in the early 1990s, private, for-profit consulting companies began securing contracts from states for the "shifting" work that legal aid organizations had been doing. Simultaneously, these companies marketed their "revenue maximization" services, encouraging state officials to see federal health and welfare programs as a resource to be mined. This Essay connects this extractive mindset to today's "extractive federalism," which scholars have documented in both the foster care and nursing home contexts.

From the state and local perspective, extractive federalism may be rational: In a context of real or perceived resource scarcity, it secures funds for public purposes. But these tactics have come at the expense of vulnerable people. Those whose needs make the federal spigots turn do not necessarily benefit from the resulting federal dollars. Meanwhile, these tactics obscure from the public the true nature of federal spending.

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INTRODUCTION

Just over a decade ago, National Public Radio ("NPR") called listeners' attention to a "startling" phenomenon: the "rise of disability in America."[1] Journalist Chana Joffe-Walt opened her piece for NPR's *Planet Money* by noting the "skyrocket[ing]" number of Americans receiving disability-based benefits in the previous three decades.[2] Striking figures and anecdotes supplemented this claim. Joffe-Walt profiled a county in Alabama where nearly one in four working-age adults received "disability."[3] She noted the tiny percentage of recipients of Social Security Disability Insurance ("SSDI") who returned to work after joining the program.[4] And she spotlighted families who were thrilled when their children could "pull a check" from the Supplemental Security Income program ("SSI"),[5] a need-based program for people with a qualifying disability or disabilities.[6] Based on this research, Joffe-Walt concluded that "disability has . . . become a de facto welfare program for people without a lot of education or job skills."[7]

Experts in U.S. disability policy were quick to respond, noting first that the profiled programs are a legitimate and long-established form of social support and, second, that these programs are notoriously difficult to access.[8] Unrefuted, however, was Joffe-Walt's intriguing reporting on

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1. Chana Joffe-Walt, Special Series, *Unfit for Work: The Startling Rise of Disability in America*, NPR: PLANET MONEY (2013), https://www.npr.org/series/196621208/unfit-for-work-the-startling-rise-of-disability-in-america.

2. Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, NPR: PLANET MONEY (March 22, 2013, 10:18 AM) [hereinafter Joffe-Walt, *Unfit for Work*], https://www.npr.org/sections/money/2013/03/22/174194673/unfit-for-work-the-startling-rise-of-disability-in-america [https://perma.cc/DFF5-4S3S].

3. *Id.* In this particular quote, Joffee-Walt appears to have used "disability" to refer to Social Security Disability Insurance, a program for qualifying workers who have become too disabled to continue working. But the article does not elaborate. In the context of public benefits, "disability" could also refer to Supplemental Security Income, a need-based program that covers people with disabilities. *See infra* note 6.

4. Joffe-Walt, *Unfit for Work*, *supra* note 2.

5. *Id.*

6. EDWARD D. BERKOWITZ & LARRY DEWITT, THE OTHER WELFARE: SUPPLEMENTAL SECURITY INCOME AND U.S. SOCIAL POLICY 1–2 (2013). SSI also serves elderly people who meet the requirement of need. Established in 1972, SSI is the successor to three programs that had been administered at the state level and were funded jointly by the federal and state governments: Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. *Id.* at 1, 5–6.

7. Joffe-Walt, *Unfit for Work*, *supra* note 2; *see also 490: Trends with Benefits*, THIS AMERICAN LIFE (Mar. 22, 2013), https://www.thisamericanlife.org/490/trends-with-benefits; *see also id.* (describing disability benefits "as a sort of quiet de facto welfare system").

8. *See, e.g.*, Donna Meltzer, *The Facts About the Social Security Disability Programs*, HUFFPOST, https://www.huffpost.com/entry/social-security-disability-

the role of a private company, Public Consulting Group ("PCG"), in producing the situation that she found so alarming. According to Joffe-Walt, states had paid PCG "to comb their welfare rolls and move as many people as possible onto disability."[9] Joffe-Walt described visiting "an office in eastern Washington state [that was] basically a call center, full of headsetted women in cubicles . . . who make calls all day long to potentially disabled Americans, trying to help them discover and document their disabilities."[10] Sometimes that "help" simply involved assisting people with applications, but it also included calling doctors' offices to secure necessary documentation and even setting up medical appointments.[11] PCG expected significant compensation for these labors. "In recent contract negotiations with Missouri," Joffe-Walt reported in 2013, "PCG asked for $2,300 per person" assisted[12]—which it justified with a prediction of $80 million in state savings.[13] At that time, PCG had seventeen contracts with states and counties.[14]

Given the tone of Joffe-Walt's reporting (*e.g.*, referring to key findings as "startling"[15]), one might imagine that these "shifting" efforts were a recent phenomenon, perhaps related to the Great Recession. In

programs_b_3014961 [https://perma.cc/M68S-DJDY] (June 4, 2013); Harold Pollack, *Misleading Trends with Benefits*, CENTURY FOUND. (Mar. 28, 2013), https://tcf.org/content/commentary/misleading-trends-with-benefits/ [https://perma.cc/BA2L-W7DX]; Michelle Chen, *How 'This American Life' Got Disability Wrong*, THESE TIMES (Mar. 28, 2013), https://inthesetimes.com/article/how-this-american-life-got-disability-wrong [https://perma.cc/W75P-A5RF]; Joan McCarter, *How 'This American Life' Got the Disability Story Wrong*, DAILY KOS (Mar. 29, 2013, 3:28 PM), https://www.dailykos.com/stories/2013/3/29/1197940/-How-This-American-Life-got-the-disability-story-nbsp-wrong [https://perma.cc/8PTB-6C42].

9. Joffe-Walt, *Unfit for Work*, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. Chana Joffe-Walt, *Moving People from Welfare to Disability Rolls Is a Profitable, Full-Time Job*, NPR, at 07:10 (Mar. 27, 2013) [hereinafter Joffe-Walt, *Moving People from Welfare*], https://www.npr.org/2013/03/27/175502085/moving-people-from-welfare-to-disability-rolls-is-a-profitable-full-time-job. In response to this reporting, policy expert Elizabeth Lower-Basch offered a different interpretation of state incentives: "TANF benefits are so low and time limited, [that] *the financial incentives to shift people to SSI are relatively small*." Elizabeth Lower-Basch, *TANF and SSI: The Rest of the Story*, CLASP (Mar. 29, 2013) (emphasis added), https://www.clasp.org/blog/tanf-and-ssi-rest-story/ [https://perma.cc/MYG8-SSGR]. "Rather, states do this because they believe it is helpful for recipients, and because it can help states with the work participation rate under TANF"—in the sense that it prevents people who are too disabled to work from being included in a population that federal law generally treats as work-eligible. *Id.* The "work participation rate" among TANF recipients matters to states because states that fall below federal expectations face financial penalties. *Id.*

14. Joffe-Walt, *Moving People from Welfare*, *supra* note 13, at 03:40.

15. Joffe-Walt, *Unfit for Work*, *supra* note 2.

fact, this Essay shows, states have long attempted to shift recipients of state-funded aid onto federally funded disability-based income support programs. The opportunity was visible as early as 1973, when it became clear that the federal government was going to take primary fiscal responsibility for disability-based income support (previously a shared federal-state responsibility).[16] But shifting efforts really gained momentum in the late 1980s and early 1990s, as officials in some states recognized the opportunity to achieve significant state savings. Nonprofit legal services organizations initially assisted states with this work. Although legal services programs and state welfare departments had sometimes clashed, this kind of collaboration made sense. Low-income individuals who qualified for disability benefits were materially better off after the "shift," making this work consistent with an antipoverty agenda. Meanwhile, legal services organizations could earn a modest payment for the assistance they provided.[17]

But Joffe-Walt was right to imply something troubling about *for-profit* involvement in this work (helpful as it may have been to some poor Americans). By the mid-1990s, private, for-profit entities had successfully marketed themselves as purveyors of "shifting" work. And importantly, shifting people onto "disability" was just one of the services these private companies offered to state and local governments. Not only could they help states save money, these companies suggested, but they could also help states *maximize revenue*—by securing for them the best possible yield of federal dollars from across a range of health and welfare programs. In retrospect, these conjoined efforts help us see an inflection point in American federalism. If high-level state officials once understood their poor residents as people who needed care and would somehow have to be provided for, by the end of the twentieth century, they could just as easily envision these same people as components of a pipeline: If configured in the right way, they could make federal money flow into state coffers and, from there, toward any number of state priorities.

