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LAND SHARK AT THE DOOR? WHY AND HOW STATES SHOULD REGULATE LANDMEN

*Ann M. Eisenberg**

INTRODUCTION

In 2015, an Iowa farmer with land located in the proposed path of a controversial pipeline claimed that the agent of a company involved in construction “offered to buy [the] farmer the services of two teenage sex workers in exchange for access to his land to build the . . . pipeline.”¹ The scandal became known as the “Prostitutes for Pipeline” controversy,² and added another wrinkle to the dialogue surrounding the divisive Dakota Access project, which is intended to transport crude oil from North Dakota to Illinois over a 343-mile route.³ The Iowa Division of Criminal Investigation looked into the claims, and no criminal charges were ultimately filed.⁴

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1. Steve Horn & David Goodner, *Revealed: Energy Transfer Partners’ ‘Pipeline-for-Prostitute’ Landman*, HUFFPOST GREEN (May 28, 2015, 10:17 PM), http://www.huffingtonpost.com/steve-horn/revealed-energy-transfer_b_7465670.html [<https://perma.cc/KB5Z-73R7>].

2. Erin Jordan, *No Criminal Charges to be Filed in Prostitutes-for-Pipeline Allegations*, THE GAZETTE (Oct. 26, 2015, 2:23 PM), <http://www.thegazette.com/subject/news/public-safety/no-criminal-charges-to-be-filed-in-prostitutes-for-pipeline-allegations-20151026> [<https://perma.cc/Z2J7-K449>].

3. Erin Jordan, *Iowa DCI Investigating Prostitutes-for-Pipeline Claim*, THE GAZETTE (May 19, 2015, 1:39 PM),

This was not the first time a land agent seeking easement or mineral rights has been the subject of controversy. The flurry of land rights transactions between land agents and private landowners that accompanied the rise of the use of high-volume hydraulic fracturing as a method to extract oil and gas from shale deposits correlated with a portion of landowners complaining of exploitation and tortious conduct.⁵ Several states, including West Virginia, Texas, Colorado, and Ohio, unsuccessfully attempted to respond to concerns about these professionals through legislation, while in 2015, Maryland and North Carolina implemented requirements that land agents be registered with the state before seeking land rights from landowners.⁶

But the professionals who acquire energy-related land rights, who are primarily known as “landmen,”⁷ have a longstanding role in

<http://www.thegazette.com/subject/news/iowa-dci-investigating-prostitutes-for-pipeline-claim-20150519> [<https://perma.cc/QY78-ETHS>].

4. *Id.*; see *supra* note 2.

5. Horn, *Revealed: Energy Transfer Partners’ ‘Pipeline-for-Prostitute’ Landman*, *supra* note 1; see also Daniel Richel, *Fracking Your Backyard: All Local Residents Deserve the Same Protection When It Comes to Their Property Rights*, SWITCHBOARD: NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (July 29, 2013), http://switchboard.nrdc.org/blogs/draichel/fracking_your_backyard_all_loc.html [<https://perma.cc/WV6F-6YTT>]; Blake Watson, *Hydraulic Fracturing Tort Litigation Summary*, (Jan. 19, 2016), https://www.udayton.edu/directory/law/documents/watson/blake_watson_hydraulic_fracturing_primer.pdf [<https://perma.cc/TA89-4U53>] (discussing, *inter alia*, claims of negligent misrepresentation and fraudulent inducement).

6. Kevin L. Colosimo, *Landman at the Door*, Kentucky Mineral Law Conference, at 7 (2014).

7. The use of the term “landman” may raise questions about gender inclusiveness and technical differentiations among different types of landmen. As to the gender concern, calling the profession “landmen” is the common practice in the industry, embodied in the Standards of Practice and Bylaws of the American Association of Professional Landmen. AMERICAN ASSOCIATION OF PROFESSIONAL LANDMEN, STANDARDS OF PRACTICE, <http://www.landman.org/docs/default-source/forms/standards-of-practice-nbsp-.pdf?sfvrsn=0> [<https://perma.cc/CEQ7-8X93>] (“the masculine gender used herein shall refer to both men and women landmen”); see also AMERICAN ASSOCIATION OF PROFESSIONAL LANDMEN, BYLAWS, <http://www.landman.org/docs/default-source/forms/aapl-bylaws-approved-6-27-14.pdf?sfvrsn=0> [<https://perma.cc/L8DA-DNC9>] (“the masculine gender shall refer to both men and women”).

energy development, and have acted as intermediaries between energy companies and property owners for over a century.⁸ Currently, more than 21,000 landmen—and likely many more⁹—work in at least two dozen states,¹⁰ negotiating high-stakes transactions with often serious financial and physical ramifications. Throughout stages of natural resource and infrastructure development, landmen research land titles, secure mineral leases and other rights to land, oversee compliance with lease terms and regulations, and serve as the point of contact between companies and landowners.¹¹

This Article addresses the traditional duties of landmen, although they may also relate to the duties of other actors. The difference between labels such as “land manager” and “land agent” is not central to this discussion, may not be defined by any particular authority, and likely differs across state lines. This discussion also presumes that landmen constitute a “profession.” Although there is no definitive formula of “profession,” certain criteria are recognized in the determination of whether an occupation rises to the level of one, including “the existence of a body of esoteric knowledge on which the practitioner relies” and “individualized client contact which comes from a private practice,” as well as the tendency to serve in an advisory capacity. Criton A. Constantinides, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1332 (1991).

8. See generally Harry M. Caudill, NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA (1963).

9. See, e.g., Brian Grow, Joshua Schneyer, & Anna Driver, *Energy Firm Uses ‘Land Grabs’ to Secure Fracking Rights from Reluctant Landowners*, NBC NEWS (Oct. 2, 2012, 8:36 AM), http://investigations.nbcnews.com/_news/2012/10/02/14183177-energy-firm-uses-land-grabs-to-secure-fracking-rights-from-reluctant-landowners [<https://perma.cc/9DVK-YYME>] (Chesapeake alone employed more than 4,000 landmen at one point).

10. See, e.g., DENVER ASSOCIATION OF PETROLEUM LANDMEN, DAPLDENVER.ORG; LOS ANGELES ASSOCIATION OF PROFESSIONAL LANDMEN, WWW.LAAPL.COM; ARK-LA-TEX ASSOCIATION OF PROFESSIONAL LANDMEN, WWW.ALTAAPL.ORG; MICHIGAN ASSOCIATION OF PROFESSIONAL LANDMEN, MICHIGANLANDMAN.COM.

11. AMERICAN ASSOCIATION OF PROFESSIONAL LANDMEN, *Frequently Asked Questions*, <http://www.americaslandman.com/faq> [<https://perma.cc/EJM2-D3JD>]; see also Rob Davis, *A Landman’s Work Is the Foundation for Accurately Determining Mineral Ownership Under Rights-of-Way: So, How Should A Landman Search for Roadway Title?*, 18 TEX. WESLEYAN L. REV. 39, 42 (2011); Lee Grossman, *Oil and Gas Law: When It Comes to Restrictive Employment Covenants, Whose Idea of*

Despite the power landmen wield, they are generally unregulated.¹² In West Virginia, for instance, “[l]andmen are not licensed or subject to the jurisdiction of any board or required to have any credentials.”¹³ According to a report on landmen issued by the North Carolina Department of Environment and Natural Resources, “none of the 34 states currently active in oil and gas production activities require formal landman registration.”¹⁴ Landmen’s avoidance of a licensing requirement in most states for so many years has even shocked some landmen,¹⁵ although many in the oil and gas industry insist that self-governance is adequate.¹⁶

This lack of oversight may not be unusual standing alone, but it becomes more vexing in light of several broader issues. First, as this Article explores in more depth below, this issue is similar to consumer protection and predatory negotiation issues that the law typically sees fit to address through regulation. It is notable that

“Reasonable” Is Correct, *the Oil Company’s or the Landman’s?*, 81 N.D. L. REV. 555, 557 (2005).

12. Cf. Ian Urbina & Jo Craven McGinty, *Learning Too Late of the Perils in Gas Well Leases*, N.Y. TIMES (Dec. 1, 2011), <http://www.nytimes.com/2011/12/02/us/drilling-down-fighting-over-oil-and-gas-well-leases.html?pagewanted=3&r=3&hp> [<https://perma.cc/ZNA2-C6SA>] (“With a gas lease, you’re permitting industrial activity in your backyard, and you’re starting a relationship that will affect the quality of living for you and your grandchildren for decades”); Grossman, *supra* note 11, at 557 (“The landman must . . . manage thousands of acres of previously leased land for each well drilled”).

13. *Committee on Unlawful Practice of Law Advisory Opinion 2007-01*, W. Va. Law., Nov./Dec. 2007, at 80, 81.

14. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, REPORT ON LANDMEN, 4 (2015) (hereinafter “North Carolina Report”).

15. Anya Litvak, *Licensing landmen—inevitable?*, PITTSBURGH BUS. TIMES (Jan. 22, 2013), <http://www.bizjournals.com/pittsburgh/blog/energy/2013/01/licensing-landmen—inevitable.html? page=all>; see also John McFarland, *Dealing with Landmen*, OIL AND GAS LAWYER BLOG (Dec. 7, 2011), <http://www.oilandgaslawyerblog.com/2011/12/dealing-with-landmen.html> [<https://perma.cc/BE33-RYYH>] (“Landmen have resisted efforts at mandatory licensing of the profession, so there is no requirement that they have any particular skills or education. Anyone can call him or herself a ‘landman’ and jump right in”).

16. *E.g.*, Speakman, *Ohio bill would require registration of drilling landmen*, *infra* note 127.

landmen have a reputation for ethically dubious behavior, which appears to be substantiated with common and consistent stories of abusive conduct with landowners.¹⁷ This is particularly concerning because residents of rural areas experience higher rates of poverty than urban areas and have more limited access to resources, including lawyers.¹⁸ If energy-related development is not managed ethically or competently,¹⁹ rural residents stand to lose a precious commodity in their land²⁰ and are more likely to have limited options for redress.

Further, when landmen secure land rights from landowners, the landowners frequently retain the bulk of their land rights and continue to occupy their land. This means that landmen may expose people to risky industrial activity, with little guidance as to the representations that should be made to those people. The potential aggregate impacts and implications for the development of safe energy infrastructure are far-reaching: an estimated 500,000 pipelines will be built in the next two decades in the United States,²¹ and certain major extraction developments, such as Utica shale gas, are ongoing. Finally, historically, landmen have been able to facilitate mass land dispossession, arguably catalyzing the socioeconomic devastation of entire swaths of the country.²² In short, landmen's

17. Heidi Gorovitz Robertson, *The landmen cometh, but do you really know who they are?*, CRAIN'S CLEVELAND BUS. (June 14, 2013), <http://www.crainscleveland.com/article/20130614/BLOGS05/130619864/the-landmen-cometh-but-do-you-really-know-who-they-are> [<https://perma.cc/3JVV-7BMC>] (“There has been a fair amount of legitimate hand-wringing in Ohio over the business practices of some landmen operating in the state on behalf of some drilling companies”).

18. Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin*, UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES 483, 483 (2014).

19. Cf. McFarland, *Dealing with Landmen*, *supra* note 15 (suggesting that landmen working in “new areas” for natural resource extraction such as the Marcellus, Utica, and Antrim shale plays may have little experience).

20. See, e.g., Jon Christensen, *Land Rich, but Cash Poor, in the West*, N.Y. TIMES (Nov. 23, 1997), <http://www.nytimes.com/1997/11/23/business/land-rich-but-cash-poor-in-the-west.html?pagewanted=all> [<https://perma.cc/R9QX-7P5Z>].

21. Stephanie Joyce, *Landowners Connect to Negotiate with Pipeline Companies*, WYOMING PUBLIC MEDIA STATEWIDE NETWORK (Aug. 22, 2014), <http://wyomingpublicmedia.org/post/landowners-connect-negotiate-pipeline-companies> [<https://perma.cc/7T5Y-FJYJ>].

22. See, e.g., WEST VIRGINIA CENTER ON BUDGET & POLICY, *Who Owns West Virginia?*, 5-7 (Dec. 2013), <http://wvpolicy.org/wp->

activities affect far more than individual landowners sitting across the table; this issue is relevant, and merits discussion.

Landmen's reputation goes beyond the stereotype of a used car salesman or a slick out-of-towner asking a farmer to sign on the dotted line.²³ Rather, they have gained notoriety for "unscrupulousness,"²⁴ although little actual data has been gathered about them. Organizations focused on consumer protection, such as

content/uploads/2013/12/land-study-paper-final3.pdf
 [https://perma.cc/74MZ-PPRY] ("During West Virginia's transformation from an agrarian economy to an industrial state beginning in the 1880's, agents for out-of-state land, railroad and coal interests purchased acres of mineral and timber rights, leaving residents in possession of only the surface rights to the land"); *West Virginia: The Story of a State that Got Bought*, APPALACHIAN MAGAZINE, <http://appalachianmagazine.com/2014/03/06/west-virginia-the-story-of-a-state-that-got-bought/>
 [https://perma.cc/T6TM-FAUE] (quoting man recounting how is illiterate grandfather "was tricked into giving up 1,666 acres of the family's land for a single shotgun"). See *infra* for further discussion of landmen as contributors to the ongoing economic struggles of Appalachia.

