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***57 PENSION FORFEITURE: A PROBLEMATIC SANCTION FOR PUBLIC CORRUPTION**

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I. INTRODUCTION 58

II. DESCRIPTION AND COMPARISON OF **PENSION FORFEITURE** STATUTES 59

 A. Who Imposes the Sanction and When 60

 B. To Whom the Statutes Apply 62

 C. Offenses Which Trigger **Pension Forfeiture** 63

 D. Full vs. Partial Forfeiture 65

 E. Mandatory vs. Discretionary Forfeiture 67

III. THE NATURE AND LEGAL STATUS OF PUBLIC SECTOR RETIREMENT PENSIONS 69

 A. The Gratuity Theory of Public Pensions 70

 B. The Contractual Theory of Public Pensions 71

 C. Vesting under the Contractual Approach 71

 D. Limited Constitutional Protection of Public Pensions 74

 E. Other Theories of Public Pensions 75

IV. CRITIQUE OF **PENSION FORFEITURE** 76

 A. Rationales Offered for **Pension Forfeiture** 76

 1. Public pensions are a reward for faithful service 76

2.	Pension forfeiture is 'just deserts' for breach of the public trust	76
3.	Pension forfeiture deters public corruption	78
4.	Pension forfeiture has symbolic importance	79
B.	Criticisms of Pension Forfeiture	81
1.	Pension forfeiture impinges on contractual rights	81
2.	Pension forfeiture provides a disincentive for persons to enter and remain in public service	81
3.	Pension forfeiture does not recognize the employee's and dependents' reliance on pension benefits	82
4.	Private pensions are protected from forfeiture in cases of employee misconduct	83
5.	Pension forfeiture statutes are not sufficiently calibrated to the wrongdoing	86
V.	RECOMMENDATIONS	88
A.	Corruption Controllers Should Rely on Criminal Fines as a Financial Penalty	88
B.	Congress Should Consider Extending ERISA to Public Pensions	88
C.	New Jersey's Approach to Pension Forfeiture Provides a Model for State Legislatures	89
VI.	CONCLUSION	91

***58 I. INTRODUCTION**

Since the Watergate scandal, corruption controllers have launched far-reaching efforts to punish and deter public corruption. [\[FN1\]](#) Among various policy initiatives and structural reforms, **pension forfeiture** is becoming increasingly popular. Although **pension forfeiture** statutes differ in detail, they basically provide that upon conviction of certain criminal offenses, some public servants forfeit their right to receive pension benefits or a portion thereof. [\[FN2\]](#)

At first blush, **pension forfeiture** does justice, even poetic justice. Bribery and other forms of corruption are serious offenses; why should an official who has enriched himself through violation of the public trust draw payments from the public treasury for the rest of his life? However, when we consider the nature and purpose of public pensions, and the purposes and administration of **pension forfeiture**, **pension forfeiture** is a more problematic sanction. Moreover, since the Employee Retirement Income Security Act (ERISA) [\[FN3\]](#) prohibits **pension forfeiture** in the private sector, we must ask whether the differences between the public and private employment contexts are great enough to justify diametrically opposed policies on **pension forfeiture**. [\[FN4\]](#)

Private employee pensions that have vested (i.e., the employee has satisfied the statutory age and/or years-of-service requirements) are protected from forfeiture for misconduct under the anti-alienation and anti-forfeiture provisions of ERISA,

sections 203(a) and 206(d)(1), as interpreted by the United States Supreme Court *59 in *Guidry v. Sheet Metal Workers Nat'l Pension Fund et al.* [FN5] Similarly, ERISA bars "bad boy clauses," i.e., provisions permitting cancellation of the pension rights of a private employee who engages in conduct injurious to his company. [FN6] Ironically, the trend in the public employment realm is to expand the government's authority to forfeit pension benefits.

There are compelling reasons to examine **pension forfeiture** closely. **Pension forfeiture** is an anti-corruption strategy that state legislatures increasingly find attractive; some proposals even extend **pension forfeiture** to sex offenses and other crimes unrelated to abuse of official duties. Despite something of a **pension forfeiture** "movement," there has been little, if any, scholarly debate over this sanction's efficacy and fairness.

What exactly do we mean by **pension forfeiture**? How does it work? When is it applicable? Part II examines enacted and pending state and federal **pension forfeiture** statutes. Before we can determine whether **pension forfeiture** is an appropriate sanction for public corruption, we must in Part III pause to consider the nature and legal status of public retirement pensions. Part IV critiques the rationales that have been offered in support of using **pension forfeiture** as an anti-corruption tool and offers criticisms of the sanction. Part V recommends that: (1) states should reject **pension forfeiture** as a sanction and instead rely on imprisonment and criminal fines as punishment for corruption offenses; (2) Congress should consider enacting a statute to protect public pensions as a counterpart to ERISA; and, (3) if legislators remain committed to **pension forfeiture**, they should look to New Jersey's approach as a model.

II. DESCRIPTION AND COMPARISON OF PENSION FORFEITURE STATUTES

In the aftermath of the Alger Hiss trial for perjury, Congress enacted a statute in 1954, commonly referred to as the "Hiss Act," which mandates **pension forfeiture** upon a federal employee's conviction of treason or other enumerated offenses. [FN7] At the time of this writing, nine states have similar laws mandating or permitting **pension forfeiture** for public employees convicted of certain corruption-related *60 offenses. [FN8] Although pensions are not usually forfeitable without statutory authorization, the New Jersey and New York courts have held that pension boards may cancel the pension benefits of an employee who is removed or dismissed from public employment "with cause." [FN9]

Although **pension forfeiture** statutes have many features in common, they differ in significant ways. This section explains and compares five salient features of **pension forfeiture** statutes: (1) the body charged with imposing the sanction; (2) the public officials and employees covered by the statute; (3) the offenses which trigger forfeiture; (4) the extent of forfeiture provided for; and (5) whether the forfeiture is automatic or discretionary.

A. Who Imposes the Sanction and When

Many states with a **pension forfeiture** statute authorize a pension board to make a forfeiture determination upon notification that the plan participant has been *61 convicted of a corruption offense. Florida's **pension forfeiture** procedure is typical. The clerk of a criminal court where charges have been brought against a public employee for a felony involving a breach of public trust must furnish notice of the proceeding to the state Commission on Ethics. If there is a guilty verdict or a plea of either guilty or nolo contendere, the clerk must furnish a copy of the verdict or plea to the Commission, which, in turn, forwards the notice and accompanying documents to the governing body of the retirement system of which the public employee is a member. [FN10] The governing pension board then determines whether the employee will forfeit his pension benefits. As provided in the statute, "[w]henever the official or board responsible for paying benefits under a public retirement system receives notice ... such official or board shall give notice and hold a hearing ... for the purpose of determining whether such rights and privileges are required to be forfeited." [FN11] According to this scheme, the board makes a forfeiture determination regardless of whether the convicted employee applied for pension benefits. The determination is appealable. [FN12] However, most states require the board or agency charged with imposing the **pension forfeiture** sanction to notify the employee before denying pension rights and to afford him the opportunity to be heard before a forfeiture order is issued. [FN13]

For federal employees, the Hiss Act provides for **pension forfeiture** "if the Attorney General of the United States certifies to the agency administering the annuity or retired pay concerned[,] that an individual subject to this chapter has been convicted by an impartial court ... [and] that such conviction was obtained in accordance with procedures that provided the defendant due process rights." [FN14] The agency administering the pension benefits orders the forfeiture upon receipt of this certification. [FN15] The agency must order the forfeiture if an employee is convicted of an enumerated offense, unless a presidential pardon is issued. [FN16]

Some **pension forfeiture** statutes "kick in" when the employee applies to the pension board or agency for his benefits. [\[FN17\]](#) For example, under the Missouri *62 **pension forfeiture** statute, it is the duty of the pension board to determine at the time a police officer files his application whether he has forfeited his right to a pension through misconduct; the board's decision is final. [\[FN18\]](#) Typically, an employee may file a claim for retirement benefits with the pension board upon attaining the statutory retirement age, or having served in the public system for a requisite number of years. All states have established statutory age and/or years of service criteria which a public employee must satisfy before he is eligible to receive pension benefits. In Delaware, for example, an employee becomes eligible in one of three ways: five years of service and age sixty-five; fifteen years of service and age sixty; or, twenty-five years of service regardless of age. [\[FN19\]](#) However, an employee's pension rights may vest prior to the eligibility date. [\[FN20\]](#)

B. To Whom the Statutes Apply

Most states' **pension forfeiture** statutes apply to all members of the retirement system. [\[FN21\]](#) For example, Florida's **pension forfeiture** statute applies to "[any] officer or employee of any public body, political subdivision, or public instrumentality within the state." [\[FN22\]](#) Pennsylvania's **pension forfeiture** statute extends to all public officials and public employees, including "justices, judges and justices of the peace and members of the General Assembly." [\[FN23\]](#) By contrast, several states make only certain classes of employees, such as police officers or judges, vulnerable to **pension forfeiture**.

The Hiss Act applies to all retirement systems for civilian and military *63 employees of the federal government, including members of Congress and employees of the District of Columbia. [\[FN24\]](#) Current and former members of the armed services are subject to additional federal **pension forfeiture** sanctions. For example, veterans found guilty of mutiny, treason, sabotage or rendering assistance to an enemy of the United States forfeit all accrued or future pension benefits. [\[FN25\]](#)

Pension forfeiture statutes apply whether or not the individual is still in public service at the time of his conviction for an offense involving a breach of public trust. [\[FN26\]](#) For example, a District of Columbia statute mandates **pension forfeiture** for an employee or former employee who refuses to testify upon matters relating to his office or employment. [\[FN27\]](#) This prevents employees from avoiding **pension forfeiture** by resigning before they are convicted of a crime.

C. Offenses Which Trigger Pension Forfeiture

Under most statutes, **pension forfeiture** is triggered by a public employee's conviction, guilty plea, or plea of nolo contendere in any federal or state court [\[FN28\]](#) to a felony or, in some cases, a misdemeanor, involving a breach of public trust. [\[FN29\]](#)

The Illinois statute is typical in mandating **pension forfeiture** whenever an employee is convicted of "any felony relating to or arising out of or in connection with his service as an employee." [\[FN30\]](#) Similarly, Pennsylvania mandates **pension forfeiture** for certain offenses "committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime." [\[FN31\]](#)

State **pension forfeiture** statutes vary with respect to which offenses trigger **pension forfeiture**. Some statutes enumerate the felonies which lead to **pension forfeiture**, while others simply state that any felony will lead to forfeiture. The Pennsylvania statute refers to specific criminal code provisions. [\[FN32\]](#)

As originally enacted, the Hiss Act denied retirement benefits to federal employees--both civilian and military--who committed a felony in the exercise of governmental authority. The 1961 amendment limited the application of the *64 forfeiture provisions to specified violations of the United States Code and the Uniform Code of Military Justice relating to national security, such as treason, espionage, or disclosure of classified information. [\[FN33\]](#)

Bills pending in the Pennsylvania and Illinois legislatures would trigger **pension forfeiture** upon conviction for certain sex offenses. [\[FN34\]](#) Provisions which allow for **pension forfeiture** for non-work related crimes are especially problematic, since the underlying rationales for **pension forfeiture**, namely breach of public trust and deterrence of official corruption, are not implicated. [\[FN35\]](#)

In some states certain petty offenses trigger **pension forfeiture**. Pennsylvania's "Public Employee **Pension Forfeiture Act**" punishes high misdemeanors with **pension forfeiture**. [\[FN36\]](#) Other state courts have held that employee misconduct not resulting in a felony conviction may still constitute "dishonorable service" sufficient to terminate an employee's pension benefits. [\[FN37\]](#)

Several states have unique provisions as to when **pension forfeiture** is triggered. For example, a California statute reaches employees who have been charged with an offense involving a breach of public trust and are fugitives from justice. [FN38] Texas provides that "[n]o person shall, while confined in any asylum of this State, at the expense of the State, or while confined in the State penitentiary, receive a pension, and any person having been granted a pension who shall afterwards be [so] confined ... shall, while an inmate of such asylum or penitentiary, forfeit his pension." [FN39]

Not all **pension forfeiture** statutes require that the offense involve a breach of *65 public trust. Several states and the District of Columbia mandate **pension forfeiture** if a public employee refuses to testify upon matters relating to his office or employment. [FN40] The federal statute mandates **pension forfeiture** for refusing to testify in proceedings related to the employee's loyalty or to immediate threats to the national security of a subversive nature. [FN41] Georgia extinguishes pension eligibility upon conviction of a "public employment related crime [committed] in the capacity of a public employee" or upon conviction of a drug-related crime. [FN42] Washington provides for **pension forfeiture** "[w]henver any person who shall have received any benefit from said fund shall be convicted of any felony, or shall become an habitual drunkard." [FN43] In *Ballard v. Board of Trustees*, [FN44] the Indiana appellate court interpreted that state's **pension forfeiture** provisions so as to terminate the pension benefits of a police officer convicted of second-degree murder unrelated to his employment.