This Essay is a preliminary attempt to sketch this change—from intragovernmental maneuvers that helped states better meet the needs of poor residents while achieving state savings, to a broader set of extractive practices. By "extractive practices," I mean strategic efforts by state and

16. *See* BERKOWITZ & DEWITT, supra note 6, at 1–13 (chronicling the enactment of the 1972 law that "federalized" disability-based income support and documenting the subsequent implementation of the SSI program); Karen M. Tani, *Disability Benefits as Poverty Law: Revisiting the "Disabled State*,*"* 170 U. PA. L. REV. 1687, 1707 (2022) [hereinafter Tani, *Disability Benefits*] (describing efforts by New York City officials in 1973 to identify which "welfare women" in their jurisdiction were sufficiently disabled to qualify for the SSI program).

17. *See infra* Part I.

local governments, often with the aid of private consulting companies, to use poor people as *conduits* for federal dollars—sometimes to the point that these federal dollars entirely bypassed their intended beneficiaries, leaving no mark on their health or welfare. Building on Daniel Hatcher's research on fiscal federalism and the "poverty industrial complex,"[18] as well as on Bernadette Atuahene's theory of "stategraft"[19] and sociologist Armando Lara-Millán's documentation of the "redistribut[ion] [of] the poor,"[20] I call this pattern "extractive federalism."[21] It is a form of intergovernmental activity in which subnational governments engage with the federal government neither "cooperatively" nor

18. *See* Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 ARIZ. L. REV. 675 (2010) [hereinafter Hatcher, *Poverty Revenue*]; DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS (2016) [hereinafter HATCHER, THE POVERTY INDUSTRY]; Daniel L. Hatcher, *Medicaid Maximization and Diversion: Illusory State Practices that Convert Federal Aid into General State Revenue*, 39 SEATTLE U. L. REV. 1225 (2016) [hereinafter Hatcher, *Medicaid Maximization*]; Daniel Hatcher, *States Diverting Funds from the Poor*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 151 (Ezra Rosser ed., 2019) [hereinafter Hatcher, *States Diverting Funds*]; *see also* Katherine Baicker & Douglas Staiger, *Fiscal Shenanigans, Targeted Federal Healthcare Funds, and Patient Mortality*, 120 Q.J. ECON. 345 (2005); BEATRICE ADLER-BOLTON & ARTIE VIERKANT, HEALTH COMMUNISM 18 (2022) ("The money flowing through these systems of 'care' . . . and warehousing . . . has become a vital source of revenue for the capitalist economy, and for the subnational governments that serve as their host.").

19. *See* Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1 (2023); *see also* Spencer Headworth, *Stategraft in Public Assistance Programs*, 2024 WIS. L. REV. 503; Daniel L. Hatcher, *The Commodification of Children and the Poor, and the Theory of Stategraft*, 2024 WIS. L. REV. 559.

20. ARMANDO LARA-MILLÁN, REDISTRIBUTING THE POOR: JAILS, HOSPITALS, AND THE CRISIS OF LAW AND FISCAL AUSTERITY (2021) (documenting how state agencies relabel and circulate people within a network of governmental institutions and programs to manage crises).

21. This idea also builds on the work of Marta Russell and those who write in her tradition. See MARTA RUSSELL, BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT (1998) (theorizing a "money model of disablement," in which disabled people are a valuable resource, even as they are portrayed as a drain on society); ADLER-BOLTON & VIERKANT, *supra* note 18, at 16 (building on Russell's work to identify ways in which people who need care become commodities). In using the term "extractive," I aspire to be in conversation with this work, as well as with scholars who have documented the extraction of resources directly from vulnerable people—via fines, fees, benefit recoupment rules, etc. *See, e.g.*, Elenore Wade, *Extractive Welfare: Medicaid Statutory Recovery Formulas After* Gallardo v. Marstiller, 58 U. RICH. L. REV. 459 (2024); Jasmine E. Harris, *The Political Economy of Conservatorship*, 71 UCLA L. REV. (forthcoming 2024); MATTHEW DESMOND, POVERTY, BY AMERICA (2023); Walter Johnson, *Ferguson's Fortune 500 Company*, ATLANTIC (Apr. 26, 2015), https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/ [https://perma.cc/L77D-SFUV]; Marc Aidinoff, *Computerizing a Covenant: Contract Liberalism and the Nationalization of Welfare Administration*, *in* MASTERY AND DRIFT: PROFESSIONAL-CLASS LIBERALS SINCE THE 1960S (Brent Cebul & Lily Geismer eds., forthcoming 2025).

"uncooperatively," as has been the focus of decades of scholarship,[22] but simply opportunistically, with the goal of maximizing the flow of federal dollars into subnational coffers.[23]

As Hatcher has argued, extractive federalism can have deeply troubling effects[24]—which is why it is important to understand the historical forces and actors that enabled it. It is a mode of governance that is not centered on meeting the basic needs of residents. Rather, it searches out residents whose needs and attributes can turn on particular federal spigots, and then it seeks to maximize the money flow. Such strategies are rational in that they can help states and localities finance worthy public programs. But they are not benign. Extractive federalism has contributed to spiraling federal health and welfare spending, as well as to crises of care at the local level, as federal money bypasses its supposed beneficiaries and travels circuitously into state general revenue funds.[25] Extractive federalism can also be antidemocratic, because it can steer federal funds away from the purposes that legislators intended and thereby create public misunderstandings about the efficacy of particular legislative choices.[26]

This Essay proceeds as follows. Part I reviews early efforts to shift recipients of state-funded programs onto federally funded SSI. At the time of these first shifting efforts (in the 1980s and early 1990s), state savings was a concern, but so was public service. And in general, there was much to admire in these early shifting programs: They secured a more stable and generous source of income support for some poor Americans—albeit one that was no panacea[27]—while also helping nonprofit legal aid organizations stay afloat. More troubling was what

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22. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (summarizing the literature on "cooperative federalism" and documenting instances of "uncooperative federalism").

23. *Cf.* Tim Conlan, *From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations*, 66 PUB. ADMIN. REV. 663, 667 (2006) (noting a shift from "cooperation to opportunism" in intergovernmental relations and describing states as "behav[ing] opportunistically when they direct federal grants away from their intended purposes to serve strictly parochial ends").

24. *See* Hatcher, *Poverty Revenue*, *supra* note 18.

25. *See* Baicker & Staiger, *supra* note 18.

26. *See* Hatcher, *Poverty Revenue*, *supra* note 18, at 679 (describing how state revenue maximization schemes conflict with statutory purpose).