23. Colby Hamilton, *The Landmen Cometh: The Frontlines of Fracking get Personal as Owners Face Aggressive Pitches for Land*, WNYC (Aug. 15, 2011), <http://www.wnyc.org/story/194971-the-landmen-cometh/> [https://perma.cc/U8WR-A9MV]. Landmen's recent appearance in popular culture illustrates this trope: in the 2012 feature film, "Promised Land," the protagonist, Steve Butler, played by Matt Damon, is a landman. The film exemplifies typical elements of landmen responsibilities and their mixed reputation: Butler and his co-landman (a woman) arrive in a small Marcellus shale town seeking to secure leases with drilling rights from landowners, go door to door attempting to persuade local residents as to why drilling will benefit them and their community financially, explain the terms of the company's offers, make their pitch to local residents at town hall meetings, and organize public events in order to garner local support for the company. PROMISED LAND (PARTICIPANT MEDIA & IMAGE NATION 2012). Although the film was criticized by supporters and opponents of shale gas development, it also provides a straightforward illustration of landmen's day-to-day jobs, as well as the influence landmen could potentially exert over landowners and communities. See Marianne Lavelle, *How Accurate Is the 'Promised Land' Portrayal of the Shale Gas Boom?*, NATIONAL GEOGRAPHIC (Dec. 28, 2012), <http://energyblog.nationalgeographic.com/2012/12/28/how-accurate-is-the-promised-land-portrayal-of-the-shale-gas-boom/comment-page-1/> ("The movie . . . fail[s] to please either the industry or its foes").

24. Litvak, *supra* note 15.

the New York State Attorney General and certain non-profits,²⁵ warn would-be signers of mineral leases that landmen may “us[e] high pressure sales tactics to get landowners to sign a lease . . . includ[ing] pitting neighbor against neighbor, or using arguments or tactics that may not be accurate,” such as telling landowners that lease terms are non-negotiable, promising inaccurate amounts of monthly royalties, and threatening that “[i]f you don’t sign, we’ll take the gas without paying you.”²⁶ Some people refer to landmen as “lease-hounds,”²⁷ and have described them as “moving through neighborhoods with military precision.”²⁸ While many landmen are, of course, decent people who conduct themselves ethically, the unethical landman can start to resemble a sort of loan shark.²⁹

25. See, e.g., OIL & GAS ACCOUNTABILITY PROJECT, *Oil and Gas at Your Door? A Landowner’s Guide to Oil and Gas Development* (July 2005), <https://www.earthworksaction.org/files/publications/LOGuide2005book.pdf> [<https://perma.cc/R2T9-SFT9>]; THE CENTER FOR COALFIELD JUSTICE, *What to Know & Do When a Landman Comes*, <http://coalfieldjustice.org/wp-content/uploads/Landmen-Guide-2015.pdf> [<https://perma.cc/6Z2R-KWW4>]; LANDMEN REPORT CARD, *Help: There is a landman at my door*, <http://www.landmanreportcard.com/lrc/info/knocking> [<https://perma.cc/XXP8-DNTC>].

26. *Oil & Gas Leases: Landowners’ Rights*, NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, http://www.ag.ny.gov/sites/default/files/pdfs/publications/gas_oil_brochure_2011.pdf [<https://perma.cc/57H3-F5ZX>].

27. John C. Heymann, *Ten Things Landmen Do to Irritate Their Lawyers*, 68 TEX. BUS. J. 842, 847 (2005); Grossman, *supra* note 11, at 584 at n.4 (citation omitted).

28. *They’re getting to know the drill: Homeowners wooed by oil companies hoping to tap into mineral rights*, TMC NEWS (Mar. 27, 2007), <http://www.tmcnet.com/submit/2007/03/27/2446224.htm> [<https://perma.cc/L8YM-LPSJ>].

29. See, e.g., Natasha Khan, *Marcellus Life: One Greene County Man’s Encounter With a Landman* (Oct. 8, 2014), <http://publicsource.org/investigations/marcellus-life-one-greene-county-man-s-encounter-with-landman#.ViloyssUwqY> [<https://perma.cc/LK6X-G285>]; Horn, *Revealed: Energy Transfer Partners’ ‘Pipeline-for-Prostitute’ Landman*, *supra* note 1; mscoville, *Report of Bonnie Foster*, LANDMAN REPORT CARD (Feb. 2, 2009), <http://www.landmanreportcard.com/lrc/review/21> [<https://perma.cc/X674-YCH8>]; *Oil Lease Rights for Bottineau County*, MINERAL RIGHTS FORUM (Aug. 24, 2010), <http://www.mineralrightsforum.com/forum/topics/oil-lease-rates-for-bottineau> [<https://perma.cc/3N33-UTTF>]. Also see

This Article examines the landman profession to assess whether landmen should be regulated, and to consider what an appropriate regulatory approach to landmen could entail. Part I.A provides background on the history of landmen and the typical role of a modern landman in the characteristic activity of securing mineral leases. Part I.B analyzes common ethical issues that arise in landowner-landman transactions, with a focus on misrepresentations and high-pressure sales tactics. Part I.C argues that these issues arise from the unequal bargaining power between landmen and rural landowners, and Part I.D looks at broader policy concerns.

In Part II, the Article reviews existing frameworks governing landmen's conduct, as well as unsuccessful efforts in Ohio and West Virginia to implement registration requirements. Part III reviews regulation of other sectors with professional activities comparable to landmen's, assesses how regulatory efforts in those contexts have approached comparable ethical concerns, and argues that significant parallels exist across all of the professions. Part III connects the regulatory approaches to those professions with broader principles of how and when the law tends to intervene into bargaining and negotiation processes through regulation. Part IV argues that the frameworks and principles discussed demonstrate that landmen would be a consistent and proper subject of stricter regulation, and proposes elements of those frameworks that would be most appropriate for oversight of landmen.³⁰

discussion of interviews The New York Times conducted with landowners about their experiences with landmen, *infra*. A further area of research could be to review oil and gas litigation and assess the frequency with which landmen's conduct is at issue and/or proven in contract, tort, and professional ethics claims.

30. This Article is not aimed at vilifying landmen. Like any profession, landmen include individuals who value ethics and strive to be honest and fair, as well as individuals whose conduct may be exploitative. *See* McFarland, *Dealing with Landmen*, *supra* note 15 (discussing how most landmen oil and gas attorney has worked with "are professional, avoid pressure tactics, are not misleading, and value their reputation for fair dealing and veracity," but that "[a]s with any profession . . . there are exceptions."). Many industry actors promote discussion of landmen ethics and encourage industry professionals to hold themselves to the highest standards. *See, e.g.*, Rob Shultz, *Ethics, Professionalism, and the Landman*, THE MAGAZINE OF THE CANADIAN ASSOCIATION OF PETROLEUM LANDMEN (2011); Anthony C. Marino, *Presentation, Ethics:*

LANDMEN: BACKGROUND AND CONCERNS

LANDMEN, FROM 1800S TIMBER TO TODAY

Little documentation exists as to any formal birth of the landman profession. But for centuries, land agents and speculators have played a notable role in the development of land ownership in the United States. Landmen operating in Appalachia in the nineteenth century, many of whom purchased large amounts of coal and other rights on behalf of companies, were not dissimilar from modern landmen.

Harry Caudill's 1962 expository work, *Night Comes to the Cumberlands*, recounted what was then called a "pathetic and disturbing story of . . . forgotten backcountry people – a tragic tale of the abuse and mismanagement of a resource heritage, and the human erosion that is always the concomitant of shortsighted exploitation."³¹ The book aimed "to trace the social, economic and political forces which produced the vast 'depressed area' of eastern Kentucky."³² Recounting mid-nineteenth century purchases of land by timber speculators, Caudill described what appears to be one early iteration of landmen:

[C]ompanies began to operate through county-seat merchants and courthouse officials whom they took into their confidence and employed to buy timber tracts on a commission basis. These men spoke the language of the mountaineer and were more likely to be believed when they assured him that his trees were of little value and that he and his descendants might never again have an opportunity to trade them for cash. Too, they could appear to buy the trees for themselves without disclosing their agency. Since the mountaineer

The Oil & Gas Industry at the Movies, PLANO 2013 Executive Night Seminar (Apr. 11, 2013), <http://www.planoweb.org/media/11967/ethics.smr.tony.pdf>

[<https://perma.cc/S6CV-BF5H>]. Further, the instant inquiry focuses on worst-case scenarios or situations that were extreme enough to garner attention, and the commonplaceness of such scenarios is unknown.

31. Caudill, *NIGHT COMES TO THE CUMBERLANDS*, *supra* note 8, at Foreword

32. *Id.* at x. Caudill noted that what he would "say about the Kentucky coal miner applie[d], with local modifications, to the entire coal-producing area of the Southern highlands." *Id.* at xii.

had no newspapers or other sources of information except rumor, it was not a difficult task to convince him that his timber was practically worthless and that the merchant or politician was doing him a favor in offering to buy it all.³³

In part due to collaboration with locals who could gain other locals' trust, "[a]t an ever-rising tempo this valuable portion of the mountaineer's legacy was transferred to men who lived far away. The price was rarely little more than nominal but so naïve was the seller that in most cases he congratulated himself for having driven a sharp bargain."³⁴

Turning to coal speculation in Appalachia, Caudill described a later iteration of an eastern landman:

The Eastern and Northern capitalists selected for this mission men of great guile and charm. They were courteous, pleasant and wonderful storytellers. Their goal was to buy the minerals on a grand scale as cheaply as possible and on terms so favorable to the purchasers as to grant them every desirable exploitive privilege, while simultaneously leaving to the mountaineer an illusion of ownership and the continuing responsibility for practically all the taxes which might be thereafter levied against the land.³⁵

To many Appalachians, Caudill continued:

the affable mineral buyer was a Godsend. With his stock of stories and friendly willingness to 'set down and rest and talk a spell,' he brought a pleasant interlude in the tedium of a dull and ungracious life. . . . With every convincing appearance of complete sincerity the coal buyer would spend hours admiring the mountaineer's horse and gazing over a worm-rail fence in rapt approbation of his razorback hogs while compliments were dropped on every phase of his hosts accomplishments. . . . After such a visit he and 'the man of the house' would get down to business and before long the deed or

33. *Id.* at 63.

34. *Id.* Timber landmen in Appalachia also played a role in transferring much of the highlands themselves to these outside speculators, to the detriment of local residents. "[M]uch of the plateau came to be blanketed by conflicting and overlapping land titles. . . . [T]he companies were to 'reach the ears of the Courts' and win a long series of law suits which eventually stripped away from the highlander much of the land which had supported his rugged independence for so long." *Id.* at 65.

35. *Id.* at 72.

option was signed with the uncertain signatures of the mountaineer and his wife, or, more probably, with their duly witnessed marks.

In addition to describing early landmen's reputation for charm and persuasiveness, Caudill noted the profound asymmetry in bargaining power between those landmen and early sellers of mineral rights, and the landmen's role in the physical and financial exploitation of the region as a whole:

When the highland couple sat down at the kitchen table to sign the deed their guest had brought to them they were at an astounding disadvantage. On one side of the rude table sat an astute trader, more often than not a graduate of a fine college He was thoroughly aware of the implications of the transaction and of the immense wealth which he was in the process of acquiring. Across the table on a puncheon bench sat a man and woman out of a different age. . . . Hardly more than 25 per cent of such mineral deeds were signed by grantors who could so much as scrawl their names. [T]he sellers relied upon the agent for an explanation of [the instrument's] contents – contents which were to prove deadly to the welfare of generations of the mountaineer's descendants. . . . The agents assured [the mountaineer] that the coal would not be mined for many years and then only under circumstances harmless to him and to his children. . . . [The mountaineer's] minerals were virtually given away.³⁶

Today, the majority of landmen work for oil and gas companies, rather than coal companies.³⁷ One modern Pennsylvania-based oil

36. *Id.* at 73-75. See also Evan Barret Smith, *Implementing Environmental Justice in Appalachia: The Social and Cultural Context of Mountaintop Removal Mining As Seen Through the Lenses of Law and Documentaries*, 4 WM. & MARY POL'Y REV. 170, 211 at n.75 (2012) (describing nineteenth-century landmen in Appalachia as unscrupulous; "local land agents retained by absentee timber and coal corporations used the complications of imperfect land titles, partial truths, or outright deceit to acquire title to land and mineral rights from mountain farmers") (quoting Benita J. Howell, *Appalachian Culture and Environmental Planning: Expanding the Role of the Cultural Sciences*, in CULTURE, ENVIRONMENT, AND CONSERVATION IN THE APPALACHIAN SOUTH, 5 (Benita J. Howell, ed. 2002)).