Similarly, a New Jersey court held in 1954 that a streets department employee was ineligible for a retirement pension because he pleaded *nolo contendere* to a charge of conspiracy to commit abortion, a crime involving "moral turpitude" completely unrelated to the employee's government position. [FN45] However, in the 1980s, the New Jersey Supreme Court expressly held that crimes involving moral turpitude should not deprive a government employee of his pension benefits if the crime committed is unrelated to his government position. [FN46] In *Masse v. Bd. of Trustees, Public Employees' Retirement Sys.*, [FN47] the court reasoned that while the state pension statute implicitly required honorable service in order for an employee's pension benefits to vest, the state legislature could not have intended such a "drastic penalty" where the offense involving moral turpitude is unrelated to the public employment. [FN48]

D. Full vs. Partial Forfeiture

Pension forfeiture statutes differ with respect to the extent of the pension that is forfeited. No statute authorizes a partial forfeiture. However, some do allow the *66 return of an employee's own contributions to his retirement account. Under the **pension forfeiture** statutes of the federal government and several of the states, an employee's contribution to his retirement account under a deferred compensation plan is nonforfeitable; therefore, these funds are paid to the employee upon his dismissal or resignation, with accrued interest. [FN49] Florida and other states refund the employee's contribution, without interest. [FN50] The Hiss Act directs that, in the event of a forfeiture, the employee is entitled to a refund of "the amount, except employment taxes, contributed by the individual toward the annuity, less the amount previously refunded or paid as annuity benefits." [FN51] Several statutes provide that, in the event of dismissal or resignation, a public employee is entitled to a refund of all monies paid as salary contributions, unless the employee's termination was occasioned by culpable misconduct. [FN52] In addition, under some state statutes, a retiree who is drawing a pension is required to pay back the amount of benefits he has received in excess of his accumulated contributions if he is convicted of a job-related offense. [FN53]

The Pennsylvania **pension forfeiture** statute permits the pension board to garnish an employee's contributions to offset any loss suffered by the government because of the employee's misconduct. [FN54] The statute provides that whenever a public official or employee is convicted of a crime related to her public office or public employment, the court presiding over the criminal proceeding shall order the defendant to make full restitution to the state, and "all sums then credited to the defendant's [pension] account or payable to the defendant including the contributions shall be available to satisfy such restitution order." [FN55] In the absence of such court-ordered restitution and upon a determination by the state attorney general that the employee's misconduct resulted in a loss to the state, "the [State Employees' Retirement Board] shall pay the amount of the loss to the State Treasurer from the member's contributions and the interest thereon." [FN56]

Other states have taken a different approach to an employee's payment of fines and restitution for his breach of the public trust. Under the Massachusetts **pension forfeiture** statute, a public employee convicted of misappropriation of government funds or property forfeits all rights to a retirement allowance or to the return of his *67 accumulated total contribution to the extent of the amount misappropriated and the costs of the investigation. [FN57] However, a public employee convicted of such an offense may receive any remaining retirement benefits or the return of his accumulated contribution after full

restitution for the misappropriation has been made. [\[FN58\]](#)

Garnishing a public employee's pension contributions and benefits to satisfy criminal fines imposed at sentencing is easier to justify than a total **pension forfeiture**. Garnishment to make the public employer whole is restitutive, not punitive. Garnishment to satisfy a fine is a means of debt collection and no more. A fine is a fixed sum calibrated to the wrongdoing. True, a criminal fine, if large enough, could become the de facto equivalent of **pension forfeiture**, but in most situations the employee would at least know that the fine can eventually be paid off. [\[FN59\]](#) By contrast, **pension forfeiture** is a financial "life sentence" that will never be extinguished; in almost all cases, it is many times greater than a typical criminal fine.

E. Mandatory vs. Discretionary Forfeiture

Pension forfeiture statutes differ with respect to whether a pension board may elect not to impose a forfeiture. All forfeiture statutes seem to mandate **pension forfeiture** when an employee is convicted of an offense involving a breach of public trust. For example, the Illinois statute says that "[n]one of the benefits provided in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a police officer." [\[FN60\]](#) Similarly, Massachusetts provides that "[i]n no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance...." [\[FN61\]](#) The Pennsylvania statute states that "no public official or public employee ... shall be entitled to receive any retirement or other benefit or payment of any kind ... if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment." [\[FN62\]](#) In *Apar v. State Employees Retirement Sys.*, [\[FN63\]](#) a Pennsylvania court held that the Public Employees' Retirement Board did not have the authority to award pension benefits to a retiree who had pleaded guilty to theft by deception, tampering with records or information, and tampering with public records.

*68 The federal statute applicable only to members of the military permits some flexibility; it gives the Secretary of Veteran Affairs discretion to pay benefits to the employee's dependents. [\[FN64\]](#) Similarly, the Hiss Act provides that a convicted employee's spouse is eligible for spousal pension benefits "if the Attorney General of the United States determines that the spouse fully cooperated with Federal authorities in the conduct of a criminal investigation and subsequent prosecution of the individual which resulted in such forfeiture." [\[FN65\]](#) This protection provides a spouse with a large financial incentive to "rat out" his or her partner. However, neither federal statute provides any guidance as to the amount of the traitorous or corrupt employee's benefits that should be granted to the dependents or on what ground, other than cooperation, this benevolence should be exercised.

On the state level, only Washington provides a pension board with discretion to determine whether a pension should be forfeited. The statute provides that the board may pay pension benefits to the dependents of the convicted employee, [\[FN66\]](#) but offers no guidance as to when the board should exercise this discretion in favor of dependents. [\[FN67\]](#)

Pension forfeiture bills introduced in the New York and New Jersey legislatures permit the pension board to consider mitigating circumstances in deciding whether and to what extent an employee must forfeit his pension. [\[FN68\]](#) Such mitigating factors include the employee's length of service, the extent to which the employee's pension has vested, and the nature and gravity of the offense committed. The proposed New Jersey statute requires consideration of the "availability and adequacy of other penal sanctions." [\[FN69\]](#) We believe that these considerations are critical to the fair application of a **pension forfeiture** statute. Still, a mature scheme would depend upon the pension board promulgating rules and regulations or at least guidelines that would lead to consistency and transparency of application.

In addition to these mitigating factors, the New York proposal gives a sentencing judge discretion to refrain from ordering **pension forfeiture** action at any time if doing so "would not serve the ends of justice." [\[FN70\]](#) However, in important cases there would probably be public outrage if a judge refused to uphold a forfeiture *69 without the ability to point to a statutorily created mitigating factor. [\[FN71\]](#) The public would likely question the judge's motivations and question whose "interest of justice" the decision furthered. Since the New York proposal places discretion in the hands of trial court judges and not in the hands of an administrative agency, much greater legislative detail is necessary. [\[FN72\]](#)

III. THE NATURE AND LEGAL STATUS OF PUBLIC SECTOR RETIREMENT PENSIONS

Before we can talk intelligently about whether it is fair and just to terminate a corrupt public employee's pension rights, we must pause to consider the nature, purpose, and legal status of a pension and pension rights. We need to ask whether extinguishing pension rights is any different than requiring that a corrupt employee forfeit his house, savings account, or

future inheritance. Remember that we are talking about forfeiting one's entire interest, not about garnishing a certain amount of money in a particular account to satisfy a specific debt or fine.

Provision for retirement benefits (pensions) are a basic feature of modern day American employment, both public and private. Disability pensions also are often a feature of modern day employment contracts, and some state forfeiture laws apply to them as well. But for simplicity of analysis, we will focus on retirement pensions. The majority of full-time U.S. workers, and practically all full-time public sector workers, are covered by some type of employer pension plan. The pension benefits that will accrue to the employee upon retirement will constitute the major component of the employee's retirement income and therefore serve as the chief financial security for the employee, his or her spouse, and other dependents in old age, and perhaps late middle age as well. From the employee's standpoint, the retirement pension is like a savings account that cannot be touched without penalty until he reaches the age of fifty-nine and a half.

There are two basic types of pension plans: defined contribution and defined benefit. Most private sector pension plans are of the first type; most public sector pension plans are of the second type. Under a defined contribution plan, the employer makes regular contributions into a special earmarked fund for each individual employee. The employee may or must, according to the plan, make his own contributions to the earmarked fund and exercise control over how the fund is invested. The employer's and employee's contributions are non-taxable to the employee, making the pension plan much more favorable than a savings plan based upon after-tax income. Many employees would therefore prefer \$1,000 in compensation to be paid to them in the form of an employer pension contribution rather than in taxable wages. Under a defined contribution plan, upon retirement *70 the employee's benefits will not be paid by his former employer, but by the fund or funds in which his earmarked account has been invested. Indeed, the employer retains no control over the employee's earmarked fund. Under such circumstances, it would make no more sense to speak of forfeiture of a pension fund than it would to speak of forfeiture of savings accounts, equity investments, or a house.

Almost all public sector pension plans are defined benefit plans, although there appears to be some movement in the direction of defined contribution plans. Typically, at retirement age, the employee has a right to receive from his former employer a percentage of the employee's average salary over his three highest earning years. Under this type of plan, the employee does not have her own earmarked fund, and the pension payment will continue to be made by the government, albeit not necessarily by the specific department or agency where the employee worked. The payments might look to an outsider like some sort of employer beneficence, but it is more realistic to think of them as part of the compensation package. If the employee had bargained for higher wages and no pension plan, would we seriously be considering the forfeiture of his savings accounts, real property, life insurance, and so forth?

A. The Gratuity Theory of Public Pensions

The U.S. Supreme Court first propounded the gratuity theory of public pensions in *Pennie v. Reiss*. [FN73] The Pennie Court considered a constitutional challenge to a state law that repealed a death benefit program ten days before an officer was killed in the line of duty. The Court held that the death benefit, which required a two-dollar per month contribution from each police officer's salary, was revocable because the officer never attained property rights in the benefits. The Court reasoned that the deduction was made automatically, so the officer never physically possessed the money. [FN74] Without physical possession, the officer had no power over the disposition of the money and such power was a requisite element of having a property right to the pension. In the absence of such a property right, the government employer, through the legislature, was free to modify the pension terms at will.

The reasoning of the Court's decision in *Pennie* has been widely criticized, [FN75] but in the late nineteenth century, "the notion that public employees had enforceable pension claims arising out of their employment would have grated harshly on the minds and ears of a nation decades removed from current and acceptable philosophies of governmental labor relations." [FN76] *Pennie* has not been challenged *71 in subsequent Supreme Court decisions, [FN77] but, as we shall note later, passage of ERISA has changed the legal foundation of private pensions. In line with *Pennie*, many state courts used to view public pensions as a gratuity to which an employee had no vested rights [FN78] and which could be terminated at the will of the employer. [FN79] However, Texas, Indiana, and Nebraska appear to be the only states which continue to adhere to this theory of public pensions. [FN80]

B. The Contractual Theory of Public Pensions

Most states now take a "contract" approach to public pensions, based on a theory first propounded by the New Jersey Supreme Court in *Ball v. Board of Trustees*. [FN81] In *Ball*, the court considered whether the state legislature could alter the

pension rights of public school teachers. An act of 1896 had granted teachers an absolute right to pension benefits upon satisfaction of the statutory service and contribution requirements. A subsequent statute made that right conditional upon approval by the pension fund's board of trustees. Ball held that a teacher's optional participation in the public pension system was clearly part of the employment contract. The court applied traditional contract principles to hold that once the agreement was made, "it could not be altered without the consent of both parties ... and upon sufficient consideration." [\[FN82\]](#) On this view, the employer has, at most, a very limited right to modify the contract unilaterally where reasonable.