27. *See* Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 178–79 (2020) (explaining the downside of tethering benefits to medical diagnoses), https://www.stanfordlawreview.org/online/reweighing-medical-civil-rights/ [https://perma.cc/DD5C-RBWC]; Tani, *Disability Benefits*, *supra* note 16, at 1716–17 (documenting the suspicion and surveillance that poor families encountered after a 1990 Supreme Court decision, combined with other interpretive changes, made SSI benefits more available to disabled children).

happened next. Part II connects the "shifting" story to the rise of private contractors in welfare administration, starting in the late 1980s but really flourishing in the mid-1990s. By 1995, these companies were offering disability "shifting" services to states, as well as something more. Claiming expertise in the location and flow of federal social welfare dollars, private contractors like PCG, Lockheed Martin, and MAXIMUS promised to help states balance their budgets—and even enable them to offer tax cuts—while ostensibly meeting the needs of poor residents. Here, we see extractive federalism taking shape. Drawing on the work of Daniel Hatcher, Dorothy Roberts, and others, Part III discusses more recent examples of extractive federalism to illustrate why this phenomenon should concern us and to underscore why we must continue to explore both its roots and its agents.

I. DISABILITY ADVOCACY PROJECTS: "SHIFTING" FOR THE PUBLIC GOOD

In 1992, public interest attorney Jane Hardin published one of the only existing scholarly accounts of what she called "Disability Advocacy Projects" ("DAPs"), which are "programs that assist low-income clients and ease state government fiscal problems" by helping people claim federal disability benefits.[28] Writing in the pages of the *Clearinghouse Review*, a publication for federally funded legal services lawyers, Hardin catalogued and analyzed state programs designed to shift qualified recipients of general assistance ("GA") onto Supplemental Security Income.[29]

For those familiar with the American poor relief tradition, these "shifting" efforts might seem counterintuitive. From the colonial period into the twentieth century, Americans had treated poor relief as a local responsibility, which in turn made poor people the subjects of local control.[30] The state or federal governments sometimes stepped in to care for particular groups (such as veterans, or migrants with no local "settlement"), but that was not the norm.[31] Even after the Great Depression and New Deal, which significantly centralized social welfare

28. Jane Hardin, *Disability Advocacy Projects: Programs that Assist Low-Income Clients and Ease State Government Fiscal Problems*, 26 CLEARINGHOUSE REV. 776, 776 (1992).

29. *Id.*; *see also* Michael B. Glomb & Jane Hardin, *Alternative Funding Mechanisms for Legal Services Providers*, 25 CLEARINGHOUSE REV. 484 (1991).

30. *See* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 30 (2016) [hereinafter TANI, STATES OF DEPENDENCY].

31. *See id.* at 31–32.

provision, poor relief felt like a local matter to many Americans.[32] Into the 1960s, perceptions of too much federal involvement produced bitter disputes, some of which erupted into national headlines.[33] Less visibly, recalcitrant states and localities plagued federal administrators with their efforts to control poor people within their jurisdictions, even when doing so contravened federal rules.[34] Given this pattern, why would states want to shift people from their own welfare programs to a federal program over which they had little control?

By the late 1980s, Hardin suggests, "shifting" had a clear fiscal benefit, which may have outweighed any loss of control.[35] GA programs (sometimes also called "general relief") were funded at the state and local levels,[36] whereas SSI was funded mostly by federal dollars.[37] The economic downturn of the late 1980s and early 1990s, combined with state balanced budget requirements, expensive federal mandates, and the aftermath of "tax revolts," made some state governments eager to identify fiscal savings opportunities.[38]

Shifting individuals from GA to SSI also made practical sense. After the New Deal, with its creation of major new income support programs, the main point of GA programs was to provide a minimal safety net beneath poor residents who did not qualify for one of the more generous, federally subsidized social welfare programs.[39] But realistically, GA often served people who were simply insufficiently sophisticated or

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32. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 235, 247 (1986).

33. *See* TANI, STATES OF DEPENDENCY, *supra* note 30, at 164–65.

34. *See id.* at 155–56; KATZ, *supra* note 32, at 261.

35. Hardin, *supra* note 28, at 782–84.

36. Precise funding arrangements varied from state to state. For a history of general relief in the twentieth century, see generally Brooke Depenbusch, Down and Out in the USA: General Relief and the Politics of Precarity in the Shadow of the Welfare State, 1935-1964 (Aug. 2019) (Ph.D. dissertation, University of Minnesota) (on file with the University of Minnesota Digital Conservancy).

37. Hardin, *supra* note 28, at 776. For a more detailed explanation of the fiscal incentives that states had to "shift" eligible individuals onto SSI, see Andrew Goodman-Bacon & Lucie Schmidt, *Federalizing Benefits: The Introduction of Supplemental Security Income and the Size of the Safety Net*, 185 J. PUB. ECON. 1, 4 (2020).

38. *See* Teresa A. Coughlin, Leighton Ku, John Holahan, David Heslam & Colin Winterbottom, *State Responses to the Medicaid Spending Health Crisis: 1988 to 1992*, 19 J. HEALTH POL., POL'Y & L. 837, 838 (1994) (noting that between 1988 and 1992, the combination of a recession, state balanced budget requirements, and residents' need for Medicaid produced "a crisis" for states).

39. LIZ SCHOTT, CTR. ON BUDGET & POL'Y PRIORITIES, STATE GENERAL ASSISTANCE PROGRAMS VERY LIMITED IN HALF THE STATES AND NONEXISTENT IN OTHERS, DESPITE NEED 1 (2020), https://www.cbpp.org/sites/default/files/atoms/files/7-9-15pov.pdf [https://perma.cc/KC62-28CA].

organized to submit a successful application to such a program.[40] In other words, the idea that there were SSI-eligible individuals in the GA population was highly plausible, and both states and individuals stood to gain from a shift.[41]

Canvassing the landscape in the early 1990s, Hardin identified three types of DAPs, most of which involved legal services lawyers: appeals projects; pre-appeals projects; and efforts focused specifically on disabled children.[42] States with appeals projects paid lawyers (both from private practice and from legal services organizations) to represent GA recipients when their applications for SSI benefits had been rejected and they were pursuing an appeal with the Social Security Administration.[43] Illinois, Arizona, California, Connecticut, Missouri, Ohio, Oregon, Virginia, and Washington had DAPs that followed this model.[44] To cover attorneys' fees, these states used recoupment payments from the federal government (repaying states for the "interim assistance" they paid to GA recipients who submitted an SSI application and were eventually found to be entitled to SSI benefits).[45] Massachusetts, New Jersey, New York, and Pennsylvania did something similar but contracted directly with a legal services program for lawyering and outreach services.[46]

The *pre*-appeals projects that Hardin documented were similar to the appeals projects and, in some states, coexisted with them.[47] The distinction is that pre-appeals projects intervened earlier in the application process, before any kind of hearing.[48] This type of work did not necessarily require a lawyer; it could be done by paralegals, social workers, or state administrators.[49] Hardin identified state-run pre-appeals projects in Michigan, New York, Pennsylvania, Oregon, and Washington State, as

40. *See* Gina Livermore, David Stapleton & Andrea Zeuschner, *Lessons from Case Studies of Recent Program Growth in Five States*, *in* THE ECONOMICS OF THE GREAT DEPRESSION 249, 256 (Mark Wheeler ed., 1998).

41. Some states, such as New York, also made efforts to shift AFDC recipients onto SSI. However, because AFDC was a shared federal-state responsibility and not just a state responsibility, the potential fiscal savings from this kind of shifting were more modest. *Id.* at 255-58.

42. Hardin, *supra* note 28, at 777, 779, 781.

43. *Id.* at 777.

44. *Id.*

45. *Id.*

46. *Id.* at 777–78. This second appeals-focused model was more visible from the state perspective, in that it might involve an appropriation of state funds to cover certain costs, but it was still based on the idea that disability advocacy efforts would ultimately pay for themselves—via cost savings to the state. *Id.* at 778.

47. *Id.* at 778–80.

48. *Id.* at 779.