37. Forrest F. Aven, Jr., *AAPL Landman Compensation Study*, AAPL (2012), http://www.landman.org/docs/marketing-ads/compsurvey_janfeb12.pdf?hc_location=ufi [https://perma.cc/XBJ7-SMS8]. The AAPL describes what it concluded are the typical

and gas attorney who represents landowners strikes a similar tone as Caudill in his description of landmen today. He warns landowners to be skeptical, and advises them that “kindness, loyalty and trust” are “friends of the landman” but “enemies of the landowner.”³⁸ He elaborates:

The gas companies and their Landmen have extensive experience dealing with rural Landowners. The company Landman understands how Landowner’s admirable character traits may be used to the company’s advantage during the negotiation process. Traits like kindness, loyalty and trust are manipulated in the negotiation process to secure the most favorable agreement for the gas or pipeline company. Far too often Landowners tell me that the Landman is ‘a really nice guy’ and that they have reservations in asking for certain terms or higher compensation as they do not want to rock the boat. I have even heard of occasions when the Landman told the Landowner that he or she would “lose their job” if they could not get the Landowner to sign Oil and Gas Lease, Pipeline Agreement, or other Marcellus Shale or Utica Shale contract.³⁹

The landman’s place in American society, in addition to his longstanding notoriety, can thus be traced from the Appalachian timber and coalfields of the mid-nineteenth century to modern shale gas development in 2015.⁴⁰

characteristics of a landman, based on a demographic study: “The land professional is male, and he has an oil and gas position within a company. He is a member of a local landman association and AAPL. He has a four-year bachelor’s degree . . . If you meet this typical landman on the street he is either 50 years old with nine to 15 years of experience in the land profession or he is under 34 with less than five years of land experience. Regardless of his age and experience, most likely he lives in Texas and is a resident of Dallas, Forth Worth or Houston.” *Id.* at 16.

38. Douglas Clark, *Kindness, Loyalty and Trust: Enemies of the Landowner, but Friends of the Landman*, THE CLARK LAW FIRM, PC, <http://pagasleaseattorney.com/kindness-loyalty-trust-enemies-landowner-friends-landman/> [https://perma.cc/C3L9-KSVJ].

39. *Id.*

40. Currently, the American Association of Professional Landmen (AAPL) distinguishes among three types of landmen: company landmen, independent field landmen, and independent land consultants. *Frequently Asked Questions*, *supra* note 11. Company landmen “[n]egotiate deals and trades with other companies and individuals, draft contracts (and administer their compliance), acquire leases, clear title, prepare land for drilling and ensure compliance with governmental regulation.” *Id.* Independent field

Given the nature of their work, it is perhaps unsurprising that landmen have mostly flown under the regulatory radar. They are often transient and temporary contractors or employees, responding to the ebb and flow of natural resource discovery, development, and exhaustion. They are treated as agents in some contexts, meaning that the companies employing them might be held responsible for their conduct.⁴¹ They also work mostly in rural areas, where policy matters receive less attention.⁴² But the unique, sometimes fleeting nature of their work does not undermine the aggregate impact they can have on landowners and communities.⁴³ Landmen are in a prime position to take advantage of, and expose to poorly understood risks, some of the least privileged landowners in the country, with much to lose and limited means of recourse.⁴⁴

For the discussion here, the most important (and the most visible) responsibility of the landman—whichever type he may be—is his interaction with landowners, which tends to entail acquiring and negotiating mineral leases and rights of way and managing aspects of

landmen “[s]erve clients on a contract basis and are generally the industry’s contact with the public as they research courthouse records to determine ownership and prepare necessary reports and locate mineral and land owners. They negotiate oil and gas leases and various other agreements, obtain necessary curative documents and conduct surface inspections before drilling.” *Id.* Independent land consultants engage in the same responsibilities as independent field landmen, with more “effort directed to due diligence examinations required in the purchase and sale of companies and properties.” Another commentator summarizes the modern landman’s role as: “A landman is an employee of an oil company. The landman’s primary responsibility is managing the oil company’s relations with the landowners. He or she works with the landowners to secure oil and gas leases, lease amendments, pooling and unitization agreements, and instruments necessary for curing title defects. He must check courthouse records, cure land titles and negotiate easements for each well drilled. The landman must also manage thousands of acres of previously leased land for each well drilled. Needless to say, the landman’s job is very demanding.” Grossman, *supra* note 11, at 557.

41. *Cf.* Heymann, *supra* note 27, at 845 (discussing how Texas penal code may be interpreted to hold employer of landman criminally responsible for landman’s acts of forgery).

42. *See* Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 467 (2014).

43. *See* Caudill, NIGHT COMES TO THE CUMBERLANDS, *supra* note 8.

44. *See, e.g.*, Pruitt & Showman, *Law Stretched Thin*, *supra* note 42, at 467.

development. Hence, the consideration of the landman here is as “the all-encompassing, boots-on-the-ground company man who interfaces with public constituencies in an effort to win and secure the most-prized asset of all: land rights.”⁴⁵

ETHICAL ISSUES THAT ARISE IN LANDOWNER- LANDMAN TRANSACTIONS

Due to the complex process of searching for appropriate land and acquiring rights to develop it, “[t]he common practices in the oil and gas industry have the potential for a large amount of conflicts.”⁴⁶ Natural resource attorney Phillip Lear suggests that “[l]andman misconduct typically arises in six contexts: (1) fraudulent conduct, (2) duty to disclose in a confidential or fiduciary relationship, (3) duty to disclose based upon superior knowledge of bargaining position, (4) duty to employer, (5) violation of other professional standards, and (6) top leasing,” as well as the more complicated area of unauthorized practice of law.⁴⁷ Given the diversity of landmen’s different responsibilities, this section focuses upon broader categories of misrepresentation (whether accidental or intentional) and high-pressure sales tactics in landowner-landman transactions. This focus is warranted because these areas appear to be among the most common types of complaints raised by landowners who deal with landmen, and also offer the most salient comparisons to other professional activities that resemble landmen’s. A broader discussion of the ethics of bargaining is included in section III,

45. Colosimo, *Landman at the Door*, *supra* note 6, at 1. According to a sample in a survey conducted by the AAPL, the majority of landmen are distributed throughout Texas, Oklahoma, Colorado, and Louisiana. Aven, *AAPL Landman Compensation Study*, *supra* note 37, at 15. However, recently, there has been a sharp increase in landmen located in Pennsylvania, North Dakota, and California. *Id.* at 16. Thus, while landmen’s activities and conduct varies by region, this issue is one of national scope.

46. Grossman, *supra* note 11, at 557.

47. Phillip Lear, *The Ethical Landman: All You Need to Know About Ethics You Learned in Sunday School*, in *ETHICS AND PROFESSIONAL RESPONSIBILITY IN THE NEW MILLENNIUM*, ROCKY MTN. MINERAL L. FOUND. INST. 6-1 (2000).

accompanying the discussion of regulatory intervention into negotiations.

(1) MISREPRESENTATIONS: FRAUDULENT INDUCEMENT AND FAILURE TO DISCLOSE MATERIAL FACTS

A 2012 *Rolling Stone* article reported on a situation that illustrates common types of complaints landowners raise about contradictions between landmen's representations and landowners' experiences once natural resource extraction begins.⁴⁸ A dairy farmer owned 200 acres in Granville Summit, Pennsylvania, and in 2007, "a landman showed up at her door and asked to lease the mineral rights beneath her farm."⁴⁹ The landowner claimed, "He told us there was natural gas in the shale rock a mile down, and they had a new way to drill for it that was minimally invasive and would cause very little damage to our land . . . [and] it was the patriotic thing to do, that natural gas would help America gain energy independence."⁵⁰ The landman offered her \$100 per acre and 12% royalties, and told her "there was no way to predict how big the royalties would be," but that she "stood to make 'a lot of money' over the 30-year life expectancy of the well."⁵¹ The landowner took the deal, thinking that she and her family "were taken care of."⁵²

However, according to *Rolling Stone* and the landowner, drilling "was an immediate nightmare."⁵³ She awoke at 6:00 a.m. to find:

18 trucks idling in her driveway. The hillside behind her house was leveled for a drill pad, and the rig went up 500 feet from her back door. Once the fracking began, water trucks made hundreds of trips up and down her driveway, while air compressors roared all day and night. When the gas was flared off before production began, the flame was so bright in the night sky that she could see it glowing red

48. Jeff Goodell, *The Big Fracking Bubble: The Scam Behind Aubrey McClendon's Gas Boom*, THE ROLLING STONE (Mar. 1, 2012), <http://www.rollingstone.com/politics/news/the-big-fracking-bubble-the-scam-behind-the-gas-boom-20120301?page=3> [https://perma.cc/L66Q-HHN3].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

on the horizon 12 miles away. . . . [She] stopped drinking [her] water after she discovered . . . methane – but tests showed that her water also contained elevated levels of toxic chemicals like radium, manganese and strontium. . . . [H]er back pasture has become a full-time industrial zone, her water supply has been contaminated, and it will be virtually impossible to sell her home, since it lacks drinkable water. What’s more, her well turned out to be a dud: The landman from Chesapeake who sold her on the deal failed to mention that 80 percent of a well’s gas is often depleted within the first two years. . . . [T]he royalty checks that [the landowner] and her husband were counting on for retirement will hardly pay for dinner and a movie.⁵⁴

The allegations in this story illustrate the critical types of misrepresentations or non-disclosures landmen have the potential to make in order to induce landowners to sign mineral leases.⁵⁵ First, landowners may be misled as to the exact nature of development, expecting much less invasive encroachments on their lands and lifestyles than what actually takes place. Similarly, landowners may be reassured as to the safety of processes they will be exposed to, while actual risks may be unknown or undisclosed. Further, some landowners report believing that allowing shale gas development on

54. *Id.*

55. While it is impossible in the instant inquiry to substantiate the claims made by the landowner in the Rolling Stone story, their potential falseness would not be fatal to this discussion, because they reflect common themes of narratives often put forth in this context. *See, e.g.*, Alexander Eichler, *Pennsylvania Fracking: A History of Shale Gas Drilling, as Told by the People Who Live There*, HUFFPOST GREEN (Jan. 25, 2013), http://www.huffingtonpost.com/2013/01/25/pennsylvania-fracking_n_2440227.html [<https://perma.cc/ZS38-XTE6>] (discussing letters and interviews with Pennsylvania residents about fracking); Emma Jacobs, *The front lines of fracking get personal*, INNOVATION TRAIL (Aug. 15, 2011), <http://innovationtrail.org/post/front-lines-fracking-get-personal> [<https://perma.cc/4DDU-R9PE>] (a landowner recounted that landmen described fracking waste water holding ponds “like basically lakes where you could go swimming,” while in reality they were plastic lined and surrounded by chain-link fence and barbed wire); Robertson, *The landmen cometh*, *supra* note 17 (noting that “there have been numerous reports and allegations [in Ohio] by landowners and politicians of landmen dishonesty and manipulative behavior.”). Therefore, even if the landowner’s claims are not true, they could be true, and in either case, the law would be inadequate to address the landman’s role in such a situation.

their land will be much more lucrative than it turns out to be, misconceptions that may be attributed to representations made by landmen.⁵⁶

The 2009 case of *Kropa v. Cabot Oil & Gas Corp.* in the United States District Court for the Middle District of Pennsylvania provides a less dramatic example of how landmen's misrepresentations could induce landowners to sign. In that case, the landman allegedly told the landowner that the landowner would never be paid a bonus of more than \$25 per acre, when the landowner's neighbors were, in fact, paid more than \$25 per acre.⁵⁷ The court denied defendants' motion to dismiss the landowner's complaint alleging fraudulent inducement, and noted that the case "raise[d] the same issues as approximately thirteen other cases that have been filed against the same defendant."⁵⁸ An oil and gas law firm commented that the case "emphasize[d] the need to ensure that a natural gas company land agent makes truthful statements when negotiating oil and gas leases."⁵⁹

(2) HIGH-PRESSURE SALES TACTICS

Another common complaint about landmen is their use of high-pressure or coercive sales tactics. The line between "high-pressure sales tactics" may be blurred with the category of fraud or misrepresentation, because inaccurate statements may be used to exert pressure. Generally, landmen "are known to hurry landowners into signing on the proverbial dotted line"⁶⁰ and to use money, ideological issues, or threats to motivate landowners into making a

56. Abrahm Lustgarten, *Unfair Share: How Oil and Gas Drillers Avoid Paying Royalties*, PRO PUBLICA (Aug. 13, 2013), <http://www.propublica.org/article/unfair-share-how-oil-and-gas-drillers-avoid-paying-royalties> [<https://perma.cc/QFX4-APHQ>].