C. Vesting under the Contractual Approach

Vesting is an important concept under the contractual approach. Vesting in simple terms means that "at a stated point in time the employee gains a nonforfeitable right to benefits under the plan, that the benefits based on service *72 already rendered are to be his at retirement regardless of whether he leaves his job, is fired or laid off, or leaves the union." [\[FN83\]](#) Early in the twentieth century, employers had no obligation to employees who terminated employment before they reached retirement age. [\[FN84\]](#) If an employee left his job for whatever reason, he lost any right to future pension benefits. The absence of any vesting provision virtually locked the employee into his job. [\[FN85\]](#)

Before the adoption of ERISA, which imposed strict vesting requirements on private sector pension plans, vesting provisions that did exist often provided for lengthy service. [\[FN86\]](#) Employers generally required ten or fifteen years of service and the attainment of forty or fifty years of age before an employee's pension rights would vest. However, in contributory plans, many employees agreed to "bird-in-the-hand" options, which provided that upon early departure, their own contributions would be returned, but the employer's contribution would be canceled. [\[FN87\]](#)

There are various definitions of vesting, and many courts and legislatures have not made clear which definition they intend to apply to public employee pensions. Employees acquire vested rights in the functional sense when they fulfill statutory retirement-eligibility requirements. Vesting in a legal sense means that employees have a protected right to remain members of the retirement system under the same rules and regulations in effect at the time they entered the system. [\[FN88\]](#) More generally, someone has a "vested" interest if he has attained some ownership rights in the res. However, vesting of pension rights under modern court interpretations does not necessarily mean that the public employee's ownership rights are nonforfeitable; that is, even vested pension rights may be subject to forfeiture. [\[FN89\]](#)

The confusion surrounding the vesting of public pension rights also stems from the fact that states adhering to a "contract" theory of public pensions have not reached a consensus as to when such rights arise--at the start of employment, once the employee has met statutory requirements regarding age and/or service and/or honorable service, or at the point that the employee is eligible for retirement. States affording the greatest protection, like Pennsylvania, Georgia, and Arizona, [\[FN90\]](#) hold *73 that pension rights vest when the employee accepts employment. [\[FN91\]](#) Accordingly, any unreasonable alteration of pension rights during the course of employment to the employee's detriment constitutes a unilateral modification in violation of contract law. The terms of the contract cannot be modified without the consent of both contracting parties. [\[FN92\]](#) Any detrimental alteration of pension benefits applied retroactively is an unconstitutional impairment of the obligation of contract. [\[FN93\]](#)

Most states that do not have a **pension forfeiture** statute provide that pension benefits vest upon the public employee's fulfillment of the statutory requirements, typically age and/or requisite years of service. Thereafter, the pension is nonforfeitable. [\[FN94\]](#) Other states view retirement benefits as gratuities that vest only when the employee applies for retirement benefits; prior to that time, there is no constitutional impediment to modifying the benefits. [\[FN95\]](#)

Some legislatures have written a condition of "honorable service" into their pension law; vesting is conditional on fulfillment of this requirement. [\[FN96\]](#) In other *74 states, courts have inferred such a condition. [\[FN97\]](#) For example, in *MacIntyre v. Retirement Board*, [\[FN98\]](#) the California Court of Appeals held that police officers dismissed for conduct unbecoming an officer were not entitled to pensions although they had met all other statutory requirements for receipt of pension benefits. [\[FN99\]](#) The court stated that California case law prohibited the legislature from depriving pensioners of their vested rights to receive pensions, but that no such rights vested until the employee fulfilled a requirement of faithful performance of duty. [\[FN100\]](#) The court thus implied a continuing duty of faithfulness up to the day of retirement as a prerequisite to vesting even if an employee fulfilled all other requirements to receive pension benefits.

Of course, if the contract model were strictly adhered to, the corrupt public employee would not necessarily forfeit his entire pension; complete rescission would not be the obvious contractual remedy unless the government could prove that the

employee was dishonest from the first day of employment.

D. Limited Constitutional Protection of Public Pensions

Presumably at the behest of public employee unions, New York and Illinois passed constitutional amendments to protect an employee's right to retirement benefits against impairment. [FN101] The New York Constitution provides that "membership in any pension or retirement system of the state or a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." [FN102] Subsequent New York case law holds that the purpose of the constitutional amendment is to fix the rights of employees at the time they join the retirement system. [FN103] The Illinois Constitution provides that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." [FN104] Other states, including Alaska, Hawaii, and Michigan, have constitutional provisions that protect only the accrued benefits portion (i.e., benefits earned during years of service) of public employee pensions. [FN105]

These constitutional guarantees work at least to prevent the retroactive application *75 of a **pension forfeiture** statute. [FN106] However, they raise the possibility of serious inequities if the legislature passes a **pension forfeiture** statute that applies only prospectively. Any employee who enters public service before the **pension forfeiture** law takes effect will not be subject to **pension forfeiture**, even if convicted of a felony involving breach of the public trust. One can imagine a scenario whereby a more senior employee uses a younger employee to accomplish a crime. The senior employee, though more culpable, would not suffer forfeiture because he was employed before the adoption of the forfeiture statute. The younger, less culpable employee would be subject to a **pension forfeiture**.

E. Other Theories of Public Pensions

Two states have rejected both the gratuity and contract theories of public employees' pension rights. In *Christensen v. Minneapolis Municipal Employees Retirement Board*, a Minnesota court adopted a promissory estoppel theory to protect pension rights and ruled that an increase in the age eligibility for pensions was unconstitutional. [FN107] The court explained that only certain state promises give rise to an interest protected by promissory estoppel. If an employee's interest in a pension is so protected, the court must determine if the modification substantially impairs the expectations of the parties. If a substantial impairment is shown, the state must demonstrate a significant public purpose for the legislation, and the modification must reasonably further the intended public purpose. [FN108] While a sufficiently calibrated **pension forfeiture** statute would almost certainly satisfy these criteria, it seems likely that a statute imposing total forfeiture regardless of the extent of wrongdoing would fail this test.

The Supreme Court of Connecticut applied a due process theory to protect pension rights. In *Pineman v. Oechslin*, [FN109] the court addressed the question of whether pension rights of employees should be protected against an age eligibility revision. [FN110] The court rejected the contract theory argued by the plaintiffs, concluding instead that statutory pension schemes establish a property interest in the existing retirement fund on behalf of all employees. [FN111] In dicta, the court noted that the employees might have a property interest in their pension funds protected *76 from arbitrary legislation under the due process clauses of the state and federal constitutions. [FN112]

IV. CRITIQUE OF PENSION FORFEITURE

In a sense, everything up to this point is necessary background material for analyzing the appropriateness and fairness of **pension forfeiture** as a sanction for corruption and other offenses. This section first explains and critiques the four most prominent rationales that have been used to justify **pension forfeiture** as a sanction for public corruption. We find none of them persuasive. The authors then offer criticisms of **pension forfeiture** as a sanction for corruption and other offenses.

A. Rationales Offered for Pension Forfeiture

1. Public pensions are a reward for faithful service

If pensions are a reward for faithful service, the corrupt public servant is not entitled to a pension. However, this rationale for **pension forfeiture** is inconsistent with the modern theory of the legal status of a pension right. Modern courts have rejected the "reward" or "gratuity" theory of retirement benefits in favor of a contractual theory. [FN113] While many courts have inferred a condition of "honorable service" which, if not satisfied, supports forfeiture of the entire pension, the more sound approach is to award the employee those pension benefits which accrued up to the point of wrongdoing. For example,

a police officer who faithfully serves for twenty years but who accepts several bribes over the final five years of his employment should not forfeit his entire pension. This would give the employee the benefit of his contractual bargain up to the point of his contract breach.

2. **Pension forfeiture** is "just deserts" for breach of the public trust

It has been argued that an employee who breaches the public trust is not entitled to the rights and privileges which attach to his position. As expressed in the Florida state constitution, "[a] public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right... [a]ny public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan." [\[FN114\]](#) Similarly, the Illinois Supreme Court has asserted that a primary purpose of the Illinois **pension forfeiture** statute is to *77 "implement[] the public's right to conscientious service from those in governmental positions." [\[FN115\]](#)

We have no doubt that breach of public trust, rising to the level of a felony, is serious wrongdoing and ought to be seriously punished. Significant prison terms and fines seem entirely just, at least in serious cases. **Pension forfeiture** is much less likely to be just because it imposes a financial penalty that depends on the corrupt employee's years of service rather than culpability. It seems little different from seizing whatever assets the employee has or will have in the future--an essentially arbitrary and indeterminate sentence.

Even if forfeiture is arguably just and reasonable in some instances of egregious corruption involving higher-level government employees, it is unjust and excessively severe for the low-level building inspector convicted of accepting a one-time \$100 bribe after twenty-five years of faithful service. [\[FN116\]](#) An employee who has faithfully served for twenty-five years will have made a far greater contribution and accumulated greater pension benefits than an employee who has served less than one year, but by treating these employees the same, **pension forfeiture** statutes in effect mete out unequal punishments. It might be argued that such a disproportionate impact is justified in that the older employee holds a greater degree of public trust through his years of service; his breach of that trust renders him more culpable than a younger employee. However, one could just as logically argue that the older employee has provided more years of bona fide service and should not forfeit all accumulated pension rights because of a single criminal act.

As noted in Part II, most states' **pension forfeiture** laws do not distinguish between ranks of public service. They fail to recognize the different degrees of public trust which attach to various public offices. Since public trust is put forth as the primary justification for treating private and public pensions differently, at least some differentiation should be made with respect to the quantum of public trust held by various ranks of public employees. The breach of the public trust occasioned by the malfeasance of a meter maid certainly does not compare with that of a judge. **Pension forfeiture** should not apply to workers in classifications involving very little public trust.

While we are critical of the public trust rationale for the additional sanction of **pension forfeiture** in general, the rationale must be taken more seriously in cases of major corruption by top officials. A judge, for example, serves as the symbol of impartiality and the ultimate arbiter of the law, a pedestal of integrity upon which the entire system of justice rests. Therefore, "selling" judgments undermines the entire rule of law and the legitimacy of the state and ought to be punished severely. *78 Nevertheless, we question whether even here **pension forfeiture**, which amounts in effect to a kind of forfeiture of estate by seizing all the defendant's assets, is a fair punishment. If it is, we might be opening the door to punishments that are the economic equivalent of the death sentence--stripping serious offenders of all present and future assets and earnings.

The case for **pension forfeiture** for judges was made by the Supreme Court of Rhode Island in *In the Matter of the Commission on Judicial Tenure and Discipline Proceedings against Justice Antonio S. Almeida*. [\[FN117\]](#) The court accepted the theory that pension benefits are a type of deferred compensation, but reasoned that an implicit condition precedent of honorable and faithful service had to be satisfied before a judge's rights to the benefits vested. [\[FN118\]](#) The court upheld the pension board's denial of pension benefits to a judge who received \$40,000 in an illegal kickback agreement with an attorney whom the judge consistently appointed as a receiver or special master in cases pending before him. [\[FN119\]](#) As the court observed, "[j]udges especially are to be held to a higher standard of conduct, thereby embodying ethics, integrity, and honesty." [\[FN120\]](#) The court further stated that "[t]he qualities involved in serving as a judge include the highest degree of honesty, integrity, and morality, and a keen sense of ultimate right and wrong in order to serve the public properly in administering justice." [\[FN121\]](#) This decision troubles us. While the corrupt employee is a judge, the corruption involves an

unfair case assignment to a lawyer, not the sale of a judgment itself. This is bribery to be sure and it ought to be punished, but the offense is not so heinous that our traditional sense of fair and proportional punishment ought to be ignored.

3. Pension forfeiture deters public corruption

All **pension forfeiture** statutes are probably premised on the belief that **pension forfeiture** will discourage official malfeasance. [FN122] As one court observed, "[p]ension forfeiture is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual and deterrence, both as *79 to the offending individual and other employees." [FN123] In one of the most famous cases of official corruption in modern history, the Illinois Supreme Court forcefully argued that **pension forfeiture** serves as a deterrent for corruption. Otto Kerner, Jr., while serving as a federal appellate judge, was convicted of several felonies relating to conduct during his tenure as governor of Illinois. In concluding that the state **pension forfeiture** statute extends to both federal and state felonies, the court reasoned that "[t]his literal interpretation accords with the obvious purpose of the statute, to discourage official malfeasance by denying the public servant convicted of unfaithfulness to his trust the retirement benefits to which he otherwise would have been entitled." [FN124] The court also reasoned that public employees who willfully breach their public trust should, as a matter of just deserts, be sanctioned severely. The court expressed the widely-shared intuition that public corruption, especially by those holding high office, is morally repugnant and deserves severe punishment. Thus, the Illinois court viewed **pension forfeiture** as a justifiable, even necessary, sanction to deter official corruption. [FN125] This argument proves too much. Every punishment could be justified on exactly the same grounds.

4. Pension forfeiture has symbolic importance

Public cynicism toward government and public officials is fanned when it is reported that a public employee who has been driven from office in disgrace will receive a handsome pension for the rest of his life. The result is to weaken trust in and support for government. Many commentators have argued that **pension forfeiture** statutes send a message to the American public that public officials will not profit from abuse of their special position.