49. *Id.*

well as a county-run project in California.[50] She found that in Chicago, the state government had contracted with a legal services program to do pre-appeals work.[51]

A third type of DAP focused specifically on children. These child-focused DAPs were a direct result of the 1990 Supreme Court decision in *Sullivan v. Zebley*,[52] which found that the Social Security Administration had long applied a too-stringent test for evaluating children's applications for SSI.[53] Separately, but around the same time, the Social Security Administration altered its regulations in ways that made it easier for a child with one or more mental impairments to qualify for SSI.[54] State officials took note. Hardin identified legal services programs in Kansas and Illinois that had contracts with their state governments to attempt to locate SSI-eligible children in foster care, and she noted similar efforts underway in Colorado and Virginia.[55]

In Hardin's estimation, these DAPs were "enormously cost effective."[56] For example, in New York State, the reported net savings from DAP efforts in fiscal year 1991 was $10,114,898[57] (over $23 million in 2024 dollars). In just the first half of fiscal year 1992, Pennsylvania reported a net savings of $18,940,623[58] (over $43 million in 2024 dollars). Moreover, these figures did not fully account for the costs that these states would avoid going forward, as state residents continued to receive federally funded disability benefits and also, in some

50. *Id.* at 780. Maryland also appears to have had a program of this nature. *See Notice of Solicitation*, BALT. SUN, Apr. 30, 1989, at 13E (referencing a "Disability Entitlement Advocacy Program" and describing it "a special project designed and operated to assist recipients of General Public Assistance to qualify for federally funded programs, specifically Social Security benefits and Federal Medicaid").

51. Hardin, *supra* note 28, at 780.

52. 493 U.S. 521 (1990).

53. *Id.* at 531–32; *see also* Tani, *Disability Benefits*, *supra* note 16, at 1708.

54. Tani, *Disability Benefits*, *supra* note 16, at 1710.

55. Hardin, *supra* note 28, at 781–82.

56. *Id.* at 782.

57. *Id.* at 782–83.

58. *Id.* at 783. Internal documents from the Pennsylvania program made similar claims. *See, e.g.*, Letter from Jonathan M. Stein, Gen. Couns., Cmty. Legal Servs., Inc., to Michael Hershock, Pa. Budget Sec'y (June 3, 1987) (on file with the Pennsylvania State Archives) (reporting that as of June 3, 1987, Pennsylvania had spent about $3–4 million on its DAP program and reaped $25 million in savings); Letter from Jerry Friedman, Pa. Deputy Sec'y for Income Maint., to John F. White, Jr., Pa. Sec'y Pub. Welfare (Aug. 31, 1989) (on file with the Pennsylvania State Archives) (reporting net GA savings of over $19 million during the period July 1, 1988, to June 1989).

states, shifted automatically from state-funded health care[59] to the federally subsidized Medicaid program.[60]

Given these figures, one might have expected a flurry of positive attention in the ensuing years—but DAPs never achieved the broad acclaim that Hardin's plaudits predicted. In some states, the raison d'être for such programs was general assistance, and when states eradicated or dramatically restricted their GA programs—as many did in the 1980s and after[61]—disability advocacy work lost some of its value. For example, Michigan eliminated its GA program in the fall of 1991, producing one massive shift toward SSI[62] but leaving not much thereafter to shift from.[63]

Other evidence, however, suggests that DAPs continued to thrive into the mid-1990s and beyond,[64] even though they have received little

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59. At this time, some states had state-level health care programs for indigent residents. States that did not have such programs often ended up paying for poor people's health care informally, via the uncompensated costs of emergency treatment at state-funded facilities.

60. Hardin, *supra* note 28, at 784. LEWIN-VHI, INC., DEP'T OF HEALTH & HUM. SERVS., LABOR MARKET CONDITIONS, SOCIOECONOMIC FACTORS, AND THE GROWTH OF APPLICATIONS AND AWARDS FOR SSDI AND SSI DISABILITY BENEFITS V-15 (1995) (noting that "31 state Medicaid programs automatically provide coverage to persons on SSI, while seven others extend Medicaid benefits to SSI beneficiaries who apply for them").

61. GA programs existed throughout the nation in 1977. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, OFF. OF FAM. ASSISTANCE, HEW PUB. NO. (SSA) 78-21239, CHARACTERISTICS OF GENERAL ASSISTANCE IN THE UNITED STATES (1978). But only thirty-eight states had such programs in place in 1989, and the general trend among states was to make these programs more restrictive. *See* L. JEROME GALLAGHER, THE URB. INST., A SHRINKING PORTION OF THE SAFETY NET: GENERAL ASSISTANCE FROM 1989 TO 1998, at 2 (Series A, No. A-36, September 1999), https://www.urban.org/sites/default/files/publication/69651/309197-A-Shrinking-Portion-of-the-Safety-Net.PDF [https://perma.cc/ER4K-7GBG]; *see also* LEWIN-VHI, *supra* note 60, at I-16 ("Seven states . . . severely cut or eliminated their general assistance (GA) programs between 1988 and 1992."); Steven G. Anderson, Anthony P. Halter & Brian M. Gryzlak, *Changing Safety Net of Last Resort: Downsizing General Assistance for Employable Adults*, 47 SOC. WORK 249, 250 (2002) ("Between 1982 and 1989, the GA benefit for one person declined in 28 programs and increased in only seven."); Schott, *supra* note 39 ("The number of states with GA programs has fallen from 38 to 25 since 1989, and benefits have shrunk in inflation-adjusted terms in nearly every state since 1998.").

62. *See* Charles Jones, *The View from Michigan's Office of Disability Determination*, *in* THE ECONOMICS OF THE GREAT DEPRESSION 311, 314 (Mark Wheeler ed., 1998) (describing aggressive attempts to shift Michigan GA recipients onto SSI after the state terminated GA).

63. In place of GA, Michigan created two narrower programs: State Family Assistance and State Disability Assistance ("SDA"). All those who qualified for SDA were required to apply for SSI, meaning that there was no need to later search out people to "shift." *See* Livermore, Stapleton & Zeuschner, *supra* note 40, at 257.

64. KATHERINE E. MEISS & ABBI COURSOLLE, HEALTH CONSUMER ALL., INVESTING IN PEOPLE TO SAVE COUNTIES MONEY: BEST PRACTICES FOR MOVING PEOPLE WITH DISABILITIES FROM GENERAL ASSISTANCE TO SSI 4–6, 15, 20–21, 24 (2010),

scholarly attention. In March 1995, a specialist in the U.S. Government Accountability Office estimated that "at least one-half of all states" were funding "programs that proactively assist disabled public welfare recipients through the SSI application process."[65]

II. THE RISE OF PRIVATE CONSULTANTS: "SHIFTING" FOR PROFIT AND MAXIMIZING FEDERAL REVENUE

At that same moment, a new player was rising to prominence in the world of welfare administration: private, for-profit companies. They made intragovernmental "shifting" part of their portfolio and showed how it could yield savings beyond the context of general relief. According to a 1995 Texas report, for example, the state had hired a consulting firm to help determine which children on Aid to Families with Dependent Children ("AFDC") were using special education services in school; caseworkers would then reach out to the families of those children and assist with SSI enrollment.[66] Senator William Cohen (R-ME) may have had Texas in mind in March 1995 when he devoted some of his remarks in a Senate Finance Subcommittee hearing to a nameless state that "shaved about $55 million from [its] State budget by

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https://wclp.org/wp-content/uploads/2015/06/SSIAdvocacyBestPracticesRpt.pdf [https://perma.cc/V5WR-TGJA] (documenting efforts at the county level in California to help GA recipients transition to SSI and referencing similar efforts in Illinois, Colorado, Massachusetts, Washington, Pennsylvania, and New York); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-62, SOCIAL SECURITY DISABILITY BENEFITS: AGENCY COULD IMPROVE OVERSIGHT OF REPRESENTATIVES PROVIDING DISABILITY ADVOCACY SERVICES (2014), https://www.gao.gov/assets/gao-15-62.pdf [https://perma.cc/7D59-YRWJ] (reporting that "[l]ittle is known about the extent to which states are contracting with private organizations to help individuals who receive state or county assistance apply for federal disability programs" and drawing on its own research to identify "16 states with some type of SSI/DI advocacy contract in 2014," with some contracts involving for-profit companies and others involving nonprofits); *see also id.* at 10 (noting that "[s]ome states designate state employees to provide SSI/DI advocacy services," and that in some locations, "other third parties—such as hospitals and private insurance companies—also contract for SSI/DI advocacy services").