57. *Kropa v. Cabot Oil & Gas Corp.*, 609 F.Supp. 2d 372, 374-75 (M.D. Pa. 2009) *on reconsideration in part*, 716 F.Supp. 2d 372, 373-74 (M.D. Pa. 2010).

58. *Id.*, at 373 n.1.

59. *Land Agent's Statements During Oil and Gas Lease Negotiations May Cause Problems*, ECKERT SEAMANS ENERGY ALERT (2010), <http://origin-www.martindale.com/matter/asr-1069610.Lease.pdf> [<https://perma.cc/CE7U-TXZX>].

60. Robertson, *The landmen cometh*, *supra* note 17.

quick deal.⁶¹ One New York woman reported that multiple landmen who visited her at the start of the northeast Pennsylvania shale boom “repeatedly urged her to sign right then and there, claiming theirs was the best deal she’d ever get. When she didn’t sign, they’d come back with a different, better deal. Signing bonuses went from hundreds to thousands of dollars per acre.”⁶²

The Pennsylvania oil and gas attorney mentioned above advises landowners:

[s]ince “guilt negotiation” tactics do not always work [such as telling the landowner the landman could “lose his job”], you may hear the Landman or company shift to a “fear tactic negotiations.” One common fear tactic is the Landman or company telling a Landowner that if the Landowner does not sign the offer presented, the company will simply operate under their existing gas lease and the Landowner will receive little to no compensation for the planned activity. I see this often when Landowners are presented with Pipeline Right-of-Way Agreements and Roadway Agreements. If the Landman uses this tactic, you must not simply take their word as true. Many times this statement is absolutely not true. Remember who the Landman works for – not you. . . .

Another common fear tactic is when a Landman tells the Landowner that “we will just work around you” or “we will just take your gas from your neighbor’s property” if you do not sign a presented oil and gas lease, lease amendment and modification or other similar agreement. These are very serious statements, especially the statement that the company will exclude you from production if you do not sign the presented document. You cannot take this statement at face value, but you cannot ignore this serious statement. Again, you need to contact experienced legal counsel to evaluate whether these statements are true and to understand your options and leverage.⁶³

The New York Times found stories consistent with these accounts when it interviewed more than two dozen landowners in Ohio, Texas, and Pennsylvania about their experiences with landmen. In those interviews, landowners reported that landmen would claim that they

61. Cf. Goodell, *The Big Fracking Bubble*, *supra* note 48; Jacobs, *The front lines of fracking get personal*, *supra* note 55.

62. *Id.*

63. Clark, *Kindness, Loyalty and Trust*, *supra* note 38.

were only “in town until tomorrow”; that they had “already signed up all your neighbors”; and that “if you do not sign right away you will miss out on easy income because other drillers will simply pull the gas from under your property using a well nearby.”⁶⁴ Additionally, “[s]ome landmen show up in poorer areas shortly before the holidays, offering cash on the spot for signing a lease.”⁶⁵

UNEQUAL BARGAINING POWER: THE FOUNDATION FOR PREDATORY CONDUCT

Landmen’s ability to use the tactics discussed above can stem from information asymmetries between the parties, the lack of sophistication of the landowner, or other disparities fueling unequal bargaining power.⁶⁶ As stated by Chris Csikszentmihalyi, a researcher at the Massachusetts Institute of Technology who created the “Landman Report Card” project, “When it comes to negotiation skills and understanding of lease terms, there is a gaping inequality between the average landman and the average citizen sitting across the table.”⁶⁷ The case of *Morsheiser Family Revocable Living Trust v. Anschutz Exploration Corp.*⁶⁸ illustrates several potential disparities in bargaining power in landowner-landman transactions. The plaintiff in *Morsheiser* argued that his lease was unconscionable because he could not “read or write, ha[d] only a fourth-grade education, and was, at the time of the transaction, both elderly (aged 76) and afflicted with a medical condition that prevented him from understanding the terms of the lease.”⁶⁹ Although the progression of the case is unknown, the court denied defendants’ motion to dismiss

64. Urbina & McGinty, *Learning Too Late of the Perils in Gas Well Leases*, *supra* note 12.

65. *Id.*

66. See J. Zach Burt, *Playing the “Wild Card” in the High-Stakes Game of Urban Drilling: Unconscionability in the Early Barnett Shale Gas Leases*, 15 TEX. WESLEYAN L. REV. 1, 18 (2008) (noting that early signers of Barnett Shale gas leases lacked considerable knowledge and meaningful choice, and were vulnerable to exploitation by landmen).

67. Urbina & McGinty, *supra*.

68. *Morsheiser Family Revocable Living Tr. v. Anschutz Expl. Corp.*, No. 5:12 CV 1734, 2012 WL 5378741, at *1 (N.D. Ohio 2012).

69. *Id.* at *2.

because these allegations sufficiently stated a claim for unconscionability.⁷⁰

Trends of leases favoring companies over landowners also highlight the room for material misrepresentations, non-disclosures, and coercive conduct in landowner-landman transactions stemming from unequal bargaining power. The New York Times collected more than 111,000 oil and gas leases from 2007-2011 in gas-rich counties.⁷¹ The majority (over 100,000) were from Texas, 3,200 were from New York, and the rest were from Maryland, Ohio, Pennsylvania, and West Virginia.⁷² The Times concluded that standard leases heavily favored companies over landowners, despite company officials' assertion that standard leases protected landowners.⁷³ Specifically, the Times found that:

[f]ewer than half the leases require companies to compensate landowners for water contamination after drilling begins. And only about half the documents have language that lawyers suggest should be included to require payment for damages to livestock or crops. Most leases grant gas companies broad rights to decide where they can cut down trees, store chemicals, build roads and drill. Companies are also permitted to operate generators and spotlights through the night near homes during drilling. In the leases, drilling companies rarely describe to landowners the potential environmental and other risks that federal laws require them to disclose in filings to investors. Most leases are for three or five years, but at least two-thirds of those reviewed by The Times allow extensions without additional approval from landowners. If landowners have second thoughts about drilling on their land or want to negotiate for more money, they may be out of luck.⁷⁴

It would be an exaggeration to characterize landowners as helpless or incapable of better informing themselves and securing a fair deal. Some landowners seek the advice of an attorney before entering into transactions,⁷⁵ and many reap substantial financial profits from

70. *Id.* at *3.

71. Urbina & McGinty, *supra*.

72. Ian Urbina et al., *Drilling Down: Oil and Gas Leases*, N.Y. TIMES, <http://www.nytimes.com/interactive/2011/12/02/us/oil-and-gas-leases.html> [<https://perma.cc/R4Q8-P9PF>] (last visited April 27, 2015).

73. Urbina & McGinty, *supra*.

74. *Id.*

75. Eichler, *Pennsylvania Fracking*, *supra* note 55.

mineral leases.⁷⁶ Landowner coalitions have also been formed to enhance bargaining power with energy companies.⁷⁷

Nevertheless, landowners' potential to strengthen their position or benefit from transactions with landmen does not render landowners less vulnerable as a whole. A potential response to the concerns discussed here is that landowners who believe they have been swindled or otherwise injured can resort to litigation. However, this response seems like a catch-22 in this scenario: an individual who has already failed to protect herself in a high-stakes transaction by securing adequate legal services would seem naturally less likely, after being injured, to be able to secure the services of an attorney and see litigation through to a satisfactory remedy. The unlikelihood of successfully making it through court is probably higher in rural areas for a variety of reasons.⁷⁸ In addition, for those who do make it into court, legal standards may be too difficult to meet despite injuries, legal expenses may be prohibitive, and remedies may take years to secure despite the urgent needs that can arise from hazardous land use. As discussed in further depth below, these types of scenarios involving high-stakes negotiations, unequal bargaining power, and litigation as a questionable means of recourse are the types warranting regulatory intervention.

POLICY CONCERNS

Concerns about landmen go beyond the exploitation of individual landowners. Individual transactions with landmen, when added together over time and infused with ethical imbalances, can contribute to considerable impacts on a region's socioeconomic trajectory, with the effects felt decades into the future. The modern landscapes of West Virginia and New Mexico illustrate the aggregate effects of historical exploitative land speculation, and show that this type of vulnerability is not limited to one region of the country.

According to a report by the West Virginia Center for Budget and Policy, as of 2013, "much of the state's private land [wa]s . . . owned by large, mainly absentee corporations"; West Virginia's largest

76. *Id.*

77. Jeffrey B. Jacquet, *Landowner Attitudes Toward Natural Gas and Wind Farm Development in Northern Pennsylvania*, 50 ENERGY POL'Y 677, 679 (2012).

78. Pruitt & Showman, *Law Stretched Thin*, *supra* note 42, at 467.

landowner was a North Carolina-based timberland investment company.⁷⁹ While ownership was once “dominated solely by corporations involved in mineral extraction,” it now “also belongs to money managers specializing in . . . build[ing] wealth”; the report concludes, “[j]ust as earlier studies concluded, the patterns of land ownership in West Virginia have facilitated the flow of wealth, especially from natural resources, out of the state.”⁸⁰ While little documentation exists as to the concentration of mineral ownership, it is likely that an even greater fraction of mineral ownership is concentrated out of state.⁸¹ The surrounding states of Tennessee, Kentucky, and Virginia face comparable issues.⁸²

The effect of people living and working on and near land that they have little control over is that these states are relatively powerless to determine the direction of regional development.⁸³ Development stagnates in a variety of ways; for instance, people wishing to start a farm may hesitate to purchase land, first, because determining who purchased the minerals on a severed estate decades ago will be fraught with expense and uncertainty; but second, because starting a farm on land subservient to a mineral estate would be very risky. These and other social circumstances have earned portions of Appalachia the label of a “colony,”⁸⁴ and this region remains one of the poorest in the nation.⁸⁵

Part of Appalachia’s loss of local land ownership can be traced back to landmen. The excerpts above from *Night Comes to the Cumberlands* are illustrative. But other accounts point specifically to landmen as playing a key role in the mass transfer away of Appalachian land. The Center for Budget and Policy report points to how “[d]uring West Virginia’s transformation from an agrarian economy to an industrial state beginning in the 1880s, agents for out-of-state land, railroad and coal interests purchased acres of mineral and timber rights, leaving residents in possession of only the surface

79. *Who Owns West Virginia?*, *supra* note 22, at 5.

80. *Id.* at 42.

81. *Id.* at 5.

82. *See id.*

83. *Id.* at 42.

84. *Id.* at 8.

85. Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905, 906 (2002).

rights to the land.”⁸⁶ One man recounts how his illiterate grandfather “was tricked into giving up 1,666 acres of the family’s land for a single shotgun.”⁸⁷

New Mexico provides another example where documentation shows landmen-like professionals’ historical role in damaging a region’s socioeconomic health. David Correia argues that the dispossession of land grant communities in New Mexico during its nineteenth-century territorial period “happened because of the actions and practices of individuals operating in a climate that accommodated their interests.”⁸⁸ Noting that “there may never be a smoking gun,” he describes speculators’ efforts to acquire land in the region as “an accumulating series of practices and tactics of dispossession unleashed on the community land grants of New Mexico.”⁸⁹ Although many actors were involved, Correia discusses speculators’ tactics of filing fraudulent claims to land, taking advantage of landowners’ financial need and limited access to justice, and benefiting from a lack of scrutiny over activities in order to acquire land titles.⁹⁰ He explains further that land grant brokers

profited by their ability to serve as the middlemen for outside financial interests. Speculating in land grants required placing Spanish-speaking brokers in the field to acquire titles, locate grant papers, or negotiate legal or purchase agreements with land grant communities, activities impossible for most investors. . . . These tactics confused and tangled the histories of deed transfers and settlement patterns, often throwing legitimate claims into doubt. . . . For British and East Coast investors, broker[s’] . . . efforts exposed land grant communities to the predatory efforts of speculative investors.⁹¹

86. See, e.g., *Who Owns West Virginia?*, *supra*, at 7.

87. *West Virginia: The Story of a State that Got Bought*, *supra* note 22.

88. David Correia, *Appendix, Land Grant Speculation in New Mexico During the Territorial Period*, 48 NAT. RES. J. 927, 928 (2008).

89. *Id.* at 929.

90. *Id.* at 931-32, 943.

91. David Correia, *Making destiny manifest: United States territorial expansion and the dispossession of two Mexican property claims in New Mexico, 1824-1899*, 35 J. HISTORICAL GEOGRAPHY 87, 92-93 (2009).

New Mexico has, in recent times, been deemed *the* poorest state in the nation.⁹²

Of course, landmen have not been the only players in the disenfranchisement of Appalachia and New Mexico, and should not be held up as the fundamental cause of regional poverty. However, they played a central role in a greater scheme of land dispossession. These issues illustrate landmen's potency (and the potency of comparable agents not so named) beyond injuring individual landowners. Landmen's ability to affect land and development on a mass scale, and significant correlations between their historical activities and regional impoverishment, should be an issue of national concern.⁹³

Finally, landmen's role in introducing hazardous industrial activity onto residential land has been overlooked. Fracking, for instance, when pursued "in homeowners' backyards presents a divergence from typical current land use practice, which separates residential living from heavy industrial activity."⁹⁴ Similarly, "[a] construction boom of pipelines carrying explosive oil and natural gas . . . poses a safety threat in rural areas, where they sometimes run within feet or yards of homes with little or no safety oversight."⁹⁵ While much of

92. *U.S. Poverty: How New Mexico, Poorest State in America, Fights Poverty*, HUFFINGTON POST, (Jan. 23, 2013), http://www.huffingtonpost.com/2012/09/13/new-mexico-poverty-rates_n_1881321.html [https://perma.cc/TE7M-JD3G].