Public outrage and cynicism are said to greet the revelation that a wrongdoer will receive his pension despite his wrongdoing. [FN126] As one journalist, referring to charges that U.S. Senator Bob Packwood had engaged in evidence tampering, observed, "[p]ublic confidence in government plummets even lower when felons in Congress walk away with a cushy retirement package beyond the dreams of most Americans." [FN127] In fact, **pension forfeiture** bills are often introduced after sensational corruption scandals. For example, in Oklahoma, state legislators enacted a **pension forfeiture** statute in 1981 immediately following a scandal in *80 which several county commissioners, convicted of taking kickbacks, were awarded their pensions. [FN128] Congress passed the Hiss Act [FN129] in 1954 in response to public pressure and outrage over the fact that Alger Hiss, a member of the federal service, would receive a public pension despite a conviction for perjury in a case involving the passage of U.S. bomb secrets to the Russians. [FN130]

New York provides other examples of scandals that caused public outrage and cynicism. In 1985, New York Supreme Court Justice William C. Brennan was convicted of federal racketeering and conspiracy charges for accepting approximately \$50,000 to "fix" four criminal cases, but his handsome pension remained untouched. [FN131] Although Brennan was sentenced to twenty-six months in prison, he still receives a \$41,236 annual pension. New York State Supreme Court Justice Francis X. Smith was convicted of perjury, but receives an annual pension for life. [FN132] In 1988, long-time mayor of Syracuse, Lee Alexander, was sentenced to ten years imprisonment after pleading guilty to federal charges of racketeering and extortion, but he still received an annual pension of more than \$18,000 until his death in 1996. [FN133] Similarly, John Cassiliano, a former superintendent of New York City's Sanitation Department's Bureau of Waste Management, pled guilty to accepting over \$660,000 in bribes and "payoffs," and despite a sentence of three years imprisonment, will receive an annual pension. [FN134]

Numerous well-publicized scandals in police departments across the nation have generated similar media outcry. One example is the case of Kenneth Eurell, ex-partner of Michael Dowd, a lead witness in the Mollen Commission hearings on corruption in the New York City Police Department. Eurell retired at age twenty-nine due to job-related injuries, which, according to Dowd, were faked. The first line of a newspaper article read, "[t]he City of New York will pay Kenneth Eurell, hoodlum, an annual pension of \$35,772 until the day he dies-- every penny of it tax-free and untouchable." [FN135] Although the issue of faking disability is beyond the scope of this Article, such news reports nicely illustrate the public sentiment in favor of **pension forfeiture**. While there may be political costs associated with supporting a **pension forfeiture**

statute, [\[FN136\]](#) the political benefits always outweigh these costs in the aftermath of a well-publicized scandal.

*81 B. Criticisms of Pension Forfeiture

1. Pension forfeiture impinges on contractual rights

Proponents of **pension forfeiture** have argued that a public pension is a reward for faithful service, and that those who breach the public trust are not entitled to such a reward. However, this argument is undermined by the widespread rejection of the "reward" view of public pensions, and its replacement with a contractual theory that sees the pension as the deferred compensation portion of an employee's wages. The contract theory recognizes that the employee has foregone some amount of present compensation in exchange for a future pension upon retirement.

Of course, the forfeiture proponent might argue that the corrupt employee has breached the employment contract and thereby forfeited his right to the public employer's future performance. This argument has some force. [\[FN137\]](#) The corrupt employee certainly forfeits his right to continued employment and thus to continued wages. But his right to payment of the pension is a more difficult question if his pension benefits have already vested at the time that the employee committed the corrupt act. Terminating an employee's salary and employment looks to the future, whereas **pension forfeiture** often reaches into the past. We do not require the employee to pay back the salary he earned while in office, so it seems anomalous to cancel the benefits he earned during that time. The fact that salary payments are made close in time to when the services are rendered, whereas pension payments are deferred, should not be determinative.

2. Pension forfeiture provides a disincentive for persons to enter and remain in public service

Pension forfeiture defeats one of the primary purposes of the public pension system--to attract and retain valuable employees. "The universally recognized primary objectives of retirement plans are to enable the employer to attract better employees, to reduce turnover, to facilitate orderly retirement of older employees, to retain valuable employees who might seek productive employment elsewhere, and, most importantly from the employee viewpoint, to assure a measure of income upon retirement adequate to allow the annuitant to live in reasonable security." [\[FN138\]](#) In this, the purposes of public and private pensions are the same. The "major purposes underlying public pensions [are] to induce people to enter public employment and continue faithful and diligent employment and to furnish public employees with employment stability and financial security." [\[FN139\]](#)

Maintaining the integrity of the pension system is especially important in the *82 public sector, since public employees generally earn lower wages than private employees in comparable positions. [\[FN140\]](#) One attraction of public sector employment is its more generous fringe benefits and greater job security. These enticements offset the lower wages a prospective employee is willing to accept. As one commentator observed, "[p]ensions are not free goods. Workers pay for them by accepting lower cash wages during work years." [\[FN141\]](#)

The public sector must compete with the private sector for employees. Traditionally, the private sector paid higher salaries, while public service provided job security and generous pensions. Since ERISA, however, the security of private employees' pensions has increased. The private employee is absolutely protected from forfeiture, but the public employee is not, thus making public employment relatively less attractive.

Proponents of **pension forfeiture** might argue that people do not enter public employment expecting to commit a felony and that we would not want to employ people who do. On this view, the only desirable prospective employee who might be deterred by a **pension forfeiture** statute is an extremely risk-averse person who worries that he might someday be wrongfully convicted of a felony and lose his pension as a result. This argument has some force. However, it is not necessarily the prospect of forfeiting a pension following a conviction that might deter employees from entering and remaining in public service, but the fact that public pensions are not as certain and secure as private pensions. Moreover, a prospective employee might fear the possibility of being unjustly charged and convicted of a corruption offense. This fear is not necessarily far-fetched in the contemporary context of complex conflict of interest rules, campaign finance regimes, special prosecutors, and the politics of corruption and reform.

3. Pension forfeiture does not recognize the employee's and dependents' reliance on pension benefits

The purpose of a pension is to provide an employee with the expectation that years of service will result both in the wages currently earned and an assurance of financial security when he retires. In consideration for this assurance, the employee foregoes a certain amount of current wages which are, in effect, contributed to the pension plan, and continues working for his current employer, foregoing possible employment elsewhere. The employee relies on this expectation of future income, and plans for retirement accordingly.

Employer-provided pensions were not intended to serve as a worker's sole ***83** source of retirement income. In the first several decades following the adoption of the Social Security system, retirement income was conceived in three tiers which included a floor Social Security payment, a supplement from pensions, and personal savings. [FN142] Over the course of time, however, retirement planning has changed so dramatically that personal savings now play a small role in the equation, thus placing heavier reliance on pension plans. [FN143] Today, public employees enter government service expecting to receive a pension adequate to provide much of their needed retirement income. [FN144] They often make no other provisions for old-age security. [FN145] This higher degree of reliance on pensions provides another reason to protect pension rights.

It is the innocent dependents of the employee whom **pension forfeiture** often punishes, because most existing statutes do not provide for full or partial payment of retirement benefits to dependents of a convicted employee, even where the family can prove extreme hardship.

Proponents of **pension forfeiture** might argue that a corrupt employee is entitled to no such reliance, and his family is out of luck, just as it is when the employee is sent to prison. Again, this argument has some force. Arguably, an employee has no right or reason to assume that he can commit a felony without jeopardizing his family's security. But how would we regard a statute that required a corrupt employee to forfeit his house, car and savings? And would the same reasoning apply to forfeiture of a disability pension as well? Moreover, if the pension had been structured as a defined contribution plan rather than a defined benefit plan, the employee would control his retirement fund much as he does a bank account, and it would likely not be forfeitable. Surely, the form of the pension plan ought not to determine whether it ought to be forfeitable.

4. Private pensions are protected from forfeiture in cases of employee misconduct

Federal law treats private sector pensions as nonforfeitable, even those of employees who are convicted of offenses that involve breach of trust. Is official corruption so much more egregious than private corruption? Should the employment rights of public employees differ so radically from the employment rights of private employees? [FN146]

***84** In *Guidry v. Sheet Metal Workers Nat'l Pension Fund et al.*, [FN147] the Supreme Court had to decide, as a matter of statutory construction, whether to recognize a misconduct exception to the bar on garnishment of pension benefits established in the anti-alienation and anti-assignment provisions of section 206(d)(1) of ERISA. [FN148] The issue in *Guidry* was not absolute **pension forfeiture** but whether to allow a set-off of a union worker's pension benefits to satisfy the union's money judgment against him. *Guidry*, a union employee, pleaded guilty to embezzling more than \$377,000 from the union. The union determined that he had forfeited his right to pension benefits. *Guidry*, while in prison, sued to collect his pension benefits. The Court held for *Guidry* because, "section 203(a) of ERISA declares that 'each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable' if the employee meets the statutory age and years of service requirements." [FN149]

The union argued that even if *Guidry* did not forfeit his pension benefits, a constructive trust should be established into which *Guidry*'s pension would be paid to satisfy a \$275,000 judgment the union had obtained against *Guidry*. Although the circuit court accepted this approach, the Supreme Court reversed, stating that it did not believe it appropriate "to approve any generalized equitable exception--either for employee malfeasance or for criminal misconduct--to ERISA's prohibition on the assignment or alienation of pension benefits." [FN150] The Court observed that section 206(d) "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." [FN151] The unanimous Court recognized that its decision probably would not be met with a warm reception, but determined that any exception to the ERISA prohibitions would have to come from Congress. [FN152]

***85** The *Guidry* decision has important implications for the comparative vulnerability of public and private pensions to forfeiture. Under section 203(a) of ERISA, as interpreted in *Guidry* and other cases, there is no question that private

employee pensions are protected against forfeiture, even for a criminal act involving a breach of trust. This policy reflects Congress' belief that pre-ERISA, the private employers had undesirable power to revoke pension benefits. [\[FN153\]](#) Ironically, the trend in the public employment realm is to expand the government's authority to forfeit pension benefits.

A main argument for the forfeitability of public pensions rests on the premise that the public employee is bestowed with public trust. [\[FN154\]](#) A conviction for a job-related felony is rightly considered a clear violation of that public trust. The public employer should not continue to pay the corrupt employee after he has breached the employer's trust.

This public trust justification is more persuasive for high-level employees. Arguably, there is a certain amount of trust vested in high-level officials, but it is an overstatement to say that the public has bestowed a great amount of trust in a meter maid or building inspector. Indeed, these jobs can be and are, in some jurisdictions, contracted out, in which case they are carried out by private employees whose pensions are not forfeitable. There is certain personal approval given when one votes for an individual for public office, which includes the trust that, if elected, this person will fulfill his duties faithfully. However, the notion that the general public has placed special trust in a corps of lower-level public employees seems exaggerated.

The breach-of-public-trust rationale assumes that a special trust, above and beyond the performance of job duties, attaches to public employment. It is as if holding a public-sector job, no matter what type of duties it involves, is an honor. However, the public also places its "trust" in private employees; consumers, management, and shareholders expect that private employees will not abuse their positions for personal gain. The amount and type of trust placed in an employee do not depend on whether his salary is paid by a private employer or by taxpayers, but rather depend on the nature of the employee's position. A private school teacher holds the same amount of trust as a public school teacher, which is greater than the *86 trust placed in public and private sanitation workers. **Pension forfeiture** statutes draw a distinction between public and private employees, but treat all public employees equally. This distinction is not persuasive.

The Guidry decision [\[FN155\]](#) also has implications for those statutes which provide for recoupment of a public employee's benefits to satisfy fines or costs incurred by the government because of the employee's malfeasance. One can make the same arguments against the garnishment of public employees' pensions as this Article makes with regard to **pension forfeiture**. Why should a private employee's pension benefits be protected from garnishment under ERISA while those of a public employee are not?

5. **Pension forfeiture** statutes are not sufficiently calibrated to the wrongdoing

Pension forfeiture statutes are not tailored to the extent of wrongdoing. Most provide that a felony conviction for a corruption-related offense automatically requires a complete cancellation of pension benefits without regard to the gravity of the offense or the employee's length of service.

The harsh sanction of **pension forfeiture** should only be available, if at all, for the most egregious and serious wrongdoing. This policy is reflected in recent forfeiture laws which limit the offenses for which **pension forfeiture** is available, for example to job-related bribery or theft by deception. [\[FN156\]](#) The requirement that an offense must involve a breach of public trust indicates that the proponents of **pension forfeiture** believe it would be wrong to deploy **pension forfeiture** as a general sanction. Apparently, a public employee who commits murder outside of his public employment is entitled to collect his pension while serving a life sentence, but an employee who accepts a one-time bribe to expedite a building inspection loses all pension benefits. This scenario fails on a just deserts rationale. The public pension ought not to be regarded as different from the employee's other property. **Pension forfeiture** is primarily imposed for the purposes of punishment and deterrence. One who commits murder deserves a harsher punishment than one who takes a small bribe.