65. *Federal Disability Programs Face Major Issues: Testimony Before the S. Spec. Comm. on Aging,* 104th Cong. 12 (1995) (statement of Jane L. Ross, Dir., Income Sec. Issues, Health, Educ. & Hum. Servs. Div.).

66. Jeffrey D. Kubik, *Fiscal Federalism and Welfare Policy: The Role of States in the Growth of Child SSI*, 56 NAT'L TAX J. 61, 68 (2003). As mentioned previously, *see supra* note 41, states paid for only part of the costs of AFDC—and in some states that share was relatively small—so we might wonder about the motivations of Texas officials. Of possible relevance is the growing unpopularity of the AFDC program (commonly known simply as "welfare"). *See generally* ELLEN REESE, BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT (2005). Many states were eager to show a reduction in their welfare rolls, and shifting people to another program would accomplish that.

paying contractors to shift welfare recipients onto the Federal rolls."[67] There was nothing illegal, however, about helping people access benefits for which they qualified. (And as noted in Part I, Congress had created the incentive to "shift" in 1972, when it established the federally funded SSI program but left other categories of poor Americans behind.) Going forward, the Texas "shifting" contract would be a harbinger, not an outlier.

The rise of these arrangements aligns more generally with the rise of private consulting and contracting in the realm of public welfare. As the Council of State Governments reported in 1993, the vast majority of states (almost eighty percent of those surveyed) had increased their use of privatized social services in the previous five years.[68] In other words, even before the landmark welfare reform of 1996, which is now remembered as the legal change that ushered these private companies in, the pattern was clear.[69]

Consider the trajectory of MAXIMUS, which in 1996 secured a $1 million contract from the Massachusetts Department of Transitional Assistance to shift recipients of short-term state disability benefits onto federally funded disability benefits.[70] Established in 1975 by a former federal government systems analyst (who was also an Air Force veteran), MAXIMUS went from handling military-related contracts in the late

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67. *Rising Costs of Social Security's Disability Programs: Hearing Before the Subcomm. on Soc. Sec. & Fam. Pol'y of the S. Comm. on Fin.*, 104th Cong. 3 (1995) (statement of Sen. William S. Cohen). In this era, "welfare" was a synonym for AFDC.

68. PAMELA WINSTON, ANDREW BURWICK, SHEENA MCCONNELL & RICHARD ROPER, MATHEMATICA POL'Y RSCH., INC., PRIVATIZATION OF WELFARE SERVICES: A REVIEW OF THE LITERATURE 3 (2002), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//40036/report.pdf [https://perma.cc/B768-7R4R].

69. *See generally* Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569 (2001) (documenting how the 1996 welfare reform created new opportunities for private contractors); see also Mark Carl Rom, *From Welfare State to Opportunity, Inc.: Public-Private Partnerships in Welfare Reform*, 43 AM. BEHAV. SCIENTIST 155, 155–57 (1999).

70. Michael Grunwald, *Federal Cash Keeps Mass. in the Black: Candidate Weld Would Cut U.S. Outlays*, BOS. GLOBE, Apr. 11, 1996; *see also* Mike McIntire & Tom Puleo, *City Easing Welfare Load with Shifts to Federal Program*, HARTFORD COURANT, Dec. 13, 1995 (describing efforts by two Connecticut cities to shift recipients of general assistance onto SSI, but not mentioning the involvement of private contractors); Mark Nadel, Steve Wamhoff & Michael Wiseman, *Disability, Welfare Reform, and Supplemental Security Income*, 65 SOC. SEC. BULL. 14, 22 (2003–2004) (noting that by 2004, most state agencies administering "TANF [the successor to AFDC] were using contractors to conduct disability assessments" on TANF beneficiaries); *id.* at 25 (noting that "two states use third-party contractors to provide legal representation and assistance in the SSI (and Social Security Disability Insurance) application and appeals processes").

1970s[71] to helping New York City root out welfare fraud by 1984.[72] By 1989, MAXIMUS had landed a lucrative contract with Los Angeles County to handle local implementation of California's new workfare initiative for AFDC recipients (the Greater Avenues for Independence program).[73] The arrangement involved payments for every welfare recipient successfully shifted into a sufficiently lasting and welfare-reducing job, as well as hourly fees for top MAXIMUS executives.[74] That same year, MAXIMUS was reportedly carrying out multiple contracts for the Florida Department of Health and Rehabilitative Services, including for streamlining child-support payments, training foster care employees, and overseeing a statewide computer system project.[75] MAXIMUS's welfare-related contracting continued into the 1990s, not only in very welfare-conscious states like California and Massachusetts, but also in places like Wyoming and Tennessee.[76]

By 1996, when MAXIMUS won the Massachusetts disability shifting contract, the company was also doing something else: revenue maximization consulting. A headline-grabbing example was MAXIMUS's work for the state of Nebraska in 1995. In February of that year, the Governor boasted that MAXIMUS had secured for the state an expected $52.8 million in additional federal funds (over $105 million in 2024 dollars)—for which the state had agreed to pay MAXIMUS a "finder's fee" of 12.5%.[77] With this new revenue, the Governor envisioned not only balancing the budget but also offering a tax cut. Subsequent disputes over the appropriateness of the fee led MAXIMUS to disclose further information about revenue maximization work, including a finder's fee of 9% in Massachusetts for locating $15 million in federal funds for the state; a 15% finder's fee in Texas for locating

71. *See* Sandra G. Boodman, *'Freebies' Scrutinized: Military Veterinary Corps Reduction Studied: Military Pets Get Health Care at Taxpayers' Expense*, WASH. POST, July 21, 1979, at D1; *Contract From HRS Questioned*, ST. PETERSBURG TIMES, Dec. 17, 1990, at B4; Diane Rado, *HRS Solicitation of Gifts Scrutinized*, ST. PETERSBURG TIMES, Jan. 10, 1990, at B1.

72. *See* Frederic J. Frommer, *Maximus Pulling in the Outsourcing Jobs with Help from a New Law, the Firm Is Overseeing More Programs for State, Local Governments*, WASH. POST, Sept. 20, 1999.

73. *See* Jay Mathews, *Free-Enterprise System Gives Welfare Reform a Try*, SEATTLE TIMES, Oct. 18, 1989, at B8.

74. *Id.*

75. *See* Jenni Bergal, *Probe Shows Pals of Coler Won HRS Jobs, Contracts*, ORLANDO SENTINEL, Dec. 12, 1989; *see also Report: HRS Still Funneling Contracts*, ORLANDO SENTINEL, Nov. 15, 1990, at D15.

76. See Kiley Armstrong, *Agency Trimming Welfare Rolls*, ASSOC. PRESS, May 8, 1994, at A8.

77. Bill Hord*, A Surplus for Budget? Maybe Not. Senators Preparing for a Closer Look*, OMAHA WORLD-HERALD, Feb. 5, 1995, at 1, 8.