93. It might be argued that landmen's conduct in Appalachia and New Mexico in the nineteenth century is of limited concern today because unlike now, the mid-nineteenth century was a time when ample land was unaccounted for, or the chaotic nature of settlement produced an atmosphere of legal confusion no longer relevant in an era when most land has been distributed and title disputes are not quite as wild. However, the argument is not necessarily that mass land dispossession could again take place at the hands of landmen. Rather, it is an illustration of their power in the aggregate. The modern impacts of their activities would likely differ, although would also likely relate to the well-being of the landowners and regions that they deal with.

94. Elisabeth N. Radow, *Homeowners and Gas Drilling Leases: Boon or Bust?*, 83 N.Y. ST. B. ASS'N J. 9, 12 (Nov./Dec. 2011).

95. Lisa Riordan Seville, *Danger Beneath: 'Fracking' Gas, Oil Pipes Threaten Rural Residents*, NBC NEWS (Aug. 25, 2014), <http://www.nbcnews.com/news/investigations/danger-beneath-fracking-gas-oil-pipes-threaten-rural-residents-n187021> [https://perma.cc/8UE9-

this issue should perhaps be addressed through zoning and environmental regulations, the unique and risky nature of landmen's work also suggests that further scrutiny and oversight of the profession is warranted, particularly concerning requirements to communicate risks to landowners.

CURRENT REGULATION OF LANDMEN

THE AMERICAN ASSOCIATION OF PROFESSIONAL LANDMEN

The primary professional organization of landmen is the American Association of Professional Landmen (AAPL), which has a membership of approximately 21,000.⁹⁶ AAPL's bylaws include a Code of Ethics, the violation of which can subject members to disciplinary action, including expulsion from the AAPL.⁹⁷ However, the Code of Ethics only contains two provisions, in addition to a preamble. Section 1 provides:

It shall be the duty of the Land Professional at all times to promote and, in a fair and honest manner, represent the industry to the public at large with the view of establishing and maintaining goodwill between the industry and the public and among industry parties.

The Land Professional, in his dealings with landowners, industry parties, and others outside the industry, shall conduct himself in a manner consistent with fairness and honesty, such as to maintain the respect of the public.⁹⁸

Section 2 provides:

Competition among those engaged in the mineral and energy industries shall be kept at a high level with careful adherence to established rules of honesty and courtesy.

A Land Professional shall not betray his partner's, employer's, or client's trust by directly turning confidential information to personal gain.

MSLC] (recounting Pennsylvania couple's claims that landman misled them as to where dangerous pipeline would be located on their land).

96. *Why Join?*, AAPL (last accessed April 27, 2015), <http://www.landman.org/aapl-membership/why-join> [<https://perma.cc/XKD6-ZH24>].

97. *Bylaws*, *supra* note 7.

98. *Code of Ethics*, *supra* note 7.

The Land Professional shall exercise the utmost good faith and loyalty to his employer (or client) and shall not act adversely or engage in any enterprise in conflict with the interest of his employer (or client). Further, he shall act in good faith in his dealings with the industry associates.

The Land Professional shall represent others only in his areas of expertise and shall not represent himself to be skilled in professional areas in which he is not professionally qualified.⁹⁹

The Code of Ethics, thus, is minimal, and other than general references to “fairness and honesty” and “the public,” focuses primarily on duties to clients, rather than ethical obligations to landowners.

More detailed guidelines are found in the AAPL’s Standards of Practice and Bylaws. The Standards of Practice provide that “[i]t is the duty of the land professional to protect the members of the public with whom he deals against fraud, misrepresentation, and unethical practices. He shall eliminate any practices which could be damaging to the public or bring discredit to the petroleum, mining or environmental industries”;¹⁰⁰ and that “[t]he land professional shall at all times present an accurate representation in his advertising and disclosures to the public.”¹⁰¹ The Bylaws include the same wording as the Code of Ethics; provide that applicants to the AAPL might “execute such documentation as AAPL may require affirming the applicant’s willingness to be bound by and abide within the AAPL Code of Ethics and Standards of Practice”; and establish an Ethics Committee and its procedures for disciplining or expelling landmen who violate the ethics standards.¹⁰²

The effects of the AAPL’s oversight are unclear. For instance, the AAPL reports that only eleven individuals were subject to expulsion from 2003 to 2015.¹⁰³ Further, the ethical standards are minimalist and vague at best, and pretextual at worst; they potentially provide the appearance of a self-regulated profession where none may in actuality be operating. The AAPL’s main goal does not appear to be

99. *Id.*

100. *Standards of Practice, supra* note 7.

101. *Id.*

102. *Bylaws, supra* note 7.

103. *Member Expulsions*, AAPL (last accessed April 27, 2015), <http://www.landman.org/docs/default-source/forms/revocation-of-membership.pdf?sfvrsn=0> [<https://perma.cc/4C9U-HWNY>].

the ethical regulation of landmen, but rather, to promote career advancement and networking for its members. However, it does appear that AAPL members may have a better reputation and more accountability than non-members.¹⁰⁴ Most significantly, the AAPL's oversight is not obligatory or comprehensive, and most states do not require landmen to be members of the AAPL or similar organizations.¹⁰⁵ In sum, "AAPL does investigate allegations of violations of ethical standards by its members and it can censure, suspend or expel a landman who violates these standards. However, if the landman chooses to resign his or her membership and continues these unethical practices there is nothing AAPL can do. The AAPL can do nothing to control the work of landmen who do not belong to AAPL."¹⁰⁶

MARYLAND'S AND NORTH CAROLINA'S REGISTRATION REQUIREMENTS

"Currently, only North Carolina and Maryland require landmen to register with the state."¹⁰⁷ The Maryland legislation on Oil and Gas Land Professionals, Title 10.5, provides in section 102 that "[a] person may not operate as a land professional¹⁰⁸ in the State unless the person registers with the Department [of Labor, Licensing, and Regulation]¹⁰⁹ and is issued a registration certificate under this title."¹¹⁰ The registration requirement, which became effective in

104. See McFarland, *Dealing with Landmen*, *supra* note 15.

105. Colosimo, *Landman at the Door*, *supra* note 6.

106. *Committee on Unlawful Practice of Law Advisory Opinion 2007-01*, W. VA. LAW. 80, 82 (Nov./Dec. 2007). The AAPL also has regional chapters, but they do not generally appear to impose additional ethical obligations on members beyond what is required by the national AAPL. See, e.g., *Michael Late Benedum Chapter By-laws*, AAPL, <http://www.mlbc-aapl.org/by-laws.php> [<https://perma.cc/XV8T-D6GF>]; *Community Impact*, Austin Professional Landmen's Association, <http://www.austinlandmen.org/community-impact/> [<https://perma.cc/DUM5-KP9J>].

107. Colosimo, *supra*.

108. "Land professional" is defined as "a person that, acting on the person's own behalf or on behalf of a prospective lessee or buyer, negotiates with a property owner for the acquisition of mineral rights in oil or gas in the State." MD. CODE § 10.5-101.

109. MD. CODE ANN., BUS. OCC. & PROF. § 1-101(e) (West 1989).

110. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-102 (West 2013).

June 2013,¹¹¹ provides that landmen must submit to the Department “(1) an initial registration application on the form required by the Department; and (2) an initial registration fee set by the Department.”¹¹² The Department then assigns the applicant a registration number and certificate, which is valid for two years and may be renewed.¹¹³ In addition, “[b]efore obtaining any mineral rights in oil and gas from a property owner, a land professional shall provide to the property owner proof that the land professional is registered under this title.”¹¹⁴ The legislation then directs the Department to adopt regulations to implement the registration provisions, and to “develop a means for providing public access to relevant information relating to each person registered under this title.”¹¹⁵ An individual who violates relevant regulations is guilty of a misdemeanor, and may be fined between \$500 and \$1,000 for a first violation and between \$1,000 and \$2,000 for a second violation.¹¹⁶ The Maryland Regulations promulgated pursuant to Title 10.5 established procedures to implement these provisions, but have not imposed additional substantive requirements.¹¹⁷

The North Carolina registration requirements are enforced through collaboration between the North Carolina Department of Environment and Natural Resources and the Consumer Protection Division of the North Carolina Department of Justice.¹¹⁸ The registration requirement is similar to Maryland’s, in that an individual may not perform the duties of a landman without first being registered.¹¹⁹ The North Carolina provisions require more

111. *Id.*

112. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-103(a) (West 2013).

113. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-103(b) to (c) (West 2013).

114. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-104 (West 2013).

115. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-105 to 106 (West 2013).

116. MD. CODE ANN., BUS. OCC. & PROF. § 10.5-107 (West 2013).

117. MD. CODE REGS. 09.41.01.01 (2015) et seq.

118. N.C. GEN. STAT. § 113-425 (2015).

119. N.C. GEN. STAT. § 113-425(b) (2015). The North Carolina legislation defines “landman” as anyone who:

- (1) Acquires or manages oil or gas interests.
- (2) Performs title or contract functions related to the exploration, exploitation, or disposition of oil or gas interests.

personal information from applicants, as well as “[a] list of all states and other jurisdictions in which the applicant has had a similar registration or license suspended or revoked.”¹²⁰ It also gives the Department of Natural Resources the right to revoke a registration or impose civil penalties if someone registers fraudulently, uses an illegitimate registration, “[f]alsely represents [him]self as a registered landman,” “[e]ngages in any other fraud, deception, misrepresentation, or knowing omission of material facts related to oil or gas interests,” has “[h]ad similar registration or license denied, suspended, or revoked in another state or jurisdiction,” or “[o]therwise violates this section.”¹²¹ The landman registration requirement is a subpart of legislation governing oil and gas operations.¹²²

The two approaches have some commonalities and some divergences. While Maryland’s approach appears mainly to seek to keep track of landmen, it also requires disclosure of proof of registration to property owners, and provides for misdemeanor violations. North Carolina’s approach is perhaps more aggressive in that it specifically addresses issues of fraud and misrepresentation, in addition to seeking to monitoring the profession. Accountability appears to be an underlying concern in both regimes. Both approaches to regulating landmen are discussed in more detail below.

FAILED EFFORTS TO MANDATE REGISTRATION: WEST VIRGINIA AND OHIO

West Virginia, Texas, Colorado, Ohio, and New Mexico have all unsuccessfully attempted to require landmen to be licensed or registered.¹²³ These failed initiatives provide other examples of impetuses for and possible approaches to the regulation of landmen.

(3) Negotiates for the acquisition or divestiture of oil or gas rights, including the acquisition or divestiture of land or oil or gas rights for a pipeline.

(4) Negotiates business agreements that provide for the exploration for or development of oil or gas.

§ 113-425.

120. *Id.*

121. *Id.*

122. N.C. GEN. STAT. § 113-421-422 (2014).

123. Colosimo, *Landman at the Door*, *supra* note 6, at 12.

House Bill 2280, introduced to the West Virginia House of Delegates in 2013 by Representative Mike Manypenny, would have required landmen to complete an ethics class and have two years of experience, if they were not members of the AAPL, before working in West Virginia.¹²⁴ The bill acknowledges that landmen's activities encompass "critical phases" of title research and lease negotiations for mineral rights; that "[l]andmen are involved at virtually every . . . level of the development process of oil and gas ventures"; and that "[m]ost new landmen are challenged by the fact that they have to be an analyst, manager, salesman and negotiator all at the same time."¹²⁵ The bill also provided that violations of its requirements, as well as for "[a]ny person who . . . fails to disclose significant information to a landowner or coerces or makes fraudulent representations to a landowner when securing a lease for the exploration of natural gas in the Marcellus Shale geologic formation," would carry penalties of a misdemeanor conviction and fines from \$1,000 to \$5,000.¹²⁶ However, the bill did not progress past its referral to the Committee on Energy, Industry and Labor, Economic Development and Small Business.¹²⁷

In Ohio, in March 2012, State Representative Mark Okey and others introduced House Bill 493 to the Ohio legislature.¹²⁸ The bill

124. H.D. 2280, 2013 LEG. REG. SESS. (W. Va. 2013); Casey Junkins, *Legislature Considers Shale Bills*, THE INTELLIGENCER (Feb. 24, 2013), <http://www.theintelligencer.net/page/content.detail/id/581759/Legislature-Considers-Shale-Bills.html?nav=515>.