Existing **pension forfeiture** statutes are insufficiently calibrated to the seriousness of the crime because all statutes mandate forfeiture upon a conviction for certain offenses regardless of the particular circumstances. [\[FN157\]](#) However, various *87 proposals introduced in state legislatures would give the governing body responsible for ordering forfeiture the discretion to do so or not. [\[FN158\]](#) If **pension forfeiture** is adopted, we favor a scheme whereby an independent board determines whether forfeiture is justified on a case-by-case basis. Automatic forfeiture fails to assess adequately the circumstances of a particular case in order to determine the fairness of the **pension forfeiture** sanction.

Pension forfeiture statutes that give pension boards discretionary power to award pension benefits to an employee's family

provide the boards with insufficient guidance. What assets of the dependents should be considered? Should the pension be protected only if the employee has dependents, and even then, only if the dependents can show financial hardship? If so, what counts as financial hardship? Should the burden be placed on the dependents to prove financial hardship? As described in Part II, bills pending in New York and New Jersey give the pension board discretionary power to award pension benefits to the convicted employee himself depending on the facts of the case. These proposals are an improvement over existing **pension forfeiture** statutes, since they allow for discretion and list the factors that the pension board or court should consider in making a determination. However, even these proposals are flawed in that they do not specify the weight to be assigned each factor; presumably, pension boards and courts would use a totality-of-the-circumstances approach, leaving them with insufficient guidance.

Why should the employee's pension fund be forfeited upon a conviction, while his other property is left untouched? If, instead of contributing a portion of every paycheck to a pension account, the employee deposited the funds into a personal bank account, should the state be able to seize the entire account and interest thereon in the event of a conviction for a job-related felony, without regard to the size of the account? Would it be regarded as just for the state to seize the \$100,000 bank account of a police officer convicted of a single ticket-fixing offense, while ***88** seizing the \$2,000 bank account of a federal judge with a long history of bribery and extortion? This is in effect what the **pension forfeiture** statutes accomplish in providing for automatic cancellation of the public employee's entire pension.

It could be argued that an employee's ownership rights to a bank account are established from the start, and are protected by the Fifth Amendment due process clause, while ownership rights to a pension vest only upon satisfaction of an "honorable service" condition. However, it is clear that a pension is not the fruit of an employee's illegal activity, any more than the bank account is; if anything, the pension is the proceeds of legal activity.

Some states allow only the forfeiture of the publicly-financed portion of a public pension, while the employee-contribution portion is nonforfeitable. This distinction between the employee contribution and publicly-financed portion of a pension is theoretically problematic. An employee's pension fund should be considered one fund, since the whole fund represents the employee's deferred compensation. If forfeiture is used as a sanction, the extent of forfeiture should depend on the extent of the employee's wrongdoing, and not upon the extent to which the pension is publicly-financed.

V. RECOMMENDATIONS

A. Corruption Controllers Should Rely on Criminal Fines as a Financial Penalty

Pension forfeiture is an extreme sanction, especially when one considers that in nearly all cases other sanctions, including prison sentences, termination from employment, and criminal fines, are available. If controllers and legislatures remain committed to the **pension forfeiture** sanction, pension garnishment provisions like those enacted by the federal government and several states are a better sanction than automatic, total **pension forfeiture**. In those jurisdictions permitting pension garnishment, a fine is imposed on the public employee as a result of his misconduct, and the pension board or court is authorized to satisfy the fine from the employee's pension fund. This approach ensures that the sum the employee is required to pay is calibrated to the extent of her wrongdoing, instead of imposing a "life sentence" on the employee. This approach also ensures that the pension board, after reviewing the facts of the case in its entirety, will view the fine as just one component of a sentence which may also include termination from employment and a prison sentence.

B. Congress Should Consider Extending ERISA to Public Pensions

Congress should consider extending ERISA to protect public pensions. As discussed above, the public trust justification for the distinction between private and public pensions is unpersuasive. A federal statute would provide a single, uniform standard for state public pension systems, including such issues as the ***89** timing of vesting. [\[FN159\]](#) Just as ERISA prohibits "bad-boy clauses" in private employment contracts, a statute governing public pension systems would prohibit the forfeiture of pension benefits for employee misconduct.

Public employee pensions were explicitly excluded from ERISA coverage because Congress lacked information about how ERISA requirements could potentially impact such plans. [\[FN160\]](#) However, ERISA provided for a special congressional study of public pension plans to consider the feasibility of extending ERISA-type protections to include them. In 1978, the Pension Task Force submitted its report to Congress and concluded that (1) the public pension should be characterized as a property right that is protected by the Fifth Amendment due process clause, (2) Congress has the authority to enact an ERISA-type statute to regulate public pensions, and the Tenth Amendment to the U.S. Constitution poses no barrier, and (3)

there is a compelling need for federal regulation of public pension plans because "the 'unclear legal status of the participants' rights' has become a 'distinguishing characteristic of governmental pension plans' ... [and] '[t]he absence of any external independent review has perpetuated a level of employer control and attendant potential for abuse unknown in the private sector.'" [\[FN161\]](#) One impetus for the enactment of ERISA was the need to protect employee pensions from private employers' dishonest cancellation of pensions, and it is commonly believed that public employers pose no similar dangers. However, the findings of the Pension Task Force revealed significant abuses by public employers as well. [\[FN162\]](#)

C. New Jersey's Approach to **Pension Forfeiture** Provides a Model for State Legislatures

If legislators remain committed to **pension forfeiture** as a sanction for official corruption, the position taken by the New Jersey Supreme Court in *Uricoli v. Board of Trustees, Police and Firemen's Retirement System* [\[FN163\]](#) provides a model that avoids some of the harshness and irrationality of most **pension forfeiture** systems. [\[FN164\]](#) The **pension forfeiture** scheme adopted by this court addresses many of the concerns raised in this Article.

*90 The *Uricoli* case involved a police officer who had served faithfully for over twenty-three years before he was found guilty of a single ticket-fixing incident for which he received no remuneration. *Uricoli* later filed a claim with his retirement system for accidental disability retirement for legitimate on-the-job injuries. The Board of Trustees of the retirement system denied his application, ruling that *Uricoli's* conviction for malfeasance prevented him from meeting the honorable service standard that is a prerequisite for receiving his pension. [\[FN165\]](#)

The *Uricoli* court considered the various approaches to **pension forfeiture** and concluded that pensions are a form of deferred compensation and not a gratuity. The court ruled that there was no basis for automatic total forfeiture upon a finding of public employee misconduct, [\[FN166\]](#) and supplied a list of factors for pension boards to consider on a case-by-case basis when deciding whether to uphold a total or partial forfeiture. [\[FN167\]](#) The factors identified by the court are as follows:

(1) the employee's length of service; (2) the basis for retirement, i.e., age, service, disability, etc.; (3) the extent to which the employee's pension has vested; (4) the duties of the particular employment; (5) the employee's public employment history and record; (6) the employee's other public employment and service; (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated; (8) the relationship between the misconduct and the employee's public duties; (9) the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like; (10) the availability and adequacy of other penal sanctions; and (11) other personal circumstances relating to the employee bearing upon the justness of forfeiture. [\[FN168\]](#)

The court also determined that "honorable service is an implicit requirement of every public pension statute, whether or not this conditional term appears in the particular statute." [\[FN169\]](#) The court held that *Uricoli* was entitled to disability pension benefits for that portion of his service prior to the date of his misconduct, but forfeited any rights to pension benefits that accrued after the misconduct. [\[FN170\]](#) The *Uricoli* decision is well-reasoned because it does not regard **pension forfeiture** as *91 the just and reasonable punishment most courts and commentators perceive it to be. Rather, the court provides illustrative factors for New Jersey pension boards and reviewing courts to apply on a case-by-case basis. Application of these factors would provide a pension board or reviewing court with discretion to implement partial forfeiture of pension benefits or no forfeiture at all when the wrongdoing is minor. [\[FN171\]](#) Applying these factors would strike a balance between the position that pension benefits are a form of deferred compensation and the position that public employees should not continue to be paid out of public funds when they have breached the public trust. [\[FN172\]](#) Application of these factors would also reduce the risk of arbitrary, uneven application of **pension forfeiture** statutes by pension boards and courts.

Moreover, the *Uricoli* approach also protects the innocent beneficiaries of the public employee's pension who rely on the pension as their primary source of income. In *Eyers v. State of New Jersey, Board of Trustees Public Employees' Retirement System*, [\[FN173\]](#) decided the same day as *Uricoli*, the New Jersey Supreme Court applied the eleven *Uricoli* factors to sustain a widow's right to continued receipt of her husband's pension based on her demonstrated reliance on these funds. Mr. *Eyers* had served faithfully as a plumbing inspector for over thirty-five years before he was convicted of accepting a bribe for concealing plumbing violations. The court ruled that although Mr. *Eyers* may have been subject to forfeiture of his pension, [\[FN174\]](#) on balance, the *Uricoli* factors weighed in his widow's favor. [\[FN175\]](#) The court seems to have reached a reasonable and humane conclusion in awarding Mrs. *Eyers* survivor benefits.

VI. CONCLUSION

Nothing we have said in this Article should be understood as suggesting that we do not think corruption is both morally and legally condemnable. Individuals who steal from or defraud their employers and the public may be incarcerated and fined commensurate with their wrongdoing. What we question is the rationality and fairness of using **pension forfeiture** as an additional sanction.

Pension forfeiture undoubtedly has symbolic importance, but the more appropriate way to send a message to the public that corruption will not be tolerated is through the penal code. **Pension forfeiture** is more problematic than legislators, *92 scholars and the public have recognized. The public pension is a form of deferred compensation, to which an employee gains vested rights. The rationales offered to justify the different protections afforded to private and public pensions are unpersuasive. **Pension forfeiture** bills introduced in the New Jersey state legislature adopt a balancing approach that would address many of the concerns raised in this Article, and other states should look to the New Jersey model for guidance.

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[FN1]. FRANK ANECHIARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* xi (1996). While several states and the federal government enacted **pension forfeiture** statutes before the Watergate scandal, **pension forfeiture** and many other sanctions became increasingly popular in the aftermath of that scandal.

[FN2]. Pension boards will generally not deny pension benefits on grounds of misconduct in the absence of clear legislative expression to that effect. See, e.g., *State ex rel. State Bd. of Pension Trustees v. Dineen*, 409 A.2d 1256, 1260 (Del. Ch. 1979) (holding employee eligible to receive pension because state statute contained no language regarding denial of benefits).

[FN3]. 5 U.S.C. § § 8312-22 (1994).

[FN4]. ERISA protects private pensions from forfeiture, even following a conviction of an offense involving a breach of trust. Public pensions are not covered by ERISA.

[FN5]. 493 U.S. 365 (1990).

[FN6]. "The courts which have considered the question whether 'bad boy' clauses were outlawed by ERISA have concluded that after the effective date of the Act, such clauses are invalid." Kevin D. Hart, Annotation, *Forfeiture of Pension Plan Benefits as Affected by Employee Retirement Income Security Act*, 57 A.L.R. FED. 661 (1996) (citing *Fremont v. McGraw, Edison, Co.*, 606 F.2d 752 (7th Cir. 1979)). See *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Vink v. SHV North American Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982); see also *Guidry*, 493 U.S. at 369 n.7. In addition to the anti-forfeiture, anti-alienation, and anti-assignment provisions of ERISA, other federal statutes protect pension benefits. For example, the Social Security Act, 42 U.S.C. § 407 (1994), the Railroad Retirement Act, 45 U.S.C. § 231 m(a) (1994), the Civil Service Retirement Act, 5 U.S.C. § 8346(a) (1994), and the Veterans' Benefits Act, 38 U.S.C. § 310(a) (1994), all prohibit the garnishment of pension benefits.

[FN7]. 5 U.S.C. § § 8312-8322 (1994).

[FN8]. See Florida, *Fla. Stat. § 112.3173* (1993); Georgia, *Ga. Code Ann. § 47-1-22* (1997); Illinois, 40 Ill. Comp. Stat. 5/3-147 (West 1997); Massachusetts, *Mass. Gen. Laws ch. 32, § 15(3)* (1997); Michigan, *Mich. Comp. Laws Ann. § 38.2701* (West 1997); Pennsylvania, 43 Pa. Cons. Stat. § 1311 (1991); Texas, *Tex. Gov't Code Ann. § 811.101* (West 1994); Washington, *Wash. Rev. Code § SCE 41.20.110* (1996); West Virginia, *W. Va. Code § 5-10A-1* (1994). Florida has enacted a self-executing constitutional amendment which provides for **pension forfeiture** following a conviction of a felony

involving a breach of public trust. See [Fla. Const. art. II, § 8\(d\)](#). **Pension forfeiture** is not set forth in these states' criminal codes, but rather in their public employee and/or ethics codes. However, the punishment clearly is meant to follow a criminal conviction and thus ought to be considered a criminal sanction. Some courts have held, perhaps to avoid double jeopardy issues, that **pension forfeiture** is not punishment in the criminal sense, but rather a collateral consequence of an employee's breach of the condition of honorable service. See, e.g., [LePrince v. Bd. of Trustees, Teachers' Pension and Annuity Fund](#), 631 A.2d 545, 549 (N.J. Super. Ct. App. Div. 1993).