$30 million; and a 25% finder's fee for similar work in New Hampshire, Rhode Island, Florida, and Connecticut.[78]

Other private consulting companies were also doing revenue maximization work at this time. Consider, for example, PCG, the company featured in this Essay's opening anecdote. In April of 1996, PCG reportedly helped the Massachusetts Department of Social Services "collect[] $63 million more federal revenue . . . than it did in 1992," in part through federal reimbursements for the maintenance of poor children in foster care.[79] Daniel Hatcher has documented many similar examples from this period, involving both the Title IV-E Foster Care program and the Medicaid program.[80] Such efforts have continued into the present, Part III shows, with troubling results.

Before moving forward in time, however, we should note the way of thinking that undergirded all these efforts. As Part I demonstrated, it was possible for states to make the most out of federally funded social welfare programs while also distributing paid work to legal aid lawyers and benefiting poor residents. When private companies like PCG and MAXIMUS muscled their way into this arena, they surely helped some people in need—but, as many investigations and reports now attest, these companies embodied a different attitude toward social welfare provision, which sometimes had disastrous results.[81] They were selling products—foraged from the crevices of a non-universal social welfare system and packaged to states as budgetary freedom—and they were doing so to make a profit. It takes little imagination to see how this cold, calculating way of thinking about social welfare programs might have affected state officials, especially when one considers the "revolving door" between

78. *See* Bill Hord, *Nelson Defends Finder's Fees*, OMAHA WORLD-HERALD, Jan. 13, 1995, at 8. Ultimately, Nebraska appears to have negotiated the finder's fee down to 9.5%. Paul Hammel, *Legal Opinion: Legislature Can't Void Consulting Pact*, OMAHA WORLD-HERALD, Apr. 14, 1995, at 19; Bill Hord, *Senators Back Strings on Consulting Contracts*, OMAHA WORLD-HERALD, May 18, 1995, at 15. For more on MAXIMUS's history and on its recent activities, see Tracie McMillan, *The War on the War on Poverty*, MOTHER JONES, Jan.–Feb. 2019, at 30.

79. Grunwald, *supra* note 71. The backstory behind this consulting contract is interesting and troubling: "In 1992, Andersen Consulting conducted a pro bono analysis for a commission studying [the state Department of Social Services]. Its key recommendation: Hire a 'revenue maximization consultant.' So DSS disbanded its revenue unit and put a contract out to bid. The winner: Public Consulting Group, an Andersen subsidiary." *Id.*

80. Hatcher, *Poverty Revenue*, *supra* note 18, at 676.

81. *See, e.g.*, ELLEN REESE, THEY SAY CUTBACK, WE SAY FIGHT BACK!: WELFARE ACTIVISM IN AN ERA OF RETRENCHMENT 77–95 (2011); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 624–40 (2004); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003).

government and the lucrative world of government contracting and consulting.[82]

There is much left to learn about the normalization of the revenue maximization mindset, and the "shifting" programs that I have highlighted are just one piece of the picture. (Even more important might be the gamesmanship that started happening in the Medicaid realm in the late 1980s: In response to fiscal pressures and new federal coverage mandates, "state officials devised several creative new mechanisms for exploiting the program's open-ended [federal] matching formula" and were thereby able to secure significant new inflows of federal funds for relatively little state effort).[83] What these privatized "shifting" efforts help us see, however, is an ethos—one in which the "deliverable" was savings rather than service and the federal government was not so much a partner as it was a resource to be mined via the legal and financial commitments that Congress had made to needy individuals.[84] Extractive federalism had arrived.

III. FROM REVENUE MAXIMIZATION TO EXTRACTIVE FEDERALISM

Two decades into the twenty-first century, extractive federalism is thriving—but it can be hard to see and analyze. One example that has attracted media attention in recent years is state and local efforts to expropriate foster children's federal disability benefits: Rather than holding these benefits in trust for foster children, state and local agencies have been pocketing the money—treating it as payment owed to them for providing care.[85] (There is a deep irony here: As Dorothy Roberts has argued, state and local officials have often produced unnecessary family

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82. Hatcher, *Poverty Revenue*, *supra* note 18, at 693–96.

83. SHANNA ROSE, FINANCING MEDICAID : FEDERALISM AND THE GROWTH OF AMERICA'S HEALTH CARE SAFETY NET 130–31 (2013).

84. The transition from AFDC, an entitlement program, to Temporary Aid to Needy Families, a block grant program, surely contributed to this mindset as well. *See* Headworth, *supra* note 19, at 508 ("State and local governments have widely used their TANF block grant allocations in ways that deviate from the program's stated purposes but benefit their budgets.").

85. *See* HATCHER, THE POVERTY INDUSTRY, *supra* note 18, at 65; Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care*, NPR (Apr. 22, 2021, 7:00 AM), https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-ca [https://perma.cc/EX5W-N8ND]; Steve Volk & Julie Christie, *Philly Still Keeps the Benefits of Foster Care Youths Despite a 2022 Law Banning the Practice*, PHILA. INQUIRER (Dec. 26, 2023, 5:00 AM), https://www.inquirer.com/news/foster-parenting-philadelphia-social-security-payments-20231226.html.

separations, thereby forcing children into government "care."[86]) This Part explores a lesser-known example, drawing on the background facts from the 2023 U.S. Supreme Court case *Health and Hospital Corporation of Marion County v. Talevski*.[87] This example usefully illustrates several of the broader points this Essay seeks to emphasize about extractive federalism: It is opaque, it is harmful, and it invites the dehumanization of vulnerable people.

Those who follow the Supreme Court may be surprised to see *Talevski* described as a case about extractive federalism. On its face, *Talevski* was about whether private individuals—in this case, the family members of an allegedly abused nursing home resident—could sue to enforce the guarantees of a particular federal funding statute.[88] However, just under the surface of the Court's decision was a bigger story: a set of extractive inter- and intragovernmental dynamics that virtually guaranteed poor treatment for nursing home residents.[89] In what follows, I recap the facts with a focus on these dynamics.

The story begins with Gorgi Talevski, an elderly and disabled man, and a publicly owned nursing facility in northwest Indiana, Valparaiso Care and Rehabilitation ("VCR").[90] Talevski resided there starting in 2016, after his family decided they could no longer care for him at home.[91] Not long after his arrival at VCR, however, the family began to worry for him.[92] At the time of admission, Talevski had been diagnosed with dementia, but he was able to walk, communicate in English (not his native language), feed himself, and recognize his family.[93] Eight months into his stay, his transformation was alarming.[94] Talevski's daughter

86. *See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 141 (2022).

87. 143 S. Ct. 1444 (2023).

88. The hospital system urged the Court to say "no"—and, further, to hold that *no spending clause statutes* were enforceable via § 1983, the Reconstruction-era legal provision that is now one of the main vehicles for private enforcement of federal law. Advocates for patients and public benefits recipients strongly opposed this view. Ultimately, Talevski prevailed. *Id.* at 1450–52.

89. By 2023, these dynamics were not new. See Sara Rosenbaum, *Medicaid at Forty: Revisiting Structure and Meaning in a Post-Deficit Reduction Act Era*, 9 J. HEALTH CARE L. & POL'Y 5, 26–27 (2006) (discussing "[s]tate revenue maximization arrangements" and citing "the Laguna Honda case" from circa 2004 as "an extravagantly horrible" example of a "a public nursing home . . . used to return millions of dollars to San Francisco while its 1400 mentally disabled residents were left to endure terrible conditions").

90. 143 S. Ct. at 1450 & n.2.

91. *Id.* at 1450.

92. *Id.* at 1451.

93. *Id.* at 1450.

