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THE NEW MINIMAL CITIES

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Abstract

Between 2007 and 2013, twenty-eight urban municipalities declared bankruptcy or entered a state receivership to manage fiscal insolvency. To cut costs and divert revenues to debt payments, these cities have taken dramatic austerity measures—an unwitting experiment with a shrinking public sector in cities hollowed by household poverty and physical deterioration. Eventually, these cuts raise a question that looms as large for insolvency law as it does on city streets: Is there a point where the city should no longer cut public services and sell public assets, even in the face of unmet obligations to creditors? If so, what is that point?

This Article looks closely at our insolvent cities—their residents, their physical and social conditions, their debts, their governments. It explores, as a descriptive matter, local adaptations to fiscal crisis. It surfaces, as a legal matter, the latent question that mayors, governors, state and local legislatures, bankruptcy judges, and state-appointed receivers must decide: What share of city revenues can a city preserve for its current residents? Unlike creditors, who have contracts and legal judgments to quantify a city's obligations to them, residents have no monetized claim to draw on city revenues.

Insolvency law itself provides no guidance on this challenging issue—it simply assumes some level of ongoing spending to preserve "health and welfare," a concept that raises more questions than answers. This Article explores residents' interests, mapping out heuristics for decisionmakers and the public to use in thinking about essential public spending in the context of cities at risk of default on debt.

The conversation started here informs two issues beyond insolvency. First is neighborhood-scale habitability: How low can shared services go before we should consider a neighborhood uninhabitable? And second: What does urban life require of public life? Posing this question in terms of cities offers a smaller setting in which to explore the age-old debate about what we want from the public sector—what taxpayers expect for themselves, and what they are willing to guarantee for others.

Introduction & Executive Summary

Unable to meet obligations to creditors while also keeping government services in operation, the City of Detroit entered a state receivership on March 14, 2013 and filed for bankruptcy on July 18. That makes Detroit the twenty-eighth city to declare municipal bankruptcy or to enter a receivership for fiscal crisis since late 2008, a window of time that has seen five of the six largest municipal bankruptcies in American history.[1] In a long-term transformation of local finance that has accelerated in the recent recession, these cities and others are engaging in slash-and-burn budgeting to address falling revenues, rising expenses, and mounting debt. In San Bernardino, the third Californian city to declare bankruptcy in the recent recession,[2] the City Attorney followed another round of deep cuts to the police department with solemn advice to residents: "Lock your doors and load your guns."[3] Such an announcement would be unsurprising to the residents of Cleveland and East Cleveland in Ohio, Flint and Inkster in Michigan, and other cities beset by rising crime and police layoffs, where 911 can rarely dispatch an officer for a call reporting a non-violent crime, such as car theft, drug dealing, and prostitution. Camden, New Jersey had over 2,100 incidents of homicide, forcible rape, robbery, or aggravated assault in 2011—an average of roughly one violent crime every four hours in a city of approximately 77,000 people, only slightly larger than suburban Palo Alto, California.[4] Yet in January 2011, Camden cut its police force in half and eliminated its homicide and narcotics units.[5]

Where police departments are understaffed, other public services are unstaffed. Cities in California, Pennsylvania, New York, Michigan, Ohio and elsewhere have terminated thirty to fifty percent of their employees. Following Vallejo, California's

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[1] The full list, ranked by amount of debt, includes Detroit, Michigan (filed in 2013); Jefferson County, Alabama (2011); Orange County, California (1994); Stockton, California (2012); San Bernardino, California (2012); and Vallejo, California (2008). *See Detroit's Bankruptcy Is the Nation's Largest*, N.Y. TIMES, July 18, 2013, http://www.nytimes.com/interactive/2013/07/18/us/detroit-bankruptcy-is-the-largest-in-nation.html; *see also*, *infra*, Table 1.

[2] The resort town of Mammoth Lakes, California also filed for bankruptcy in this period, but its population falls below the 15,000 population threshold used to define "urban municipalities" in this Article. *See infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**.