125. H.D. 2280, 2013 LEG. REG. SESS. (W. Va. 2013).

126. *Id.*

127. Burton Speakman, *Ohio bill would require registration of drilling landmen*, YOUNGSTOWN VINDICATOR (Nov. 12, 2012), <http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/ohio-bill-would-require-registration-of-drilling-landmen-1.349651> [<https://perma.cc/A2QH-DBKF>]; H.D. 2280, 2013 LEG. REG. SESS. (W. Va. 2013).

128. H.B. 493, 2011-2012 LEG. REG. SESS. (OHIO 2011-2012); Robertson, *The landmen cometh*, *supra* note 17. In an interview, Okey explained some his reasoning: "'They believe in intimidation tactics. They threaten you. They will yell at you. . . . It's all about getting you to sign,' Okey said. 'You don't sign? We'll go around you. You don't sign? You'll not get anything out of your mineral rights. You don't sign? Then you're going to pay the price because we're going to take those minerals from you.'" Brian Grow, *Energy Firm Uses 'Land Grabs' to Secure Fracking Rights from Reluctant Landowners*, NBC NEWS (Oct. 2, 2012),

would have required landmen to register with the Ohio Department of Natural Resources before negotiating leases.¹²⁹ The bill also would have required landmen to use “a checklist of information the landman and the lessee would have to sign acknowledging the property owner understood the leasing contract and the procedures involved in oil and gas production.”¹³⁰ The “Disclosure Form” included confirmation that a lessor received “a. [a] thorough explanation of the company that the Landman worked for, b. [a] thorough explanation including how long the lease may last, c. [t]he right to ask for a separate land-use agreement, and d. [t]he right to ask for a no surface use lease.”¹³¹ This bill, too, stalled when it was referred to the Ohio House Agriculture and Natural Resource Committee.¹³²

The proposed West Virginia regulations mirror North Carolina’s framework, while the Ohio approach involves the unique “disclosure form.” Both failed bills sought some combination of monitoring landmen while also promoting substantive accountability. The stagnation of these bills, however, reflects the fact that efforts to regulate landmen have experienced pushback, particularly in states with a strong history of natural resource extraction.¹³³ In an AAPL publication, a commentator celebrated the failed passage of HB 493 in Ohio, and argued that “most of the issues regarding Landmen and their conduct may be avoided by all of us acting in a professional manner.”¹³⁴ Political tensions associated with these conversations notwithstanding, this Article illustrates in section IV what a robust and comprehensive approach to landmen could look like in a state

<http://investigations.nbcnews.com/news/2012/10/02/14183177-energy-firm-uses-land-grabs-to-secure-fracking-rights-from-reluctant-landowners> [<https://perma.cc/873R-M3ML>].

129. *Id.*

130. Burton Speakman, *Ohio drilling bill adds rule, stirs controversy*, THE VINDICATOR (Nov. 12, 2012), <http://www.vindy.com/news/2012/nov/12/ohio-drilling-bill-adds-rules-stirs-cont/>.

131. Jud Byrd, *Landmen Working in Ohio*, AAPL (March 2013), http://www.mlbc-aapl.org/docs/Jud_article.pdf [<https://perma.cc/Y7N6-Q4VF>]; H.B. 493, 2011-2012 LEG. REG. SESS. (OHIO 2011-2012).

132. *Id.*

133. See McFarland, *Dealing with Landmen*, *supra* note 15.

134. Byrd, *Landmen Working in Ohio*, *supra*.

with sufficient political will to implement such a framework, drawing upon all of the approaches discussed here.

REGULATION OF COMPARABLE PROFESSIONS

Although landmen are a unique institution within American culture and law, when individual responsibilities and landowner-landman dynamics are isolated and examined, several comparable professions come to mind—namely, professions with similar dynamics, duties, or potential for predatory conduct. This section examines the regulation of several professions with aspects comparable to landmen’s in order to compare and contrast them with existing and possible approaches to landmen.¹³⁵ The professions examined here include real estate agents, securities brokers, and mortgage brokers.¹³⁶

(1) REAL ESTATE AGENTS

Generally, “[i]n every state, prospective real estate salespeople must take a basic real estate course. And all states require [agents] to pass a real estate licensing exam before [they] start selling homes.”¹³⁷ States’ requirements for course study vary, but tend to include at least

135. An obvious profession to consider here would be attorneys. However, the questions surrounding comparisons between attorneys and landmen are complex, and could constitute an inquiry of their own. Namely, the issue of when a landman is engaging in the unauthorized practice of law has been the focus of ample debate and discussion, and would warrant a consideration of issues beyond the scope of misrepresentations and high-pressure sales tactics. Further, a substantial subset of landmen are attorneys, and are thus beholden to the legal and ethical standards applicable to attorneys in any event. Aven, *AAPL Landman Compensation Study*, *supra* note 37. Thus, the focus of the instant inquiry is on landmen who are not attorneys, and on issues other than the matter of the unauthorized practice of law, in order to examine the already substantial issues of misrepresentations and high-pressure sales tactics.

136. See North Carolina Report at 17 (noting that intention behind North Carolina registry was to create something “similar to [registration] that a real estate broker or mortgage broker would attain”).

137. Dona DeZube, *Become a Licensed Real Estate Agent*, MONSTER, <http://career-advice.monster.com/job-search/company-industry-research/become-a-licensed-real-estate-agent/article.aspx> [<https://perma.cc/6M53-F5B8>] (last accessed April 27, 2015).

several dozen classroom hours.¹³⁸ The objective of these requirements is to “prove an agent has mastered a minimum amount of necessary information about the real estate process . . . [and to] give states something to revoke if an agent [is not] honest.”¹³⁹

Like the landman, the real estate agent’s role can be quite complicated. Professor Ann Olazábal explains that in the “classic setting” of residential real estate transactions, the selling broker was a subagent of the seller through a listing contract and an agreement to split the commission.¹⁴⁰ This traditional listing/selling broker model—where the buyer typically went unrepresented in the transaction—has been the norm.¹⁴¹ However:

As the form and substance of the industry expanded, and realtors became more central to the real estate transaction, their precise duties and loyalties became less clear. Commentators have for some time agreed that the traditional listing/selling broker model creates agency relationships that are counterintuitive to the parties and that, all too often, neither consumer nor realtor seems to know exactly what is expected or required within the context of the legal relationship. The agent that works with the buyer is, in fact, often a seller’s subagent. This could easily be overlooked by the seller (who could be held vicariously liable for the licensee’s conduct), misunderstood by the buyer (who may believe that the agent working with her actually represents her), and sometimes even confused by the subagent or licensee (who may also erroneously see her role as “representing” the buyer).

Contributing to the confusion, there is very little standardization in licensing laws and agency rules regulating realtors. Moreover, judicial decisions regarding realtor liability are far from uniform; the case law in this area was and continues to be in a state of disarray in many jurisdictions.¹⁴²

Olazábal and colleagues analyzed trends in regulations governing realtors and observed that the late twentieth century saw “a

138. *Id.*

139. *Id.*

140. Ann Morales Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 66 (2003).

141. *Id.*

142. *Id.* at 67.

revolution in real estate licensing statutes,”¹⁴³ aimed at heightening realtor accountability to parties with whom they transact.¹⁴⁴ “Disclosure and due diligence behavior” gained increasing attention, both informally within the industry and in the law.¹⁴⁵ Legal trends also included proliferation of laws and rules requiring various types of disclosure and realtor education and training.¹⁴⁶

As relevant to the duties of landmen, real estate agents are generally required to provide “information forms . . . identify[ing] any problems with, or known defects in, the property.”¹⁴⁷ Many states also require real estate agents to disclose details on what, exactly, their role is in the transaction (i.e., distinguishing among agency relationships, or establishing whether one exists), in order to limit “uncertainty with respect to [realtors’] precise obligations”¹⁴⁸ and to recognize the fact that although the realtor may have a client, “the realtor’s true incentive is to act as the agent of the transaction rather than as the agent of either the buyer or the seller.”¹⁴⁹ Federal and state consumer protection statutes have also been interpreted “to apply to deceptive acts and practices committed by real estate agents in connection with the sale of residential real estate.”¹⁵⁰

In some respects, the real estate agent’s role is a reversal of the landman’s: the real estate agent is trying to persuade an individual to acquire land, while the landman is trying to persuade the individual to allow development on land already owned. This contrast highlights where the common law principle of *caveat emptor* (buyer beware) that limits real estate agent liability to an extent does not apply to the landman: a potential buyer of real estate has the ability to commission third-party inspections of the property.¹⁵¹ By contrast, a landowner’s ability to confirm or inspect development as characterized by the landman is much more limited. Thus, arguably,

143. *Id.* at 130.

144. Ann Morales Olazábal et al., *Real Estate Agent as “Superbroker”*: *Defining and Bridging the Gap Between Residential Realtors’ Abilities and Liabilities in the New Millenium*, 30 REAL EST. L.J. 173, 202 (2002).

145. *Id.* at 198.

146. *Id.*

147. *Id.* at 203.

148. *Id.* at 213.

149. *Id.* at 216.

150. *Id.* at 220.

151. *Id.* at 200, 203.

a landman's duty to disclose information to landowners should be even greater than the duty of realtors. Although the landman would not be disclosing "defects" per se, presumably, part of the purpose of the real estate agent's disclosure requirements is to make the buyer aware of issues that could compromise property values and quality of life. Concerns about property values and quality of life apply equally to natural resource extraction near residential areas, and hence, similar, or stronger, disclosure requirements could justifiably be imposed on landmen.¹⁵²

The issue of representation also transcends the buyer-real estate agent relationship and the landowner-landman relationship. In the real estate context, buyers frequently have believed real estate agents to be serving their interests in addition to the interests of the seller, when in fact, real estate agents' "fiduciary obligations ran to the seller only."¹⁵³ Olazábal notes that

[p]robably the most common and unfortunate consequence of this situation was that buyers whose interests were not being protected freely revealed vital confidential information, unintentionally compromising the integrity of the negotiation and the fairness of its result. For example, seventy-three percent of buyers surveyed in the 1980s reported telling the cooperating broker the highest price they were willing to pay for a home. . . . [N]ot all cooperating brokers actually followed through with their fiduciary obligation to divulge this critical piece of information to the seller during negotiations. Nonetheless, the inherent conflict of interest posed by the cooperating broker working with the buyer but being legally obligated as a seller subagent created a real economic hazard—

152. One oil and gas attorney opposed regulations for landmen in Ohio because "[t]he skills of landmen are usually being good communicators and good at earning people's trust . . . They're not typically experts in every aspect of exploration and production . . . [and e]very area is different, and in fact every well is different[.]" Speakman, *Ohio bill would require registration of drilling landmen*, *supra* note 127. However, it is precisely this type of attitude on the part of the industry or landmen that often makes development both surprising and hazardous to landowners. As discussed below, the stance that disclosures should not be required of landmen because landmen are uninformed and the nature of development is unknown seems inconsistent with the fact that landmen's responsibilities include engaging with landowners and persuading them to sign leases.

153. Olazábal, *Redefining Realtor Relationships and Responsibilities*, *supra* note 140, at 72.

particularly for the buyer who was not represented but who mistakenly believed he was. Making matters worse, with no fiduciary duties running in their favor, buyers generally ended up with no legal recourse when details of the transaction were negligently misrepresented, or when their best interests were simply left unattended.¹⁵⁴

Similar concerns arise in landowner-landman relations. Namely, rather than turning to their own attorneys or representatives in the process of natural resource development, landowners with mineral leases may ask the landman for information or help;¹⁵⁵ the Pennsylvania oil and gas attorney mentioned above bemoaned the fact that some landowners did not want to negotiate too forcefully because the landman was “a really nice guy.”¹⁵⁶ To address comparable concerns in the real estate agent context, most states’ modern approaches “have broken completely with the common law” and extended “other-party duties”—i.e., duties that realtors owe to parties who are not their clients—to address these concerns.¹⁵⁷

(2) MORTGAGE LENDERS

As with real estate agents, parallels can be drawn between ethical issues with landmen and the lending practices that resulted in the subprime mortgage crisis. Namely:

A majority of analysts believe that one of the largest causes of the 2008 financial crisis in the United States involved the predatory mortgage lending practices of many financial institutions which ultimately drove many homeowners into foreclosure as the crisis

154. *Id.*

155. Eliza Griswold, *The Fracturing of Pennsylvania*, THE NEW YORK TIMES MAGAZINE (Nov. 17, 2011), http://www.nytimes.com/2011/11/20/magazine/fracking-amwell-township.html?pagewanted=all&_r=0 [https://perma.cc/UT6D-EGGQ] (landowner’s first reaction to pollution in water was to ask Range Resources to test it).