94. *Id.* at 1450–51.

asked to see what medications the facility was giving him and received a list of ten items, six of which were psychotropic drugs.[95] The family intervened and also filed a formal complaint against VCR with the Indiana Department of Health.[96] VCR, for its part, claimed that Talevski's decline was characteristic of his dementia.[97]

Thereafter, VCR administrators decided multiple times to send Talevski elsewhere for care, via a practice that some industry insiders call "patient dumping" and others describe more neutrally as "facility-initiated involuntary discharge."[98] Over the next several months, Talevski bounced back and forth between VCR and a neuropsychiatric hospital an hour away.[99] On the third return transfer, VCR tried to deny his readmission and instead have him involuntarily discharged to a dementia facility two and a half hours away—a move that his family contested.[100] VCR justified its efforts by referencing Talevski's sometimes aggressive and harassing behavior.[101]

Following another complaint to the state health department, the family ultimately secured an administrative order telling VCR to readmit Talevski, but VCR ignored it.[102] The family complained *again* to the state agency, and VCR's management company then signaled willingness to discuss Talevski's readmission.[103] But at that point, Talevski's family worried that he would experience continued abuse, or even retribution, if he returned to VCR's care.[104] Finally, in January 2019, Talevski's family filed a lawsuit on his behalf, alleging that VCR had violated various provisions of the Federal Nursing Home Reform Act, including a guarantee of freedom from chemical restraints and restrictions around transfers and discharges.[105] The lawsuit continued after Talevski's death.[106]

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95. *Id.* at 1451.

96. *Id.*

97. *Id.*

98. *Id.* Jessica Silver-Greenberg & Rachel Abrams, *Nursing Homes Oust Unwanted Patients with Claims of Psychosis*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/business/coronavirus-nursing-homes.html; Michael J. Lepore, Patricia K. Yuen & Samantha Zepeda, *Nursing Home Facility-Initiated Involuntary Discharge*, 45 J. GERONTOLOGICAL NURSING 23, 23, 25 (2019).

99. *Talevski*, 143 S. Ct. at 1451.

100. *Id.*

101. Petition for a Writ of Certiorari at 6, *Talevski*, 143 S. Ct. 1444 (2023) (No. 21-806) (describing Talevski's behavior as "violent and sexually aggressive").

102. *Talevski*, 143 S. Ct. at 1451.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1452 n.3.

As the case moved through the legal system, it surfaced revealing information about the dynamics that may have produced Talevski's injuries and prevented their earlier resolution. One important dynamic was a decision-making paradigm at VCR that appeared designed to provide minimally adequate care at the lowest possible cost.[107] This is a highly plausible explanation for the bevy of psychotropic drugs that VCR began administering to Talevski shortly after his admission.[108] As patients, health care workers, and scholars have long documented, these drugs function as "chemical restraints."[109] As such, they are also a labor-saving device—and thereby a cost-saving device.[110] The same logic explains the multiple attempts to transfer Talevski: Once it became apparent that Talevski would not be a tractable patient, VCR had an incentive to remove him from the facility and replace him with a patient that could bring in similar or higher revenue at a lower cost.

But why would VCR, a publicly owned nursing home, operate in a manner that virtually guaranteed worse health outcomes and inhumane treatment for vulnerable members of the public? Because for VCR and other publicly owned nursing homes in Indiana, patients are revenue streams; these streams nominally pass through the nursing home but are destined for other coffers. Daniel Hatcher filed an amicus brief in *Talevski* to illuminate this dynamic[111]—one in which the efforts of private revenue maximization consultants are deeply implicated.[112] Starting in 2003, Hatcher explained, a municipal agency called Health and Hospital Corporation of Marion County ("HHC") bought up the licenses (but not the physical property) of a bunch of privately owned nursing homes and then promptly entered into contracts with private companies to operate

107. Brief for Amicus Curiae Daniel L. Hatcher in Support of Respondent, at 12, 16, *Talevski*, 143 S. Ct. 1444 (2023) (No. 21-806) [hereinafter Hatcher, Amicus Brief].

108. *Talevski*, 143 S. Ct. at 1451.

109. Hatcher, Amicus Brief, *supra* note 107, at 16.

110. *Id.*

111. *See generally id.*

112. *See* Hatcher, *Medicaid Maximization*, *supra* note 18, at 1228 ("Private revenue maximization consultants often help states with Medicaid claiming at every stage of the process—seeking to both increase the federal matching funds while also decrease payouts to healthcare providers."); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-748, MEDICAID FINANCING: STATES' USE OF CONTINGENCY-FEE CONSULTANTS TO MAXIMIZE FEDERAL REIMBURSEMENTS HIGHLIGHTS NEED FOR IMPROVED FEDERAL OVERSIGHT (2005), https://www.gao.gov/assets/gao-05-748.pdf [https://perma.cc/JJD3-U2XS] ("As of 2004, 34 states—up from 10 states in 2002—used contingency-fee consultants to implement projects to maximize federal Medicaid reimbursements.").

the homes.[113] VCR was one such home.[114] These arrangements were financially beneficial to HHC because of a decision by the Indiana state legislature to give higher Medicaid payments to *government*-owned nursing homes—payments that the federal government would then match at a generous rate.[115] Through ownership of these nursing homes, HHC successfully claimed these more generous Medicaid payments, parked those payments for a time in the accounts of its operating companies, and then routed most of the money (seventy percent through 2021) away from nursing homes toward other purposes.[116] To be clear, this was *a lot* of money. According to Hatcher, nursing home ownership (of VCR and other facilities) netted HHC $218 million in federal Medicaid funds between 2003 and 2010.[117] By 2021, that total amount had risen to $1.57 billion.[118] In those same years, VCR earned the dubious distinction of being named one of the worst nursing homes in the country for its persistent failure to meet federal standards.[119]

The State of Indiana also benefited from the Medicaid dollars flowing to VCR—which may explain why the Talevski family made so little headway with its complaints to the State Department of Health. Indiana benefited by imposing a "quality assessment fee" on nursing homes—essentially, just a tax meant to recapture a big chunk of the supplemental Medicaid money.[120] With the revenue that resulted, Indiana

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113. Hatcher, Amicus Brief, *supra* note 107, at 8.

114. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1451 n.2 (2023).

115. Hatcher, *Medicaid Maximization*, *supra* note 18, at 1251–52; Tim Evans, Emily Hopkins & Tony Cook, *Nursing Home Residents Suffer as County Hospitals Rake in Millions*, INDYSTAR, https://www.indystar.com/in-depth/news/investigations/2020/03/11/indiana-nursing-home-patients-suffer-medicaid-money-diverted-hospitals/2517834001/ [https://perma.cc/95HQ-NHFA] (Feb. 2, 2021, 3:53 PM).

116. Evans, Hopkins & Cook, *supra* note 115.

117. HATCHER, THE POVERTY INDUSTRY, *supra* note 18, at 196. Predictably, other county-run health systems followed suit, resulting in government ownership (on paper) of ninety-three percent of Indiana's nursing homes. Hatcher, Amicus Brief, *supra* note 107, at 8. In 2020, the year after the Talevskis filed suit, government-owned nursing homes in Indiana generated $996.1 million in federal supplemental payments. *Id.* at 9.

118. Evans, Hopkins & Cook, *supra* note 115.

119. Ken Kusmer, *Feds: 2 Indiana Nursing Homes Among Nation's Worst*, ASSOCIATED PRESS NEWSWIRES, Nov. 29, 2007.

120. Hatcher, Amicus Brief, *supra* note 107, at 11. Intergovernmental taxes and transfers are a well-documented state strategy for maximizing federal Medicaid payments. *See, e.g.*, Teresa A. Coughlin, Stephen Zuckerman, Susan Wallin & John Holahan, *A Conflict of Strategies: Medicaid Managed Care and Medicaid Maximization*, 34 HEALTH SERVS. RSCH. 281, 285–86 (1999); Teresa A. Coughlin & Stephen Zuckerman, *States' Use of Medicaid Maximization Strategies To Tap Federal Revenues: Program Implications and Consequences* 11 (Urb. Inst., Discussion Paper No. 02–09, 2002); John Holahan & Alshadye Yemane, *Enrollment Is Driving Medicaid Costs—But Two Targets Can Yield Savings*, 28 HEALTH AFFS. 1453, 1462–63 (2009).

spent some on other parts of the health care system—thus generating *more* federal Medicaid matching but with no real fiscal effort on its own part.[121] In 2020, according to Hatcher, this complex system of intrastate taxes, transfers, and spending produced a $47.7 million "surplus," which Indiana deposited in its general fund.[122] In other words, nursing homes had become a cash cow for the state, with no obvious benefit to the people whose needs generated the cash.