[3] Ian Lovett, *A Poorer San Bernardino, and a More Dangerous One, Too*, N.Y. TIMES, Jan. 14, 2013, http://www.nytimes.com/2013/01/15/us/crime-rises-in-san-bernardino-after-bankruptcy.html. The Milwaukee County Sheriff made a similar announcement. *See* Matt Pearce, *Milwaukee County Sheriff: Don't Wait for the Police; Arm Yourselves*, L.A. TIMES, Jan. 28, 2013, http://articles.latimes.com/2013/jan/28/nation/la-na-nn-milwaukee-county-sheriff-guns-20130128.

[4] *See Crime in the United States 2011: Table 8*, U.S. FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offenses-known-to-law-enforcement/standard-links/city-agency.

[5] Alisa Chang, *Crime-Ridden Camden to Dump City Police Force*, NPR (Dec. 6, 2012), http://www.npr.org/2012/12/06/166658788/crime-ridden-camden-to-dump-city-police-force.

bankruptcy, the city's 2011-12 budget explained that in addition to cutting forty-five percent of all public safety staff, "[a]ll funding for youth, library, arts, elderly, needy, education, and recreation programs, projects and positions previously provided by the General Fund were completely eliminated."[6] Decisions to scale government back in this way are distinct from contracting out for services; these cities are not purchasing private substitutes for public services. This is privatization in its purest form—government service shedding, on the unfunded hope that private or charitable alternatives will arise. Yet such cuts amplify the longstanding trend of outsourcing service provision to other public agencies (like counties) and private contractors, because the city government itself has fewer responsibilities, less authority, and a smaller staff.

Cities undertaking austerity measures also shed their property—public assets like parks, pools, and government office buildings. In Benton Harbor, Michigan, a city commission and a state receiver transferred possession of twenty-two acres of the city's pristine lakeshore and dunes to a private golf course in exchange for critically needed annual income, even though the scattered, inland replacement parcels given to the city as substitute open space required industrial decontamination and the installation of exposure barriers prior to public use.[7] In Newark, New Jersey, Mayor Cory Booker sold sixteen city buildings in active public use, including the city's historic police and fire headquarters and Newark Symphony Hall, in a deal that plugged most of an eighty million dollar deficit in the 2010 budget but will ultimately cost the city $125 million to lease back the buildings over the next twenty years.[8]

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[6] CITY OF VALLEJO, ADOPTED BUDGET, FISCAL YEAR 2011-2012, at ix (2011), http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=29293.

[7] The contested lakeshore preserve was dedicated to the public in 1917 in the name of the donors' deceased daughter, with the following message:

> Perhaps some of you do not own a foot of ground, remember then, that this is your park, it belongs to you. Perhaps some of you have no piano or phonograph, the roll of the water murmuring in calm, roaring in storm, is your music, your piano and music box... The beach is yours, the drive is yours, the dunes are yours, all yours. It is not so much a gift from my wife and myself, it's a gift from a little child. See to it, that the park is the children's.

Klock Family's Legacy and Gifts to the Community, SAVE JEAN KLOCK PARK, http://savejeanklockpark.org/KlockLegacy.html (last visited Dec. 9, 2013) (ellipses in original). For a window into the storm of controversy surrounding the conversion of twenty-two acres of the park into the golf course, see Jonathan Mahler, *Now that the Factories Are Closed, It's Tee Time in Benton Harbor, Mich.*, N.Y. TIMES, Dec. 15, 2011, http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html; Robert McClure, *Heart of Michigan Park Sacrificed for Private Golf Course*, INVESTIGATE WEST (June 11, 2012), http://www.invw.org/article/benton-harbor-michigan-1280; Mich. Envtl. Council, *Jean Klock Park's Dunes Closer to Conversion from Public Ownership to Private Golf Course*, MICH. ENVTL. REPORT, Summer 2008, http://www.environmentalcouncil.org/priorities/article.php?x=16.

[8] Michelle Conlin, Assoc. Press, *The Great Government Fire Sale Is On*, NPR (May 13, 2011), http://www.npr.org/templates/story/story.php?storyId=136268652.