Bills have been introduced in the following states: Hawaii, 1997 HI S.B. 82; Illinois, 1995 IL S.B. 194 and 1995 IL H.B. 601; New Jersey, 1996 NJ S.B. 117, 1996 N.J. S.B. 222, and 1996 NJ A.B. 123; New York, 1995 NY S.B. 4143 and 1995 NY A.B. 10421; Pennsylvania, 1995 PA S.B. 57 and 1995 PA S.B. 170; Rhode Island, 1993 RI H.B. 6968; Tennessee, 1995 TN H.B. 1161 and 1995 TN S.B. 1375 and 1995 TN S.B. 1474; Wyoming, 1996 WY H.J.R. 3.

There have also been developments in the opposite direction. Several legislatures have repealed their **pension forfeiture** statutes. For example, the Maine legislature repealed its **pension forfeiture** statute governing police officers. Title 23 repealed the provision that "[a]ny person convicted of a felony while receiving a pension under this section shall forfeit such pension." 23 Me. Rev. Stat. Ann. tit. 25, § 1593 (West 1988). In 1995, New Jersey repealed its statute mandating **pension forfeiture** where a person holding public office, position or employment refuses to testify on self-incrimination grounds. See N.J. Stat. Ann. § 2A: 81-17.1 (West 1994). Similarly, Congress repealed a 1956 federal statute that mandated **pension forfeiture** for Army deserters. [10 U.S.C. § 3637 \(1994\)](#) (repealing Act of Aug. 10, 1956, ch. 1041, 70A Stat. 28). Congress also passed a bill in 1994 protecting the benefits of all retired military officers who are convicted of violating the federal law prohibiting shredding of protected government documents. Helen Dewar, Senate Votes to Restore North's Retirement Pay, Wash. Post, Nov. 3, 1989, at A8.

[FN9]. See [Grimes v. Bd. of Trustees of Pub. Employees' Retirement Sys.](#), 8 N.J.A.R. 7 (1984); [Pell v. Bd. of Educ.](#), 313 N.E.2d 321, 327 (N.Y. 1974). The New York State Constitution provides that "membership in a state retirement system shall constitute a contractual relationship, the benefits of which cannot be impaired." [N.Y. Const. art. V, § 7](#). However, this constitutional amendment only protects an employee's right to pension benefits from impairment by the state legislature, where the legislative enactment occurs after the employee is hired. John J. Dwyer, Note, [FN10]. Where the Florida State Senate has initiated impeachment proceedings against a public officer, the Secretary of the Senate is required to notify the Commission on Ethics of the proceeding. Similarly, the employer of any member whose office or employment is terminated by reason of his admitted commission, aid, or abetment of a specified offense must forward notice thereof to the Commission. See [Fla. Stat. Ann. § 112.3173\(4\)](#) (West 1993).

[FN11]. [Fla. Stat. Ann. § 112.3173\(5\)\(a\)](#) (West 1993).

[FN12]. Id.

[FN13]. See, e.g., [Mount v. Trustees of Pub. Employees' Retirement Sys.](#), 335 A.2d 559, 565 (N.J. 1975) (upholding appellant's pension payments pending disposition of indictment).

[FN14]. [5 U.S.C. § 8312\(d\)\(1\) \(1994\)](#).

[FN15]. Id.

[FN16]. [5 U.S.C. § 8318\(a\) \(1994\)](#).

[FN17]. Several **pension forfeiture** statutes do not specify who is authorized to impose the sanction. See, e.g., Illinois, [40 ILL. COMP. STAT. 5/3-147](#) (West 1995); Massachusetts, [Mass. Gen. Laws ch. 32, § 15\(3\) \(1995\)](#); Pennsylvania, 43 Pa. Cons. Stat. Ann. § 1313 (West 1995). Cases interpreting these statutes have involved challenges to a local or state pension board's imposition of the **pension forfeiture** sanction. See, e.g., [Collatos v. Boston Retirement Bd.](#), 488 N.E.2d 401, 403 (Mass. 1986) (holding state forfeiture law inapplicable to former public employee convicted of violating federal law); [Apgar v. State Employees' Retirement Sys.](#), 655 A.2d 185, 189 (Pa. Commw. Ct. 1994) (upholding revocation of public employee's pension benefits as of date of entry of guilty plea).

[FN18]. See [State ex rel. Idlet v. Lockwood](#), 201 S.W.2d 514, 516 (Mo. App. 1947) (reasoning that pension board was acting in a quasi-judicial capacity and its discretion could not be controlled by mandamus). A pension applicant may appeal a pension board decision on the grounds that the decision was fraudulent or arbitrary.

[FN19]. [Del. Code Ann. tit. 29, § 5522\(a\) \(1995\)](#).

[FN20]. See, e.g., [Del. Code Ann. tit. 29, § 5523\(a\) \(1995\)](#) (stating that "[a] n employee who has five years of credited service ... shall have a vested right to a pension ...").

[FN21]. See, e.g., Florida, [Fla. Stat. Ann. § 112.3173\(2\)\(d\)](#) (West 1987) ("[p] ublic officer or employee means an officer or employee of any public body, political subdivision, or public instrumentality within the state"); Georgia, 35 [Ga. Code Ann. § 47-1-22 \(1993\)](#) (defining "public employee" as "elected and appointed officials and employees of the state or any branch ... or other agency of the state and elected and appointed officials and employees of any political subdivision ..."); Illinois, Ill. Comp. Stat., para. 7-219 (West 1987) (General Municipal), para. 3-147 (police officers), para. 6-221 (firefighters), para. 11-230 (laborers), para. 18-163 (state judges); Massachusetts, [Mass. Gen. Laws ch. 32, § 15\(4\) \(1995\)](#) ("[i]n no event shall any member after final conviction of a criminal offense ... be entitled to receive a retirement allowance..."); Pennsylvania, 43 Pa. Cons. Stat. Ann. § 1312 (West 1995) (stating "[a]ny person who is elected or appointed to any public office or employment including justices ... and members of the General Assembly or who is acting or who has acted in behalf of the Commonwealth ... or any agency thereof ..."); New York, 1995 N.Y.S.B. 4143 ("[m]ember shall mean a member of ... [any public retirement system] who joined such system on or after the effective date of this article."); 1996 NJ A.B. 117 (authorizing the "forfeiture of all or part of the pension" of any member).

[FN22]. [Fla. Stat. Ann. § 112.3173\(2\)\(c\)](#) (West 1987).

[FN23]. 43 PA. CONS. STAT. ANN. § 1312 (West 1995).

[FN24]. [5 U.S.C. § 8311 \(1994\)](#).

[FN25]. [38 U.S.C. § 6104 \(1994\)](#). The Secretary of Veteran Affairs makes determinations of guilt.

[FN26]. See, e.g., [Kerner v. State Employees' Retirement Sys., 382 N.E.2d 243, 246 \(Ill. 1978\)](#) (holding former governor who retired prior to criminal conviction subject to **pension forfeiture**).

[FN27]. [D.C. Code Ann. § 1-506 \(1992\)](#).

[FN28]. See, e.g., [Kerner, 382 N.E.2d at 245](#) (interpreting statutory language "convicted of any felony" to include all felonies, state and federal, so long as the offense is a felony relating to or arising out of or in connection with the employee's service as a state employee). Cf. [Shields v. Smith, 404 So.2d 1106 \(Fla. Dist. Ct. App. 1981\)](#) (holding that conspiracy convictions in federal court are not grounds for forfeiture of state retirement benefits).

[FN29]. See, e.g., 43 PA. CONS. STAT. ANN. § 1312 (West 1991).

[FN30]. [40 ILL. COMP. STAT. § 5/9-235](#) (West 1996).

[FN31]. 43 PA. CONS. STAT ANN. § 1312 (West 1991).

[FN32]. 43 PA. CONS. STAT. § 1312 defines "Crimes related to public office or public employment" with reference to specific provisions of 18 Pa. Cons. Stat., which deals with crimes and offenses.

[FN33]. [5 U.S.C. § 8312\(b\) \(1994\)](#). However, the statute makes an exception where the employee is convicted of an enumerated offense as a result of proper compliance with orders issued, in a confidential relationship, by an agency or other authority of the government of the United States or the government of the District of Columbia. In such circumstances, the right to receive an annuity or retired pay may not be denied. [5 U.S.C. § 8320 \(1994\)](#).

[FN34]. See S.B. 194, 89th Gen. Assem., Reg. Sess. (Ill. 1995) (providing that a person convicted of sexual assault, aggravated criminal sexual assault, aggravated criminal sexual abuse, or felony criminal sexual abuse against a victim under 18 years of age forfeits his benefits under the Pension Code). See also S.B. 57, 179th Leg., 1st Spec. Sess. (Pa. 1995) (mandating the forfeiture of pension benefits for convictions of certain sexual offenses committed against any person 18

years of age or younger).

[FN35]. Compare [Cullen v. Retirement Bd. of Policeman's Annuity](#), 649 N.E.2d 454, 457 (Ill. App. Ct. 1995) (holding that former police officer's conviction of first-degree murder was not grounds for **pension forfeiture** because the offense was unrelated to public employment) with [Pell v. Bd. of Educ. of Union](#), 313 N.E.2d 321, 330 (N.Y. 1974) (upholding pension board's denial of pension benefits to bus driver for misappropriating bus fares, i.e., "nickeling").

[FN36]. See 43 PA. CONS. STAT. § 1311 (1930) (binding "rank and file" employees as well as judges). See also [Apgar v. State Employees' Retirement Sys.](#), 655 A.2d 185, 188 (Pa. Commw. Ct. 1994) (holding that as an employee of Commonwealth, petitioner was bound by the Act).

[FN37]. See, e.g., [Corvelli v. Bd. of Trustees, Police and Firemen's Retirement Sys.](#), 617 A.2d 1189, 1193, 1196 (N.J. 1992) (holding that former police chief's action of assigning officer to daily foot patrol for two and a half years as punishment constituted "dishonorable service" justifying complete forfeiture of pension benefits).

[FN38]. See [Cal. Gov't Code § 9355.16](#) (West 1992 & Supp. 1997) (providing only for suspension of the member's pension benefits while such charge is pending and until final disposition of the charge).

[FN39]. [Tex. Rev. Civ. Stat. Ann. art. 6220](#) (West 1970). Although the statute's broad language might indicate otherwise, this **pension forfeiture** statute applies only to state and county employees, not private-sector employees.

[FN40]. See, e.g., [D.C. Code Ann. § 1-506](#) (1981).

[FN41]. [5 U.S.C. § 8314](#) (1994).

[FN42]. [Ga. Code Ann. § § 47-1-22, 47-1-22.1](#) (1993).

[FN43]. [Wash. Rev. Code § 41.20.110](#) (1990).

[FN44]. [452 N.E.2d 1023](#) (Ind. Ct. App. 1983).

[FN45]. [Ballurio v. Castellini](#), 102 A.2d 662 (N.J. Super. Ct. App. Div. 1954). Although the applicable statute in Ballurio contained no condition of "honorable service" for pension benefits, the court inferred one. *Id.* at 666.

[FN46]. See, e.g., [Procaccino v. State Dept. of Treasury, Bd. of Trustees, Pub. Employees' Retirement Sys.](#), 432 A.2d 1346, 1347 (N.J. 1981) (ruling that public employee who misappropriated funds from a source other than the public employer did not forfeit public service retirement benefits); [Masse v. Bd. of Trustees, Pub. Employees' Retirement Sys.](#), 432 A.2d 1339 (N.J. 1981) (holding that a public employee's crime that is unrelated to his government position does not defeat the honorable service requirement for public employees and does not deprive the employee of pension credits for service rendered efficiently).

[FN47]. [432 A.2d 1339](#) (N.J. 1981).

[FN48]. *Id.* at 1342.

[FN49]. See, e.g., [D.C. Code Ann. § 1-506\(c\)](#) (1992) (providing that the total employee contributions plus accrued interest must be refunded to the employee, less the amount of retirement benefits received by him prior to such forfeiture).

[FN50]. See [Fla. Stat. § 112.3173\(3\)](#) (1993).