156. Clark, *Kindness, Loyalty and Trust*, *supra* note 38.

157. Olazábal, *Redefining Realtor Relationships and Responsibilities*, *supra* note 140, at 100. A non-legal response to these concerns in the real estate context has been for buyers to hire their own representatives as well. This approach and other non-legal mechanisms for protecting landowners in transactions with landmen would also be potentially desirable, in addition to regulating landmen.

began to accelerate. . . . [F]ailed regulatory and oversight policies . . . produced unfair, deceptive, and abusive mortgage lending practices. Major deceptive and abusive lending practices included inflated property appraisals, large mortgage broker fees, abusive prepayment penalties, risky and irresponsible loan products, fraud in servicing the loan products, and ineffective underwriting standards.¹⁵⁸

Thus, like with landmen, general issues of fraud, risk exposure, and poorly managed deals arise in lender-borrower transactions.

Issues of borrowers' unwariness, borrowers' confusion, and lenders' mixed incentives additionally arise in lender-borrower transactions. Namely, borrowers have been "overly trusting and rel[ie]d] on the mortgage broker to make a determination for them . . . [while also] tend[ing] to underestimate or ignore . . . future costs while placing more emphasis on short-term costs such as a low down payment[.]"¹⁵⁹ Further, "under the previously prevailing form of mortgage broker compensation . . . brokers had a built-in conflict of interest and an incentive to steer their clients toward transactions that were more expensive and less favorable to them in the long run."¹⁶⁰

The Truth in Lending Act (TILA) of 1968 was designed to protect consumers from such practices, mainly through disclosure regulations.¹⁶¹ However, for years, "studies showed that consumers did not, or could not use the mandated disclosures to make good choices."¹⁶² Specifically, "[b]ehavioral economists demonstrate[d] that there are very daunting cognitive and behavioral obstacles that prevent many consumers from using the information provided." "[C]onsumers continued to regularly obligat[e] themselves to potentially disastrous mortgage transactions."¹⁶³

158. Christopher K. Seide, *Consumer Financial Protection Post Dodd-Frank: Solutions to Protect Consumers Against Wrongful Foreclosure Practices and Predatory Subprime Auto Lending*, 3 U. PUERTO RICO BUS. L.J. 219, 233 (2012).

159. Dee Pridgen, *Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010*, 24 LOYOLA CONSUMER L. REV. 615, 623 (2012)

160. *Id.* at 624.

161. *Id.*

162. *Id.* at 615.

163. *Id.*

The Mortgage Reform and Anti-Predatory Lending Act of 2010, also known as Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, was a “powerful response” to these phenomena and the subprime mortgage crisis.¹⁶⁴ Title XIV took “a much more substantive regulatory approach than has been seen until recently in federal credit regulation.”¹⁶⁵ It imposed stricter disclosure requirements on lenders, including that they must “show the borrower how [any] new interest rate will be calculated, make a good faith estimate of what the new monthly payment will be, and disclose all of the borrower’s available alternatives before the interest rate adjusts upward.”¹⁶⁶ It also expanded borrowers’ procedural options for defending themselves from foreclosure actions against lenders who had used abusive lending practices; raised the cap for damages on class action lawsuits against lenders;¹⁶⁷ and strictly limited prepayment penalties.¹⁶⁸ Significantly, too, it placed a “[b]an on mortgage brokers steering consumers into unfavorable loans and accepting yield spread premiums as compensation.”¹⁶⁹

Home loans and the land rights sought by landmen raise several comparable concerns. They both involve the security of individuals’ homes, both can be complicated and confusing, both involve exposure to risks and obligations, and both may be manipulated for profit to the detriment of people who are unprotected. As discussed in more detail below, Title XIV could be informative for purposes of regulating landmen.

(3) SECURITIES BROKERS

Unethical conduct by securities brokers also closely resembles that of exploitative landmen. Namely, the Securities and Exchange

164. *Id.* at 615-16.

165. *Id.* at 616.

166. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1414-1420, 124 Stat. 1376 (2010); Seide, *Consumer Financial Protection Post Dodd-Frank*, *supra* note 158, at 239 n.130.

167. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1416; Seide, *Consumer Financial Protection Post Dodd-Frank*, *supra*, at 239-40 n.133.

168. Pridgen, *supra* note 159, at 628.

169. *Id.*

Commission warns of brokers that use high-pressure sales tactics and make promises of once-in-a-lifetime opportunities.¹⁷⁰ For instance,

high pressure sales tactics can take various forms and are carried out using a variety of tactics. For example, one unfortunate practice that has developed with some of the more unscrupulous securities brokers and dealers is a concerted high pressure sales campaign which frequently includes the cold calling of individuals who are not regular customers. . . . Brokerage firms sponsoring such high pressure sales campaigns typically pressure their sales representatives to push the securities in question through the use of sales incentives or other tactics. . . . Another common high pressure tactic . . . is the use of pre-written scripts including prepared rebuttals to customer objections.¹⁷¹

In light of the high risk for exploitative conduct in this context, “numerous federal statutory provisions give animation to the core idea [drawn from the common law] that market participants should not lie in a market transaction in order to take value from others.”¹⁷² Namely, two of “the most famous and often used antifraud provisions . . . protect against fraud in the capital markets by imposing on companies the obligation to be accurate and complete in their communications to actual or potential investors.”¹⁷³ Those provisions are section 10(b) of the Securities and Exchange Act of 1934,¹⁷⁴ and Securities and Exchange Commission Rule 10b-5,¹⁷⁵ both of which prohibit fraud.

170. *Fast Answers: Telephone Calls from Brokers*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/answers/highprs.htm> [<https://perma.cc/4BG6-7B6C>] (last accessed February 15, 2016).

171. Thomas Lee Hazen, *THE LAW OF SECURITIES REGULATION* (6th ed. 2009) § 14.18, at 618.

172. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 *YALE L.J.* 715, 726 (1997).

173. *Id.*

174. 15 U.S.C. § 78j provides, “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or

The aspect of the SEC rules showing that they take a particularly aggressive and robust stance on preventing and remedying fraud is not just the prohibition on fraudulent conduct, but also the imposition of a requirement of completeness on individual professionals. For instance, violations of federal law can include “disseminating false or misleadingly incomplete information in some informal context such as a report, press release, or director’s speech, even if the communication is voluntary.”¹⁷⁶ Further, “[f]actual accuracy will not insulate a company’s communication from possible liability if the statement is nevertheless materially misleading.”¹⁷⁷ As Kent Greenfield explains, the “duty to speak the full truth arises when a defendant undertakes to say anything . . . [a duty which] attaches even when the communication is completely discretionary.”¹⁷⁸ Companies may even “have an obligation to ensure continued accuracy after disclosure under a duty to correct and update.”¹⁷⁹

The SEC rules also facilitate plaintiffs’ pursuit of remedies for fraud and material omissions. Section 12(2) of the Securities Act of 1933 states that any person who sells a security using a communication (written or oral) “which includes an untrue statement of a material fact or omits to state a material fact . . . shall be liable . . . to the person purchasing such security from him, who may sue either at law or in equity in any court of competent

appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78j(b) (2015).

175. 17 C.F.R. § 240.10b-5 provides: “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

17 C.F.R. § 240.10b-5 (2016).

176. Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, *supra*, at 728.

177. *Id.*

178. *Id.*

179. *Id.* at 728-29.

jurisdiction[.]”¹⁸⁰ Additionally, “[f]ederal securities laws have made actionable a range of fraudulent activities that lie outside the paradigmatic case,” such as when traders in secondary markets rely on false information that was disseminated knowingly or recklessly.¹⁸¹

In sum, the SEC rules acknowledge the capacity of brokers and other participants in the capital markets industry to manipulate, exploit, and take advantage of their greater access to information. The rules recognize the types of vague and informal communication that can influence sales scenarios, while also expanding access to justice for potentially victimized individuals. As discussed in the next section, elements of these regulations could inform a regulatory approach to oversight of landmen.

Most significantly, from the discussion above, consistent themes emerge across realtor-buyer, lender-borrower, broker-buyer, and landman-landowner transactions—who could be called, in their respective positions, Party A (realtor, lender, broker, landman) and Party B (buyer, borrower, buyer, landowner). They all reveal issues with Party B being confused about whether Party A is serving her interests, and potentially placing excess trust in Party A; potential conflicts of interest on the part of Party A, such as financial incentives to steer Party B toward something risky; information asymmetries that favor Party A, and the potential for Party A to manipulate Party B through omissions or misrepresentations; and Party B being unrepresented in a complex and potentially hazardous transaction with serious personal ramifications. Yet, the first three professions are increasingly aggressively regulated, while landmen are not.

Generally, how is unequal bargaining power treated under U.S. law? The standards of “ethics” referred to here are drawn in part from common-law tort and contract principles,¹⁸² which evidence a

180. 15 U.S.C. § 77i (2015).

181. Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, *supra*, at 729.

182. For instance, the common law elements of fraud (“material misrepresentation of fact made with some degree of scienter,” followed by the other party’s reasonable reliance and suffering of damages) have “remained rooted to its core idea: It is wrong for a participant in the marketplace to tell a lie in order to take value from another in a market transaction.” Greenfield, *The Unjustified Absence of Federal Fraud*

disfavor for unfairness in bargaining—although traditionally, the law has not taken an interventionist approach.¹⁸³ Rather, “[t]hrough contract and tort law doctrines such as assent, duress, concealment, and nondisclosure, the law has addressed bargaining sporadically, barring particular abuses as they arise, such as fraud or misrepresentation.”¹⁸⁴ However, Professor Eleanor Norton observed in her seminal article on the topic that legal controls of certain bargaining activities have tended to be stronger where one party is perceived as weaker; the law tends to “retreat” in response to perceptions of enhanced equality between parties.¹⁸⁵ Thus, the discussion above of the regulatory interventions into bargaining scenarios should not be a surprise, according to Norton: one party was increasingly seen as patently weaker, justifying legal intervention that afforded protections and remedies beyond post-hoc litigation.

THE OVERLOOKED LANDMAN PROFESSION, AND HOW IT COULD BE REGULATED

Common law remedies might be applicable to the issues addressed here. But they may very well be inadequate in that they only apply after an injury has been suffered, fail to address the aggregate impacts and policy concerns surrounding landmen’s activities, and may be of limited accessibility to many rural residents anyway.¹⁸⁶

Protection in the Labor Market, supra, at 723. Further, “[t]he idea that truth is a good thing, and falsity a bad one, is hardly new. Truth is a central principle in many ethical systems, and falsehood is generally condemned. But truthfulness as a principle is borne out by economic, as well as moral, theory. It is routine, in fact, when one speaks in economic terms, to maintain that accurate information is essential to a competitive market and to ‘efficient’ outcomes.” *Id.* at 738.

183. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 558 (1989).

184. *Id.*; cf. John E. Moyer & Cynthia L. McNeill, *Legal and Ethical Aspects of Negotiations – Duties of disclosure and the Right to Maintain Confidentiality in Natural Resources Transactions*, 42 ROCKY MTN. MINERAL L. FOUND. INST. 1 (1996).

185. Norton, *Bargaining and the Ethic of Process, supra*, at 560.

186. *Id.* at 496-97 (“In effect, litigation is the alternative to bargaining. More often than not, litigants use courts as bargaining leverage, rather than

Further, the formidable federal frameworks discussed above, including the relatively recent Title XIV of the Dodd-Frank Act, show that American law's continued evolution embraces the principle of stronger substantive regulatory intervention into bargaining and negotiations where parties have unequal power. States' regulation of real estate agents reflects similar principles, emphasizing an upward trend of increased disclosure and ethical obligations to non-clients. These trends highlight the fact that landmen's capacity for exploitative conduct has been overlooked as an area worthy of similar legal intervention. These frameworks also suggest that efforts to impose simple registration requirements may not suffice to remedy the complex issues discussed here. In fact, the report from the North Carolina Department of Environment and Natural Resources suggests that North Carolina's "current registry may provide a false sense of security to landowners of the landman's qualifications and expertise."¹⁸⁷ This discussion leads to the conclusion that the current laissez-faire legal approach to landmen should give way to more robust legal intervention.

Structurally, perhaps the most salient regulatory model for addressing landmen is found in the approach to real estate agents, which varies from state to state. This approach seems more appropriate and realistic for landmen than other potential options, such as federal legislation, strengthening of the AAPL, or the creation of an entirely new agency or regulatory body. Like with real estate agents, state legislation could tailor oversight of landmen to local needs, taking into account regional geography, history, resources, and public interest in the level of stringency.¹⁸⁸ The law appears to be evolving this way in any event: the Maryland combination of state legislation and agency regulations and the North Carolina state legislation both offer replicable models, structurally,

as decision makers."); Pruitt & Showman, *Law Stretched Thin*, *supra* note 42, at 467.