Local government is shrinking in these and other struggling cities. Years, if not decades, of budget cuts and asset sales have left little beyond a stripped down version of core service functions like irregular police and fire protection, rudimentary sanitation, and water supply. School districts continue to manage education (albeit with budget woes of their own), but the city government itself is no longer pursing a vision beyond public safety in true emergencies. How low can these cuts go? While laws provide an entitlement to a public education, and we have long struggled to interpret what constitutes a legally adequate education, there is little to nothing to indicate what other services the local public sector must provide. Beyond education, is there some minimum level of public services and public space needed to achieve neighborhood safety and habitability?

This is a humanitarian question, but it is also a doctrinal challenge. A system of state and federal laws govern cities that cannot pay their bills, and decisionmakers in this system (including mayors, governors, federal bankruptcy judges, and creditors) must determine whether a city's finances require outside intervention, such as a state receivership or federal bankruptcy protection, and if so, how to budget for the city going forward. Decisionmakers must evaluate, in essence, whether a city could cut still more deeply into spending on current residents to pay off creditors, or whether it is creditors, rather than residents, who have to bear the next round of cuts. Five

Standards for local public services must necessarily inform this balancing of interests between creditors and current residents. Creditors such as bondholders, retired public employees, contractors, and tort plaintiffs have contracts and legal judgments that quantify a city's obligations to them. Residents, by contrast, have no such legal instruments with which to monetize their share of a city's revenues. They have no concrete legal entitlements to police and fire protection, no regulations governing emergency response times, no enforceable right to water and water infrastructure, and no mandate for sanitary services like solid waste or wastewater disposal. Municipal bankruptcy and receivership laws articulate a duty to protect "basic public safety" and minimum services "consistent with public health and safety," but these laws lack guidance as to what those broad concepts mean as a practical matter. How long should a caller to 911 wait for a fire truck or an ambulance? Is there some point when a city's violent crime rate tells us that the city needs more police officers, if not gang prevention efforts, afterschool programs for juveniles, and victim support programs? Is there a specific density at which neighborhoods are "entitled" to access a public water system? Where to set the floor under public service cuts is a critical legal issue in public insolvencies, but we are asking decisionmakers to reason through it alone, and we have failed to pay attention to their answers.

In this fog of opaque, discretionary reasoning, a curious political reality is nonetheless visible. In the context of municipal insolvency, everyone (liberal, conservative, and libertarian alike) assumes that residents have some claim to share in a city's present and future revenues. When it comes to public fiscal crisis, everyone seems to agree that it is in the best interests of both creditors and society for a city to continue to provide for the "basic health and safety" of its residents—if not because they are simply people, then simply because they are the city's taxpayers, the ones who can make creditors whole over the long run without a bailout. Everyone seems to agree, that is, with no public deliberation (let alone agreement) as to what those minimum levels of public services should be. This Article frames and advises that early stage deliberation.

My goal is not to assert that residents' interests are the only ones urgently at stake in a bankruptcy. "Creditors" is a monolithic word that stands in for thousands of individuals as well as institutions. Among them are retirees who worked for decades in insolvent cities plagued by poverty, crime, and, in some cases, demoralizing working conditions. From the point of view of individual retirees, most pension commitments are not extravagant: the average annual police pension in Detroit, for example, is $30,000 a year, and general city workers (like librarians or sanitation workers) receive about $18,000 a year.[9] If these payments fall through, there may be nothing except poverty programs to fall back on, because many of these retirees, including most former fire and law enforcement employees, are excluded by law from Social Security.[10] The 10.8 million people (amounting to 64% of full-time civilian public employees nationwide) who work full-time for a local government are stricken with dread as they watch these insolvencies.[11] What they see of the fate of public pensions, which are a form of deferred compensation, will affect the competitiveness of public sector jobs and thus the quality of local public services.