[FN51]. [5 U.S.C. § 8313](#) (1994).

[FN52]. See, e.g., [Mo. Rev. Stat. § 86.523](#) (1994).

[FN53]. See, e.g., [Fla. Stat. ch. 112.3173\(5\)\(d\)](#) (1993).

[FN54]. See 43 PA. CONS. STAT. ANN. § 1313(d) (West 1991) ("The appropriate retirement board may retain a member's contributions and interest thereon for the purpose of paying any fine imposed upon the member of the fund, or for the repayment of any funds misappropriated by such member from the Commonwealth or any political subdivision.").

[FN55]. 43 PA. CONS. STAT. ANN. § 1314(c) (West 1991)

[FN56]. Id. § 1313(e).

[FN57]. [Mass. Gen. Laws ch. 32, § 15\(1\) \(1989\)](#).

[FN58]. Id. at [§ 15\(3\)](#).

[FN59]. Historically, criminal fines have been modest, typically far less than a private criminal defense attorney's fees.

[FN60]. [40 ILL. COMP. STAT. 5/3-147](#) (West 1995).

[FN61]. [Mass Gen. Laws ch. 32, § 15\(4\) \(1995\)](#).

[FN62]. 43 PA. CONS. STAT. § 1313 (1995).

[FN63]. [655 A.2d 185 \(Pa. 1994\)](#).

[FN64]. [38 U.S.C. § 6104 \(1994\)](#).

[FN65]. [5 U.S.C. § 8318 \(1994\)](#).

[FN66]. [Wash. Rev. Code § 41.20.110 \(1991\)](#).

[FN67]. Id.

[FN68]. S. 4143, 218th Gen. Assem., 1st Reg. Sess. (N.Y. 1995); A. 10421, 218th Gen. Assem., 1st Reg. Sess. (N.Y. 1995); A. 117, 207th Leg., 1st Ann. Sess. (N.J. 1996); S. 222, 207th Leg., 1st Ann. Sess. (N.J. 1996); A. 123, 207th Leg., 1st Ann. Sess. (N.J. 1996). The bills provide examples of mitigating factors that may be considered, but these factors are not exhaustive. New York's bill differs from New Jersey's and most **pension forfeiture** statutes because it authorizes the district attorney to commence a **pension forfeiture** action in the New York Supreme Court following a conviction. The New Jersey bill and most state statutes give pension boards and agencies the authority to order **pension forfeiture**. At the time of this writing, the New Jersey bills are pending in the legislature. The New York Senate bill has been amended and sent to committee. The New York Assembly bill is pending.

[FN69]. S. 117, 207th Leg., 1st Ann. Sess. (N.J. 1996).

[FN70]. S. 4143, 218th Gen. Assem., 1st Reg. Sess. (N.Y. 1995).

[FN71]. The New Jersey bill includes in its list of mitigating factors "other personal circumstances relating to the member which bear upon the justness of forfeiture." A. 117, 207th Leg., 1st Ann. Sess. (N.J. 1996).

[FN72]. Compare S. 4143, 218th Gen. Assem., 1st Reg. Sess. (N.Y. 1995) (affording elaborate legislative detail), with S. 117, 207th Leg., 1st Ann. Sess. (N.J. 1996) (providing minimal legislative detail).

[FN73]. [132 U.S. 464 \(1889\)](#).

[FN74]. Id. at 470.

[FN75]. See, e.g., Rubin G. Cohn, Public Employee Retirement Plans, U. ILL. L.F. 32, 35-36 (1968) (opining that the

analysis in Pennie is "logically and analytically disquieting").

[FN76]. Id.

[FN77]. Andrew C. Mackenzie, Note, [Spiller v. State: Determining the Nature of Public Employees' Rights to Their Pensions](#), 46 ME. L. REV. 355, 356 (1994).

[FN78]. See R.D. Hursh, Annotation, [Vested Rights of Pensioner to Pension](#), 52 A.L.R.2d 437 (1957), and later case supplements.

[FN79]. Dwyer, supra note 9, at 570-71.

[FN80]. See Note, [Public Employees' Pensions in Times of Fiscal Distress](#), 90 HARV. L. REV. 992, 993 n.7 (1977). See also 53 A.L.R.2d 437 (1957) and later case supplements; [Lickert v. Omaha](#), 12 N.W.2d 644, 649 (Neb. 1944) (finding that police officers had no vested right in their pensions until payment due); [Schaub v. Scottsbluff](#), 83 N.W.2d 775, 779 (Neb. 1957) (holding that right to pension does not arise except by statutory procedure); [Creps v. Bd. of Firemen's Relief and Retirement Fund](#), 456 S.W.2d 434, 437 (Tex. Civ. App. 1970) (firemen had no vested property right in their pension funds); [Dallas v. Trammell](#), 101 S.W.2d 1009, 1012 (Tex. 1937) (right of pensioner to receive monthly payments from his pension fund subordinate to right of legislature to abolish pension system). The federal courts also adhere to the gratuity concept. See, e.g., [Richardson v. Belcher](#), 404 U.S. 78, 80 (1971) (expectation of public benefits does not confer contractual right to receive expected amounts); [Fleming v. Nestor](#), 363 U.S. 603, 609 (1960) (social security benefits do not qualify as accrued property right); [Pennie v. Reiss](#), 132 U.S. 464, 471 (1889) (legislature is free to modify officer's pension terms because officer had no property rights to his pension).

[FN81]. 58 A. 111 (N.J. 1904).

[FN82]. Id.

[FN83]. WILLIAM C. GREENOUGH AND FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 163 (1976).

[FN84]. Id. at 32, 154.

[FN85]. Id. at 156.

[FN86]. Id. at 193.

[FN87]. Id. at 155.

[FN88]. Courts have been unclear in distinguishing between "functional vesting" of pension rights and "legal vesting." For example, in [Spiller v. State](#), No. CV 92-56 (Me. Super. Ct.), vacated, 627 A.2d 513 (Me. 1993), the superior court of Maine held that though pensioners' rights do not "functionally vest" (i.e., the employees cannot collect benefits) until the statutory requirement of ten years of service or age 60 is met, the contractual rights of employees to earn a pension according to the terms promised at employment "legally vest" at the start of employment.

[FN89]. See [Allen v. City of Long Beach](#), 287 P.2d 765 (1953) (holding that an employee has vested contractual rights before retirement but that reasonable modification is permissible for the purpose of keeping the system flexible and in accord with changing conditions).

[FN90]. See [Association of Pa. State College and Univ. Faculties v. State Sys. of Higher Educ.](#), 479 A.2d 962, 966 (Pa. 1984) (ordering state to refund all employee contributions in excess of the basic contribution rate since the retirement benefits were deferred compensation bestowing contractual rights on the employee); [Yeazell v. Copins](#), 402 P.2d 541, 544-45 (Ariz. 1965) (holding that under a compulsory participation plan, the employee has vested rights in the pension provided for in the original form of the state statute); [Burke v. Bd. of Trustees](#), 104 S.E.2d 225, 227 (Ga. 1958) (same).

[FN91]. See, e.g., [Betts v. Bd. of Admin. of Pub. Employees Retirement Sys.](#), 582 P.2d 614, 617 (Cal. 1978) (holding that

pension rights vest at the time public employee accepts public employment); [Leonard v. City of Seattle, 503 P.2d 741, 747 \(Wash. 1972\)](#) (same); [Yeazell, 402 P.2d at 546](#) (same). Other courts have held that pension rights vest at other stages of employment. See, e.g., [Dorsey v. State ex rel. Mulrine, 283 A.2d 834, 836 \(Del. 1971\)](#) (holding that pension rights vest at the time of retirement); [Board of Trustees of the Police Pension and Retirement Sys. v. Weed, 719 P.2d 1276, 1277 \(Okla. 1986\)](#) (holding that pension rights vest when employee has contributed to the pension fund for twenty years).

[FN92]. See, e.g., [Betts, 582 P.2d at 617](#) (holding that change of a vested pension right impairs contractual obligations and, therefore, that there are strict limitations on changes); [Dorsey, 283 A.2d at 836](#) (holding that an employee eligible for a pension has vested rights which may not be abrogated without express statutory authority of the pension law itself); [Weed, 719 P.2d at 1279](#) (holding that vested right to a pension benefit cannot be forfeited as a result of a felony conviction); [Leonard, 503 P.2d at 746](#) (holding that as an employee contributes to a pension fund, his rights vest and cannot be deprived by subsequent legislation); [Yeazell, 402 P.2d at 545](#) (holding that a contract cannot be unilaterally modified without the assent of the other party).

[FN93]. See, e.g., [Bellomini v. State Employees Retirement Bd., 445 A.2d 737, 741 \(Pa. 1982\)](#) (striking down as unconstitutional a provision in the state's **pension forfeiture** statute applicable to those employees whose pension rights had already vested at the time the act was passed).

[FN94]. See, e.g., [Jones v. Cheney, 489 S.W.2d 785, 789 \(Ark. 1973\)](#) (holding that employee rights in a pension become firmly vested upon fulfillment of service requirements, and cannot be altered by subsequent legislation); [Driggs v. Utah State Teachers' Retirement Bd., 142 P.2d 657, 664 \(Utah 1943\)](#) (same).

[FN95]. See, e.g., [Patterson v. City of Baton Rouge, 309 So.2d 306, 313 \(La. 1975\)](#) (affording employee no vested right to retirement benefits prior to eligibility for the same); [Herrick v. Lindley, 391 N.E.2d 729, 733 \(Ohio 1979\)](#) (holding that vesting statute prohibited a reduction in the rate of payment of a pension, but did not prohibit imposition of a tax on income received from the pension); [Baker v. Oklahoma Firefighters Pension and Retirement Sys., 718 P.2d 348, 350-51 \(Okla. 1986\)](#) (holding that rights in pensions neither vest nor accrue until the contract between state and beneficiary comes into existence). The provision allowing for modification of benefits prior to an employee's retirement age includes, but is not limited to, the **pension forfeiture** discussed in this paper, i.e., forfeiture following a conviction for an offense involving a breach of public trust.

[FN96]. See, e.g., [W. Va. CODE § 5-10A-1 \(1994\)](#) (stating that "the service rendered by any participating public officer or employee shall at all times be honorable. The Legislature further finds and declares that honorable service is a condition to receiving any pension, annuity, disability payment or any other benefit under a retirement plan.").

[FN97]. See, e.g., [Van Coppenolle v. Detroit, 21 N.W.2d 903, 904 \(Mich. 1946\)](#) (holding that the duty to perform faithfully is an implied condition of employment in public service).

[FN98]. [109 P.2d 962 \(Cal. 1941\)](#).

[FN99]. [Id. at 964](#).

[FN100]. [Id. at 963-64](#).

[FN101]. See Dwyer, *supra* note 9, at 573 (citing applicable New York and Illinois constitutional provisions).

[FN102]. [N.Y. Const. art. V, § 7](#).

[FN103]. See [Birnbaum v. New York State Teachers Retirement Sys., 152 N.E.2d 241, 245 \(N.Y. 1958\)](#) (barring adoption of adjusted mortality table that would reduce the amount of pension payments made to pensioners).

[FN104]. [Ill. Const. art. XIII, § 5](#).

[FN105]. See [Alaska Const. art. XII, § 7](#) (protecting only accrued benefits, not employees' right to earn pension benefits in the future); [Haw. Const. art. XVI, § 2](#) (same); [Mich. Const. art. IX, § 24](#) (same).

[FN106]. Pennsylvania courts have held that the retroactive application of a **pension forfeiture** statute is an unconstitutional impairment of contract. [Assoc. of Pa. State College and Univ. Faculties](#), 479 A.2d at 966; [Bellomini](#), 445 A.2d at 741.

[FN107]. 331 N.W.2d 740 (Minn. 1983). The doctrine of promissory estoppel is explained in the [Restatement \(Second\) of Contracts, § 90 \(1981\)](#) as "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee ... and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[FN108]. [Christensen](#), 331 N.W.2d at 751 (citing [Energy Reserves Group v. Kan. Power & Light](#), 459 U.S. 400, 413 (1983)).

[FN109]. 488 A.2d 803 (Conn. 1985).

[FN110]. *Id.*

[FN111]. *Id.* at 810.

[FN112]. *Id.*

[FN113]. See discussion, Part II.B, *infra*.

[FN114]. Fla. Const. art. II, § 8.

[FN115]. [Kerner v. State Employees Retirement Sys.](#), 382 N.E.2d 243, 246 (Ill. 1978).

[FN116]. In fact, many **pension forfeiture** statutes were enacted in the aftermath of a scandal involving serious malfeasance on the part of a high-ranking official.

[FN117]. 611 A.2d 1375 (R.I. 1992).