187. North Carolina Report at 10.

188. Some have even suggested using real estate regulations to oversee landmen. *Cf.* Robertson, *The landmen cometh*, *supra* note 17 (noting that the Ohio Department of Commerce regulates Ohio real estate agents, but does not have authority to regulate landmen). However, in light of the discussion above of landmen's history and activities, it would appear appropriate to acknowledge the fact that landmen are a unique profession of their own, and to address them as such.

for other states wishing to follow suit. While Maryland uses its Department of Labor, Licensing, and Regulations to enforce its landman rules, North Carolina uses a combination of its environmental conservation department and a consumer protection agency.¹⁸⁹ These approaches show how other states could utilize the agencies or departments that made the most sense for them; agencies touching on labor, environment, or consumer protection issues would all appear to be logical options.¹⁹⁰

Substantively, each of the approaches discussed above offers insights as to elements that would be appropriate to include in a set of landman rules and regulations. The following list is a possible regulatory model that reflects an effort to extrapolate the most apt elements for the governance of landmen from the approaches discussed above, as well as other informative regulations:¹⁹¹

A requirement that landmen be registered and licensed with the state, with the ability to obtain a license premised on a substantive evaluation, such as taking a course and passing an ethics exam. The license should be revocable in certain circumstances.

The registration requirement is found in all of the existing and failed state frameworks discussed here. Registration is a logical first step because it allows for monitoring and disciplinary oversight. None of the state landman frameworks included a licensing element, however. Licensing requirements, which apply to real estate agents and other professions, offer stronger protections against abusive

189. However, the North Carolina report recommends moving the registry under the authority of the North Carolina Real Estate Commission due to its more relevant expertise on regulating land and lease transactions. North Carolina Report at 11.

190. *But cf.* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 *STAN. ENVTL. L.J.* 81, 84 (2002) (discussing persistent problem of “agency capture” with environmental enforcement agencies).

191. It is important to note that substantive elements that should be included in mineral leases are outside the scope of this Article. The complexity of the terms of mineral leases is the very reason why it is critical for landowners to consult with attorneys in their state who have expertise in mineral lease transactions. The suggestions discussed here focus instead on equalizing bargaining power in landowner-landman transactions by increasing landowners’ access to information and increasing landmen’s accountability.

conduct because they establish a heightened barrier to entry, and greater consequences for misconduct through the possibility of revocation. The requirement of passing an exam will strengthen landmen's knowledge of ethical standards, while also potentially weeding out the "unscrupulous."

A requirement that, before negotiating any mineral transaction, landmen present identification and proof of license and/or registration, and disclose to the landowner the existence or nature of any agency relationship.

This element is drawn from the Maryland approach to landmen and the general regulation of real estate agents. Immediate disclosure of the identification and licensing of the landman and the identity of the employer company serves several purposes. Perhaps most importantly, the immediate and explicit acknowledgement of an agency relationship should help diminish landowners' confusion about whose interests the landman is primarily serving. Further, the landowner is better equipped to complain or seek remedies in the event of misconduct;¹⁹² is better able to become informed about the reputation of the parties she is dealing with, as well as plans for development; and will have enhanced bargaining leverage through the ability to compare and contrast proposals with neighbors.

A detailed set of ethical standards, including a duty of truthful communication, a duty of complete disclosure, a duty to update, and additional "other-party duties" to non-clients.

These elements are drawn from regulation of real estate agents, the Dodd-Frank Act, the SEC Rules, and the AAPL's ethical standards. Duties of complete disclosure and updating can help mitigate information asymmetries and landowners' exposure to financial and physical risks. The duties of complete disclosure and updating should entail both the physical and environmental aspects of proposed development, and the financial details of any proposed deal.¹⁹³ Both should be in writing and signed by the landowner. It should not be an excuse on the part of the landman or the company that they are unaware of what development will entail; if physical or

192. See, e.g., McFarland, *Dealing with Landmen*, *supra* note 15. (noting that if a landman is a member of the AAPL, landowners should complain to the AAPL if the landman acts unethically).

193. *Cf. id.* (discussing some states' imposition of realtor duties to other parties, including duty to disclose both financial issues and environmental hazards).

financial terms are uncertain, the precise details as to why, and the nature of the risks, should be put in writing, similarly to how mortgage lenders are required to explain risks and alternatives.¹⁹⁴ “Other-party” duties can help mitigate the confusion landowners experience as to whether landmen are serving landowners’ interests by actually making landmen owe landowners duties.¹⁹⁵

Imposition of misdemeanor convictions and civil fines for acts of fraud or intimidation, for advising landowners not to consult with an attorney, or for otherwise violating applicable ethical standards.

The imposition of a misdemeanor conviction or criminal fines for ethical violations is found in both the Maryland framework and the stalled West Virginia framework. Modest criminal liability for professional misconduct is used in several other contexts,¹⁹⁶ and would appear appropriate to include in a comprehensive approach to

194. *Cf.* Speakman, *Ohio bill would require registration of drilling landmen*, *supra* note 127 (discussing energy and natural resources attorney’s opinion that he was “unsure landmen will be able to meet the explanation requirements the proposed [Ohio] law entails . . . ‘The skills of landmen are usually being good communicators and good at earning people’s trust . . . They’re not typically experts in every aspect of exploration and production.’”). These suggestions are drawn from the most stringent other-party duties imposed on realtors (such as duties to investigate and to disclose adverse material facts in writing), as well as the Dodd Frank Act’s reforms of how mortgage lenders should communicate risk to borrowers.

195. Professor Olazábal discusses several forms of other-party duties states have imposed on realtors, any of which could apply to landmen. They include duties to disclose agency relationships; to treat all parties honestly and fairly; to not knowingly provide false information; to disclose “material adverse facts”; to disclose “any information that the [other party] is, or may be, unable to perform”; to disclose adverse facts the realtor should have known about a property (i.e., a duty of discovery); to disclose material adverse facts in writing; and to treat other parties with “reasonable care.” Olazábal, *Redefining Realtor Relationships and Responsibilities*, *supra* note 140, at 100-110. Olazábal argues that the latter duty is the most powerful for protecting consumers. *Id.* at 110. Other-party duties would also be beneficial to landmen, because some landmen may perceive obligations to withhold information from landowners based on the landmen’s duties to their employers. *Cf. id.*

196. *See, e.g.,* Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413 (2010).

landman regulations as well in order to deter fraud and abusive practices.

A documentation mechanism for holding landmen accountable for adhering to applicable obligations, such as a standardized checklist of statements (a “Disclosure Form”) that must be signed by landowners, encompassing disclosure and ethics obligations.

The requirement of using a “Disclosure Form” is found in the stalled Ohio legislation. A measure such as this may be a critical component of landmen regulation, because it creates evidence as to whether landmen are, in fact, complying with their ethical obligations. It will also help remedy issues of both landmen and landowners being confused about the legal requirements that apply to landmen. Indeed, landmen acting in good faith may face conflicts of interest when they are duty-bound to maintain client confidentialities, but also wishing not to withhold material information from landowners. Explicit, documented duties to landowners will thus protect the landman from perceived violations of duties to any employer company.

A right of revocation for landowners.

The right of revocation in potentially risky contracts exists in several areas, such as the giving of annuities.¹⁹⁷ A period in which the landowner has the right to revoke a contract entered with a landman could allow the landowner to conduct additional research or consult an attorney after entering into the agreement and protect himself upon the realization that the agreement’s terms were undesirable or misconstrued.

The creation of an avenue for landowners to file complaints about individual landmen, or a statutory cause of action to hold landmen personally liable in the event that landowners were not adequately informed of the environmental or financial harms to which they would be exposed through development.

Both Title XIV and the SEC Rules recognize the importance of expanding access to justice for potential victims of predatory conduct. One of the concerns about landmen’s potential for exploitative conduct is that residents of rural areas tend to have more limited access to justice.¹⁹⁸ A logical corollary of the regulations,

197. See generally Conrad Teitell, NON-TRUST TECHNIQUES AND CHARITABLE GIFT ANNUITIES, SU038 ALI-CLE 293 (2013).

198. See Pruitt & Showman, *Law Stretched Thin*, *supra* note 42, at 467.

then, is to expand access to justice in a manner similar to comparable models. Avenues for redress could be included in the disclosure form used by the landman. This approach also signals to landmen that if they are going to represent themselves as sources of information, they will be held responsible for being reliable sources of information.

A provision which creates a presumption of an agency relationship with any company employing a landman and holds the company liable for the landman's fraud, intimidation, failure to disclose material facts, or other conduct contrary to the regulations.

This proposed element cuts to a central question of the dilemma of how to regulate landmen: is it the landmen who should be regulated, or the companies who employ them, and who perhaps even sanction or require ethically questionable conduct on the part of landmen? The regulatory approach recommended here could also apply directly to oil and gas companies; including their agents in the regulations would include many landmen. However, first, the recommendations here presuppose that it would be easier to regulate one individual profession rather than an entire industry (which is not to suggest that the entire industry should not also be more strictly regulated). But more importantly, the analysis here suggests that landmen are a type of profession that tends to go overlooked as a "profession" warranting attention as such, unlike brokers, real estate agents, and lenders, who also may receive instruction from and answer to higher levels of authority. In any case, a presumption of an agency relationship will pull higher levels of authority into the scope of liability, incentivizing them to reform landmen's practices from the top down, while also making tolerance of misconduct more expensive for companies, and more remediable for those who seek damages.¹⁹⁹

199. The question of whether a landman is an "employee" or an "independent contractor" can be a significant one. Most importantly here, a company's ability to claim that a landman is an independent contractor rather than an employee may make it easier for the company to disavow the landman's actions. In a case dealing with a landman agency question, a Texas court explained that the case was "about a principal who employs an agent to carry out its business but, regretting the outcome of the agent's actions, opportunistically denies the agent acted with authority." *Panamerican Operating Inc. v. Maud Smith Estate*, 409 S.W.3d 168, 175

The report of the North Carolina Department of Environment and Natural Resources supports the framework above. In its assessment of North Carolina's experience with its landmen registry to date, it concludes that provisions should be added addressing fraud and material misrepresentation, the possibility of removal from the registry, a requirement that landmen disclose credentials at the time of leasing and negotiations, and a continuing education requirement.²⁰⁰ The report also suggests that "the legislature may want to consider directing the Consumer Protection Division of the Attorney General's Office to explore . . . whether model lease documents can and should publicly be made available to landowners."²⁰¹

Some industry leaders have argued that "regulations are unnecessary and complicated," or that they stagnate growth²⁰² "and hinder an industry that is driving . . . economic resurgence."²⁰³ But another advantage of state-based landman regulation could in fact be the benefit to the local economy of developing, monitoring, and nurturing the profession locally. Since the early days of natural resource extraction, commentators have noted that natural resource wealth tends to be funneled to out-of-state corporate entities.²⁰⁴ Transient landmen have been able to facilitate this by moving through states where they have little accountability, limited stake in the local outcomes of natural resource development, and limited incentive to reinvest their own profits locally.²⁰⁵ Tethering landmen's professional activities to the states where they operate, by contrast, could promote both accountability and economic growth.

(Tex. App. 2013). A presumption of an agency relationship will therefore make it more difficult for companies to escape liability for landmen's actions.

200. North Carolina Report at 11-12.

201. *Id.* at 12.

202. Speakman, *Ohio bill would require registration of drilling landmen*, *supra* note 127.

203. *Id.* See also North Carolina Report at 17 ("The AAPL views state run landman programs as ineffective due to the way most landmen work. They can operate in multiple states during a week, travel frequently, and ensuring that all state laws are being followed can be burdensome.").

204. Smith, *Implementing Environmental Justice in Appalachia*, *supra* note 36.

205. Khan, *supra* note 29 (Pennsylvania landowner describing difficult interactions with Texas-based company and landman from Kansas).

For instance, in State X without a landman requirement, a Texas company could pass through and employ a landman from Texas. But if State X required that landmen be registered with the state, perhaps the Texas company would be more likely to hire a State X landman, promoting accountability, nurturing the profession locally, and fueling financial benefits back into the local economy. North Carolina's report on its landman registration supports this prospect as well: as of April 2015, "[o]f the 59 registrants, 39 [we]re North Carolina residents, and the others reside[d] in Texas, Pennsylvania, West Virginia, Louisiana, and Ohio. . . . [O]nly seven [we]re members of the AAPL."²⁰⁶ According to the AAPL, "data from 2010 has captured a profession growing with new young members while maintaining a continued upward trend of compensation during one of the worst economic periods in United States history."²⁰⁷ Regulations could help states have landmen stay local and keep this economic success local.

CONCLUSION

The potency of the landman profession has gone overlooked for well more than a century. This is likely because they come in waves to discrete regions, and where they do exploit landowners, those landowners have limited access to justice. But the unequal bargaining power between landowners and landmen and the risky transactions landmen conduct suggest this is an appropriate area for legal intervention, in light of the federal and state approaches to negotiations and ethical issues discussed here, and in light of the central role landmen will continue to play in energy-related natural resource and infrastructure development. Whether misconduct can be traced to entities higher than landmen or not, bringing regulation of this profession on par with regulation of similar professions will promote accountability in the energy industry and keep in check an actor with substantial power.

206. North Carolina Report app. at 16.

207. Aven, *AAPL Landman Compensation Study*, *supra* note 37, at 35.