The word "creditor" also stands for investors who lent these cities money in good faith, believing loans to municipalities to be one of the most stable, predictable assets available in American financial markets. When a city defaults on its obligations to bondholders, it creates risk in municipal bond markets that may drive up borrowing costs for other cities in the future. Like it or not, the national economy is exposed to these risks. The American municipal bond market includes one million outstanding municipal bonds with a total aggregate principal of more than $3.7 trillion.[12] A cascade of municipalities (beyond the twenty-eight cities to date) that paid less than the contracted price for debt would reverberate in the national economy. Individual investors' exposure to any given municipal insolvency is likely to be proportionately minor as compared to that city's retirees' exposure, but default on municipal bonds nonetheles distributes individualized losses to investors, both large and small, most of whom had expressed little taste for (and perhaps tolerance of) risk.

I thus stand on the foundation that creditor perspectives on municipal insolvency are compelling from both a humanistic perspective and a policy one. I leave the full articulation of that perspective, however, to other work where it is being widely and ably explored.

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[9] Melanie Hicken, *Just How Generous Are Detroit's Pensions?*, CNN MONEY (July 23, 2013), http://money.cnn.com/2013/07/23/retirement/detroit-pensions/.

[10] Many states exclude public employees from the Social Security Act. *See* Lauren Damme, *Amid State Pension Funding Crises, Joining Social Security Becomes an Option*, NEW AM. FOUND. (Aug. 4, 2010), http://www.newamerica.net/publications/policy/amid_state_pension_funding_crises_joining_social_security_becomes_an_option.

[11] *See* U.S. CENSUS BUREAU, GOVERNMENT EMPLOYMENT & PAYROLL (2011), http://www.census.gov/govs/apes/ (calculation based on total civilian full-time employees and total full-time employees of local governments).

[12] U.S. SEC. & EXCH. COMM'N, REPORT ON THE MUNICIPAL SECURITIES MARKET, at i (July 31, 2012), http://www.sec.gov/news/studies/2012/munireport073112.pdf.

Instead, I focus here on residents' position in the struggle toward the "least bad" compromise that is the nature of insolvency.

This story of residents' interests must surely begin with a look at who lives in insolvent cities. Part I provides a comprehensive list of all twenty-eight cities with at least 15,000 residents that have declared bankruptcy or entered a formal state receivership for municipal insolvency during the five years following September 2008. Tables of data about these cities lay out their demographics, poverty rates, population change over time, median home values, crime rates, and other metrics. Capturing the probability that these twenty-eight cities will soon be joined by others, this Part also presents a list of cities at risk of default on debt and contracts.

Two commonalities are noticeable immediately in all these cities: their poverty rates are high and rising, while their populations are shrunken and shrinking. Poverty means less revenue despite growing expenses—more crime and fires, more children unprepared for school, and deeper needs for drug treatment, afterschool care, and homeless shelters. We might assume that population loss would bring down expenses to offset some rising costs (fewer people cost less to service, right?), but in fact, steep population loss is also dramatically bad for budgets. Cities that formerly had large populations consumed more extensive city services in the past, leaving a disproportionate pension and capital debt overhang. Spatially, such cities' service territories are as large as they ever were, but the density of service consumers is down, resulting in costly inefficiencies. And people and businesses rarely clean up their mess[13] when they exit a city, leaving behind vacant structures likely to be dilapidated or obsolete, if not sullied by contamination and waste. Those structures impose costs much deeper than the aesthetics of dereliction. It has been said that in shrinking cities, demolition may be the major public works of the 21st century.[14] Firemen are kept busy and endangered: When arson becomes entertainment, a city's decay is as desperate as it is ordinary.[15]

Whatever the service demands of an impoverished shrinking city might be, in a time of state and federal deficits and redistributive intolerance, local fiscal crisis means that city governments must get smaller. What are these cities doing to shrink their governments? After introducing insolvent cities as well as insolvency law in Part I, including an overview of the main legal systems that apply to cities at risk of insolvency, Part II looks at the changes

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[13] This is how one lifelong Detroiter put it to journalist Charlie LeDuff. *See* CHARLIE LEDUFF, DETROIT: AN AMERICAN AUTOPSY 45 (2013).

[14] 2 WILL ALSOP ET AL., SHRINKING CITIES: INTERVENTIONS 80 (2006) (quoting Paul Virilio: "[D]uring a crisis period, will the demolition of cities replace the major public works of traditional politics? If so, it would no longer be possible to distinguish between the nature of recessions (economic, industrial) and the nature of war.")