[FN118]. *Id.* at 1389.

[FN119]. The state Supreme Court found its authority to uphold such a forfeiture in its inherent authority to supervise the courts. Rhode Island has yet to adopt a **pension forfeiture** statute, but a proposal is pending. See H.R. 6968, Regular Sess. (R.I. 1993).

[FN120]. [Discipline Proceedings](#), 611 A.2d at 1389.

[FN121]. *Id.* at 1387. The court rejected an argument for partial forfeiture, stating that since honorable service was statutorily required, total forfeiture was warranted. *Id.* at 1383. The justification for forfeiture of pension benefits accrued during the years of faithful service is not obvious. The courts seem to construe the statutory language requiring that public service be honorable "at all times" as imposing a continuing condition of honorable service from the inception of employment.

[FN122]. See, e.g., [Kerner v. State Employees Retirement Sys. of Ill.](#), 382 N.E.2d 243, 246 (Ill. 1978) (stating that the obvious purpose of a **pension forfeiture** statute is to deter official malfeasance).

[FN123]. [Eyers v. New Jersey Bd. Of Trustees Pub. Employees Retirement Sys.](#), 449 A.2d 1261, 1264 (N.J. 1982).

[FN124]. [Kerner](#), 382 N.E.2d at 246.

[FN125]. See, e.g., [Moore v. Bd. of Trustees of the Sanitary Dist. Employees' and Trustees' Annuity and Benefit Fund](#), 510 N.E.2d 87, 91 (Ill. 1987) (stating that "[t]he legislature surely may take action which is directed toward deterring felonious conduct in public employment by affecting the rights of public employees who have been convicted of a work-related felony").

[FN126]. FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE 16 (1996).

[FN127]. Editorial, Pension Penalty: What Packwood Feared Most, CINN. ENQUIRER, Sept. 14, 1995, at A10.

[FN128]. Editorial, No Pension for Felons, TULSA TRIBUNE, Feb. 18, 1992, at 6A.

[FN129]. [5 U.S.C. § § 8311-8322 \(1994\)](#).

[FN130]. [Hiss v. Hampton, 338 F. Supp. 1141, 1150 \(D.D.C. 1972\)](#).

[FN131]. [United States v. Brennan, 798 F.2d 581 \(1986\)](#).

[FN132]. Joseph P. Fried, Judge Smith Convicted of Perjury in Queens Cable-TV Investigation, N.Y. TIMES, July 2, 1987, at A1.

[FN133]. Mike Fish, How the Ex-Mayor Spent His Final Days, THE POST-STANDARD,,, Dec. 26, 1996, at A1.

[FN134]. Convicted Worker Ruled Entitled to City Pension, N.Y.TIMES, Dec. 16, 1984, at 56. The New York Supreme Court restored Cassiliano's pension, citing a law that provides veterans with added pension protections. The court noted that city employees, dismissed on similar charges, would ordinarily not be entitled to pension benefits.

[FN135]. Jim Dwyer, Dirty Cop's Tax-Free Score, N.Y. NEWSDAY, Oct. 1, 1993, at B5.

[FN136]. For example, public employees and their unions presumably oppose **pension forfeiture** legislation.

[FN137]. Some courts have held that an employee has a right to accrued pension benefits, but the employee has no right to the employer's payment of those benefits in the future. This distinction is unpersuasive.

[FN138]. Cohn, *supra* note 76, at 40.

[FN139]. [Uricoli v. Bd. of Trustees, Police and Firemen's Retirement Sys., 449 A.2d 1267, 1276 \(N.J. 1982\)](#).

[FN140]. ROBERT TILOVE, PUBLIC EMPLOYEE PENSION FUNDS 4-5 (1976). However, Tilove suggests that the broad assumption that public employee salaries are lower, always and everywhere, than those of private sector employees performing comparable work might not be warranted. *Id.* at 29.

[FN141]. Richard A. Ippolito, A Study of the Regulatory Effect of the Employee Retirement Income Security Act, 31 J.L. & ECON. 85, 88 (1988).

[FN142]. TILOVE, *supra* note 140, at 74-75 See generally THOMAS P. BLEAKNEY, RETIREMENT SYSTEMS FOR PUBLIC EMPLOYEES, 1-9 (1972) (discussing the development of state and local plans); GREENOUGH & KING, *supra* note 83, at 121-124 (discussing the statistical makeup of public pension plans in general).

[FN143]. TILOVE, *supra* note 140, at 77.

[FN144]. *Id.* at 55.

[FN145]. *Id.* at 78.

[FN146]. For a discussion of the differences in protection given to public and private employee pension benefits under federal law, see Ridgeley A. Scott, [Misuse of Public Pension Assets: White Collar Crimes and Other Offenses, 26 IND. L. REV. 589 \(1993\)](#) (advocating adoption of a Public Employee Retirement Income Security Act ("PERISA") to regulate public pension plan investment).

[\[FN147\]. 493 U.S. 365 \(1990\).](#)

[\[FN148\].](#) The Court acknowledged that the circuit courts were in conflict with regard to this question. The Court cited [Ellis Nat'l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466, 471 \(2d Cir. 1986\)](#), in which the Second Circuit did not find an exception to section 206(d)(1) allowing a corporation to recover for losses suffered because of employee criminal misconduct. However, it also cited the Eleventh Circuit's opinion in [St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550, 552 \(11th Cir. 1985\)](#), which held that garnishment to satisfy liabilities arising from criminal misconduct was an exception to ERISA's non-alienability provision. [See also Guidry, 493 U.S. at 371, n.9; Crawford v. La Broucherie Bernard Ltd., 815 F.2d 117 \(D.C. Cir. 1987\)](#) (recognizing an exception to the anti-alienation provisions when a trustee defrauds a pension plan).

[\[FN149\]. Guidry, 493 U.S. at 369.](#)

[\[FN150\]. Id. at 376.](#)

[\[FN151\]. Id.](#)

[\[FN152\].](#) The Guidry decision has been questioned by the Third Circuit. See [Coar v. Kazimir, 990 F.2d 1413, 1420 \(3d Cir. 1993\)](#) (holding that section 409(a) of ERISA, which makes a pension plan fiduciary liable to plan for any losses incurred because of his misconduct, permitted a set-off of pension benefits to satisfy a plan's claim against fiduciary). The court in Coar distinguished Guidry by asserting that the Guidry Court did not allow a set-off because the fiduciary relationship between the pensioner and the plan was never established, but that such a fiduciary relationship existed in the Coar case. *Id.* at 1419. The Coar court asserted that the general intention of Congress under ERISA was to protect all pension beneficiaries, and that Congress could not have intended the anti-alienation provisions to dilute the potential relief available to all beneficiaries. The Guidry decision, of course, remains good law, and the question of protection from absolute **pension forfeiture** provided in section 203(a) of ERISA was never questioned in the Third Circuit's case.

[\[FN153\].](#) Richard A. Ippolito, A Study of the Regulatory Effect of the Employee Retirement Income Security Act, 31 J.L. & ECON. 85 (1988).

[\[FN154\].](#) Several courts have justified the different protections afforded to public and private pensions by reasoning that public pensions are premised in part upon the public trust; a breach of that trust leads to forfeiture of public pension. See, e.g., [West Va. Pub. Employees Retirement Sys. v. Dodd, 396 S.E.2d 725 \(W. Va. 1990\)](#) (noting that honorable service at all times by a public employee is a statutory and common law condition to receiving any public retirement plan benefits).

[\[FN155\]. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 \(1990\).](#) See supra notes 148-54 and accompanying text for a discussion of this case and its implications for the different protections given to private and public pensions.

[\[FN156\].](#) Compare 43 PA. CONS. STAT. ANN. § 1312(1)-(22) (1991) (listing those felonies for which a conviction leads to **pension forfeiture**), with [40 ILL. COMP. STAT. 5/3-147](#) (West 1996) (mandating **pension forfeiture** following any felony conviction relating to or arising out of or in connection with service as a police officer). Under the latter statute, a police officer's assault on his supervisor could possibly result in **pension forfeiture**. The harsh sanction of **pension forfeiture** should be limited, at the very least, to offenses involving serious willful breach of public trust.

[\[FN157\].](#) See, e.g., [Ga. Code Ann. § 47-1-22\(b\) \(1987\)](#) (requiring that "[i]f a public employee commits a public employment related crime ... and is convicted for ... such crime, such employee shall forfeit all rights and benefits under and membership in any public retirement system"); [40 Ill. Comp. Stat. 5/3-147](#) (West 1996) (stating that "[n]one of the benefits provided in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a police officer"); [Mass. Gen. Laws Ann. ch. 32, § 15\(3\) \(1995\)](#) (mandating that "[i]n no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system ... be entitled to receive a retirement allowance"); 43 Pa. Cons. Stat. Ann. § 1313(a) (1991) (directing that "no public official or public employee ... shall be entitled to receive any retirement ... payment of any kind ... if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.").

[\[FN158\].](#) See A.B. 117, 207th Leg., 1st Sess. (N.J. 1996) (proposing that "[t]he board of trustees of any State or locally-

administered pension fund or retirement system ... is authorized to order the forfeiture of all or part of the pension or retirement benefit of any member of the fund or system for misconduct occurring during the member's public service which renders the member's service or part thereof dishonorable"); S. 4143, 218th Leg., 1st Sess. (N.Y. 1995) (proposing that "[i]n the case of a member or retired member who is convicted of any designated felony offense ... the commission of which is related to the performance or failure to perform such member or retired member's official duties and responsibilities, an action may be commenced ... by the District Attorney having jurisdiction over the offense for the forfeiture of all or a portion of those rights and benefits").

[FN159]. See Deborah Kemp, [Public Pension Plans: The Need for Federal Regulation](#), 10 HAMLIN L. REV. 27 (1987) (arguing for the enactment of an ERISA-type statute for public pensions).

[FN160]. *Id.* at 43 (citing the PENSION TASK FORCE, SUBCOMM'N ON LABOR STANDARDS, HOUSE COMM'N ON EDUCATION AND LABOR, 94TH CONG., 2D SESS., INTERIM REPORT ON ACTIVITIES I 17 (Comm. Print 1976)) [hereinafter THE TASK FORCE].

[FN161]. Note, [Public Employees Pensions in Times of Fiscal Distress](#), 90 HARV. L. REV. 992, 992-93 (1977) (citing THE TASK FORCE report at 65). The Pension Task Force cited four alternative bases for federal jurisdiction: the commerce clause, the taxing power, the Fourteenth Amendment, and conditions attached to federal revenue sharing grants.

[FN162]. Kemp, *supra* note 159, at 51 (citing THE TASK FORCE report at 196).

[FN163]. [449 A.2d 1267 \(N.J. 1982\)](#).

[FN164]. **Pension forfeiture** bills introduced in the New Jersey state legislature would codify the eleven factors set forth by the Uricoli court. See A.B. 117, 207th Leg., 1st Sess. (N.J. 1996), A.B. 123, 207th Leg., 1st Sess. (N.J. 1996).

[FN165]. [Uricoli](#), 449 A.2d at 1269.

[FN166]. *Id.* at 1275 (stating that "[t]he rule that any public employee misconduct, though related to the performance of public duties, must result automatically in total forfeiture of all pension benefits, regardless of its gravity or the degree of personal culpability in comparison to an otherwise honorable public career is discordant with the times").

[FN167]. *Id.* at 1275-76.

[FN168]. *Id.* We have reservations about factor 11's catch-all provision and whether a pension board or reviewing court faced with a case which does not justify forfeiture would protect an employee's pension benefits based on substantial justice grounds.

[FN169]. *Id.* at 1269. The honorable service requirement adopted by this court is more acceptable than that adopted in *In re Almeida* because the Uricoli court's test would not make a breach of honorable service grounds for total forfeiture. See *supra* notes 117-21 and accompanying text for a discussion of *In re Almeida*.

[FN170]. *Id.* at 1276.

[FN171]. In applying the eleven factors, the pension board may decide that a total forfeiture is warranted. See, e.g., *Scarafile v. Bd. of Trustees*, 9 N.J.A.R. 120 (1986) (ruling that a patrolman convicted of several job-related offenses was subject to forfeiture of his pension, even though the majority of factors weighed in his favor, because the gravity of the negative factors outweighed the favorable ones).

[FN172]. For a fair application of the Uricoli factors, see *Cavaliere v. Bd. of Trustees of Pub. Employees' Retirement Sys.*, 93 N.J.A.R.2d 178 (1993) (concluding that pension credit was properly disallowed for the period of Cavaliere's dishonorable employment with the county).

[FN173]. [449 A.2d 1261 \(N.J. 1982\)](#).

[\[FN174\]. Id. at 1263.](#)

[\[FN175\]. Id. at 1264.](#)

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