All the while, the state took advantage of a system of federal oversight that has proven both ill-suited and unwilling to catch up to this kind of manipulation. Within the U.S. Department of Health and Human Services ("HHS"), the Centers for Medicare and Medicaid Services ("CMS") have the mandate to police and curb bad behavior by nursing homes, but CMS relies on state-level inspectors as their front line, and these inspectors have often fallen short.[123] Moreover, when the inspection process has resulted in citations—as occurred at VCR and other Indiana nursing homes[124]—CMS has tended to take a light touch with penalties.[125]

CMS has also proven ineffective at curbing the kind of state revenue grab at the heart of this case. Technically, no state is supposed to receive

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121. Hatcher, Amicus Brief, *supra* note 107, at 11.

122. *Id.*

123. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-01-04-00340, NURSING HOME COMPLAINT INVESTIGATIONS, at i (2006), https://oig.hhs.gov/oei/reports/oei-01-04-00340.pdf [https://perma.cc/74JG-8M6T]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-280, NURSING HOMES: MORE RELIABLE DATA AND CONSISTENT GUIDANCE WOULD IMPROVE CMS OVERSIGHT OF STATE COMPLAINT INVESTIGATIONS (2011), https://www.gao.gov/assets/gao-11-280.pdf [https://perma.cc/T9X9-6G49]; *see also* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-01-19-00421, STATES CONTINUED TO FALL SHORT IN MEETING REQUIRED TIMEFRAMES FOR INVESTIGATING NURSING HOME COMPLAINTS: 2016–2018 (2020), https://oig.hhs.gov/oei/reports/OEI-01-19-00421.pdf [https://perma.cc/EKN7-CXTE].

124. Hatcher, *Medicaid Maximization*, *supra* note 18, at 1248 (citing a 2013 report that found that ninety-four percent of Indiana's nursing homes had deficiencies); Kusmer, *supra* note 118 (noting citations issued to VCR).

125. Nina A. Kohn, Adrianna Duggan, Justin Cole & Nada Aljassar, *Using What We Have: How Existing Legal Authorities Can Help Fix America's Nursing Home Crisis*, 65 WM. & MARY L. REV. 127, 149–50 (2023); *see also* Robert Gebeloff, Katie Thomas & Jessica Silver-Greenberg, *How Nursing Homes' Worst Offenses Are Hidden from the Public*, N.Y. TIMES, https://www.nytimes.com/2021/12/09/business/nursing-home-abuse-inspection.html (June 22, 2023) (noting CMS's failure to post citations on its website, thus creating a misleading picture of the quality of particular facilities); Letter from Daniel R. Levinson, Inspector Gen., to Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs. (Aug. 24, 2017), https://oig.hhs.gov/oas/reports/region1/11700504.pdf [https://perma.cc/36TA-8C7S] ("CMS procedures are not adequate to ensure that incidents of potential abuse or neglect of Medicare beneficiaries residing in [nursing facilities] are identified and reported."). Notably, CMS's compliance tools are not limited to fines. It may also impose non-monetary sanctions, such as decertification and holds on new admissions. Kohn, Duggan, Cole & Aljassar, *supra*, at 152–53.

federal Medicaid dollars unless it is operating under a plan that CMS has approved (*i.e.*, found to be in compliance with the relevant laws).[126] Moreover, a plan that CMS has approved at one point in time must be approved again if a state has changed the plan, such as by altering payment rates for services.[127] Indiana's current revenue maximization scheme is inconsistent with the basic structure of Medicaid, which requires a specific allocation of federal and state fiscal effort,[128] but federal payments have continued to issue to Indiana, as well as to other states employing similar tactics.[129]

The amicus brief that former senior officials at HHS submitted to the Supreme Court in *Talevski* is revealing in this regard.[130] Given HHS's limited resources, the brief explained, the agency has long left it largely to state agencies to oversee nursing homes' compliance with federal law.[131] This has remained the case even though HHS officials now know three crucial things: (1) that their state-level partners "frequently understate the number or level of deficiencies"; (2) that state governments have now *become the regulated party*, via public ownership of so many nursing homes; and (3) that, although it is theoretically in states' interest to treat nursing home residents fairly and humanely, the real priority seems to be revenue maximization, which makes enforcement actions "antithetical" to states' interests.[132]

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126. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-267, MEDICAID FINANCING: STATES' INCREASED RELIANCE ON FUNDS FROM HEALTH CARE PROVIDERS AND LOCAL GOVERNMENTS WARRANTS IMPROVED CMS DATA COLLECTION 5 (2014), https://www.gao.gov/assets/d14627Errata.pdf [https://perma.cc/6TNQ-EGUR].

127. *Id.* at 6.

128. It also replicates state-level strategies that CMS has long known about; there was no radical innovation in what Indiana did here. *See id.* at 2; U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-574T, MEDICAID: INTERGOVERNMENTAL TRANSFERS HAVE FACILITATED STATE FINANCING SCHEMES (2004), https://www.gao.gov/assets/gao-04-574t.pdf [https://perma.cc/GDF9-4KEN].

129. Hatcher, *Medicaid Maximization*, *supra* note 18, at 1256, 1258; *see also* HATCHER, THE POVERTY INDUSTRY, *supra* note 18, at 112–43 (documenting other examples of "Medicaid money laundering"). In 2019, CMS proposed a rule intended to address dubious revenue maximization strategies. However, in 2021 CMS withdrew the proposal. Medicaid Fiscal Accountability Regulation, 84 Fed. Reg. 63722 (proposed Nov. 18, 2019) (withdrawn Jan. 21, 2021).

130. Brief of Former Senior Officials of the Department of Health and Human Services as Amici Curiae in Support of Respondent at 4, *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444 (2023) (No. 21-806).

131. *Id.* at 19.

132. *Id.* at 19–20. This is not to say states have no interest in enforcing standards at nursing homes. Egregious situations have sometimes produced state-level prosecutions. *See, e.g.*, Erin Nolan, *Nursing Homes Defrauded Taxpayers of $83 Million, Lawsuit Says*, N.Y. TIMES (June 28, 2023), https://www.nytimes.com/2023/06/28/nyregion/ny-attorney-general-nursing-homes-fraud.html. My point here is about the behavior of

CONCLUSION

That the extractive federalism story did not make it into the Supreme Court's opinion in *Talevski* is understandable, given the legal question at issue, but scholars should not allow it to fade from view. The harms that Talevski's family alleged will continue so long as state officials still have the incentives, the ability, and the *mindset* that created the conditions at VCR.

Going forward, scholars should continue surfacing and analyzing examples of extractive federalism. They should also look back in time and try to mark out the road by which we got here, as this Essay has aspired to do. In American history, there was no halcyon day of robust, universal, and humane social provision, but there was a time when it would not have been intuitive or acceptable to treat needy people as mere conduits for federal funds. When, how, and why did this change? And what does this history suggest about the future of cooperative federalism as a mechanism for meeting Americans' basic needs?

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state-level regulators—the officials who are in the best position to spot problems and enforce the law.

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