[15] In 2011, there were more than 287 fires caused by arson in Flint, Michigan, compared with just 8 in Cambridge, Massachusetts and 7 in Green Bay, Wisconsin—two healthier cities with comparable (even slightly larger) populations. Detroit saw 957 fires by arson compared with 161 in San Francisco and 143 in Fort Worth, comparably sized cities in terms of population. Youngstown, Ohio saw 237 fires caused by arson compared with 12 in Palo Alto, California. *See Crime in the United States 2011: Table 8*, *supra* note 4. Comprehensive crime data is not yet available for 2012.

underway in insolvent cities. I consider these adaptations according to a three-part framework that describes the main purposes of local government spending, namely: to provide services (including economic development), to maintain land and equipment for public use, and to regulate for public safety. Because there is very little that insolvent cities can do to increase revenues, cities are cutting services, selling assets, and reconsidering their land-use regulations. This Part explores the nature of the transformative changes underway along each of these dimensions.

The result of these budget contractions is, as discussed in Part III, a generation of urban, high-poverty governments focused on little more than the control of fire and violent crime. These are our new minimal cities. I call them "new" because we have seen minimal local government before. Wealthy suburbs have experimented with a thin local public sector focused primarily on land-use and public safety, including police, fire, sanitation, and land-use control, often via contracts with counties and private contractors. The term "minimal cities" was coined by political scientist Gary Miller in 1981 to describe such places, where local government borders and land-use policies are organized to keep property taxes low and minimize the range of local public services.[16] Beyond the fact that government spending is limited, however, the new minimal cities identified in this Article look nothing like Miller's original minimal cities. Indeed, minimal government in wealthy areas is predicated on excluding the heterogeneous service needs associated with the residents and uses that inhabit our new minimal cities. This reflects an implicit bargain, or at least assumption, that residents who require more public services will live elsewhere. A councilmember of the prosperous, suburban city of Costa Mesa, California revealed candidly that the best way to keep service costs low and revenues high is to filter out residents who might commit crimes—for instance, by catering only to residents with a college degree.[17] In a state where only 30% of people over 25 years old meet that criterion,[18] where would the non-college educated persons of the state live? The bankrupt city of San Bernardino (about an hour's drive from Costa Mesa) might be one option, because the new minimal cities are not exclusive—cheaper land provides homes for people with weak buying power, including low-wage workers.

I take up the major normative questions for public law that emerge from the transformation of poor cities into minimal cities, including the question of essential minimum services. Joining the officials who are now struggling to figure out how to maintain basic health and safety, this part works through the question of minimum standards for basic services by mapping out heuristics for bankruptcy judges, state receivers, state legislators,

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[16] *See* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 85-86 (1981).

[17] *See* Tad Friend, *Contract City: When a Town's Budget Fight Turned Deadly*, NEW YORKER, Sept. 5, 2011, http://www.newyorker.com/reporting/2011/09/05/110905fa_fact_friend ("[Councilmember Jim] Righeimer countered that Costa Mesa could reduce crime by expelling its undesirables and attracting better residents, not by overpaying its cops. Irvine was famously safe, he said, because 'eighty-five per cent of the people there have college degrees.'")

[18] *2007-2011 American Community Survey 5-Year Estimates: Educational Attainment*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_5YR_S1501&prodType=table (last visited Dec. 3, 2013).

and the public to use in thinking about the shape of minimum standards. I draw ideas from social contract theory, economic efficiency, human rights and humanitarian exigency, property rights, anti-poverty policy, and land use planning to assemble a set of normative approaches and sources of law that help reason through residents' claims to city revenues.

Part IV, in conclusion, asks what it means for local governments to get smaller and do so responsibly. I try to look holistically and pragmatically at how to restructure local government finance and power in light of fiscal stress and concentrated poverty. If we must shrink the local public sector, that change should be intentionally created and internally consistent, not simply government weakness borne of disorganized decay. Like the land-use strategies of the "shrinking cities movement," which work to restructure the way land is organized and used in post-industrial cities coping with substantial population losses, the concept of shrinking governance that I develop here recognizes that some cities are not on an inevitable, upward growth trajectory. Shrinking governance shifts focus from the context of land use and spatial organization to broader governance context.

This Article explores what happens when inclusive and exclusive cities are both minimal cities, when a government model from suburban life ends up in populous cities with concentrated poverty. I grieve the conditions in our high-poverty shrinking cities. Yet this Article is neither an obituary nor a lament. It is forward-facing and functionalist. Local governments need ways to build, shrink, and, if desired, rebuild government responsibly and flexibly across economic cycles. They need tools to manage decline that go beyond the passive, injurious strategies of atrophy and attrition. Instead of extending long-running research and debate about why cities reach the point when they can't pay their bills—a "whodunit" of urban fiscal crisis[19]—cities need work on what to do about it.

The fact that the broader American economy is thawing does not spell an end to the difficult questions the recession has surfaced. Every city identified in this study has been struggling with deindustrialization for decades, and their pre-recession fiscal prospects were dim. Widening inequality among individuals has imprinted itself in space, and these cities lie within the lowest strata of cities ranked by property values, crime rates, and educational outcomes. In addition, the housing market crash that began in 2006 means that this particular recession will continue to impact local budgets for years. For reasons explained herein, cities' property tax revenues will lag any recovery of the local housing market by years, if not decades. This is ominous news for local budgets, because property taxes remain the single largest source of local revenues.

For purposes of this current piece, I stand in the current moment—along with the residents and local leaders who live in these cities—to think through the contraction of the local public sector. When cities face the compound threat of poverty, population loss, and fiscal crisis, what should they do? The imperative for research on these questions was captured by author and journalist Charlie LeDuff: "You better look at Detroit, because that's what happens when you run out of money."[20] Needless to say, running out of money is a

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[19] I owe the word choice in this disclaimer to MARK BINELLI, DETROIT CITY IS THE PLACE TO BE: THE AFTERLIFE OF AN AMERICAN METROPOLIS 13 (2012).
[20] *The Colbert Report* (Comedy Central television broadcast Apr. 9, 2013).

phenomenon not limited to cities. It is becoming business as usual for many higher-level governments, from sequestration in Washington, D.C. to serious deliberation about state bankruptcy. So too is it the current state of affairs for many school districts today, which lost 300,000 teachers between 2008 and 2011, resulting in changes like this one: in Texas in 2011, no less than 7,000 schools received waivers from the state's maximum class size limits for grades K-4.[21] A minimal state may thus come to describe the trajectory of the public sector, beyond city hall.

The New Minimal Cities explores, as a descriptive matter, the austerity experiment underway in American cities that have gone broke. It surfaces, as a legal matter, the latent question of minimum standards in the system of laws governing cities in crisis. And it investigates, as a normative project, sources of guidance to help fiscal overseers determine the point beyond which it should be legally, or at least politically, unacceptable to cut local public services and sell assets. In so doing, it is wrestling through two challenging issues for legal theory. First is the question of habitability for neighborhoods: Is habitability a scalable concept that ascends past individual dwellings and out into the collective space of neighborhoods and cities? And second: What does urban life require of public life? What are the essential collective services that we will guarantee regardless of consumer buying power or access to private charity? City insolvencies offer a smaller setting in which to explore the politically inflamed debate about what we want from government—even in places where government has fallen to its knees.

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[21] EXEC. OFFICE OF THE PRESIDENT, TEACHER JOBS AT RISK 1 (Oct. 2011); Claudio Sanchez, *Texas Schools Grapple with Big Budget Cuts*, NPR (Dec. 22, 2011), http://www.npr.org/2011/12/22 /144079041/texas-schools-grapple-with-big-budget-cuts. Texas cut another four billion dollars in state aid for education for fiscal years 2012 and 2013. *Outlook for U.S. Local Governments Remains Negative in 2012*, MOODY'S INVESTORS SERVICE (MOODY'S) 5 (Feb. 1, 2012) [hereinafter *Outlook Remains Negative* (Feb. 2012)].