EQUITABLE ESTOPPEL, UNJUST ENRICHMENT AND THE GOOD SAMARITAN DOCTRINE: THREE POSSIBLE DEFENSES TO A FARMERS HOME ADMINISTRATION FORECLOSURE PROCEEDING

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I.
INTRODUCTION

For over two hundred years, our culture has recognized the family farm as a metaphor for the best that we can be. In art, literature, music, politics and ethics, we have turned again and again to the Jeffersonian vision of the small farm as living testimony to our deepest values.[1] Today, the family farm is under siege in America; not by a foreign army, but by the very governmental agency designed to preserve it—the Farmers Home Administration ("FmHA").[2] This essay is designed to provide lawyers representing small farmers against the FmHA with a series of possible arguments to resist FmHA foreclosure; what follows is a work of advocacy.

Most litigation directed at FmHA on behalf of small farmers has, understandably, centered on statutory issues and on the procedural defects inherent in the FmHA debt collection process.[3] This essay seeks to explore substantive

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1. *See* W. BERRY, THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE (1977).

2. The Farmers Home Administration ("FmHA"), the lender of last resort to low-equity, low-income family farmers, was established in 1946. Farmers' Home Administration Act of 1946, Pub. L. No. 731, 60 Stat. 1062. It is governed by the Consolidated Farm and Rural Development Act ("CFRDA"), 7 U.S.C. §§ 1921-96 (1973 & Supp. 1987), which was enacted "to foster and encourage the family farm system of agriculture in this country." *Id.* at § 2266(a); *see* U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979).

The FmHA is a product of over 120 years of federal government involvement in lending to agricultural enterprises. The FmHA's predecessors include the Homestead Act (1862), the Rural Resettlement Administration (1935), and the Farm Security Administration (1937). The program has been recognized as a form of "social welfare legislation, primarily designed to assist farmers. . . that cannot obtain funds from private lenders on reasonable terms." U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979). The Supreme Court has also noted that the relationship between FmHA and farmer is essentially one of creditor and debtor because FmHA has "promulgated exhaustive instructions to ensure that loan recipients are financially reliable and to prevent improvident loans. The government, therefore, is in substantially the same position as private lenders . . . ." *Id.* at 737. *See also* Curry v. Block, 541 F. Supp. 509, 509-514 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984). *See generally* 2 AGRICULTURAL LAW § 11 (J. Davidson ed. 1981).

3. *See* Hayes, *FmHA Farmer Borrowers: New and Complex Problems*, 20 CLEARINGHOUSE REV. 1100 (1987); Wiley, *Suing the FmHA: The Federal Farm Borrower's Last Stand*, 31 S.D.L. REV. 297 (1986); Note, *FmHA Loan Servicing: Alternatives to Foreclosure*, 35 DRAKE L. REV.

defenses to FmHA foreclosure based on traditional notions of equity. Briefly put, I argue that fundamental conceptions of justice and fairness would be violated by permitting FmHA to foreclose on valuable farmland that became burdened by debt through the culpable failure of FmHA officials to administer its loan programs in a minimally competent manner. In short, I argue that FmHA should not be permitted to reap a benefit from its own wrongdoing.

II.
THE FARM DEBT CRISIS: OF FAUST AND MEPHISTOPHELES

One of the pernicious myths generated by the current crisis in American agriculture is that the family farm is economically obsolete—a dinosaur marked for extinction because it is no longer a viable unit of production.[4] The fact is, though, that family farms, if not flourishing, are surviving throughout American agriculture.[5] The ability to react flexibly to changing market patterns and the willingness to invest enormous quantities of sweat equity in a way of life that is far more than just a means to earn a living, has enabled contemporary family farmers to retain a niche in the agribusiness world.[6] Not only does the contemporary family farm operate as a socially productive unit; it operates as an economically viable one — with one very important caveat. Many family farmers are prisoners of a crippling debt burden that drains current farming operations of profitability and, in the long run, often forces family farmers into liquidation and foreclosure.[7] It is true, of course, that if family

561 (1986); Coleman v. Lyng, 663 F. Supp. 1315 (D.N.D. 1987); Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983).

4. The modest full-time family farm is caught in a squeeze between corporate and part-time farms. For an excellent summary of the economic plight of the mid-sized family farm, *see* Harl, *The Architecture of Public Policy: The Crisis in Agriculture*, 34 KANSAS L. REV. 425, 425-28 (1986).

5. Large farms are not always better, more efficient farms. A seminal report of the U.S. Department of Agriculture stated: "[U]nit costs . . . fall rapidly as farms grow from relatively small sizes, and then remain relatively stable," and "[t]he increasing average size of farms does not necessarily imply the existence of attainable economics of size. It only implies the absence of significant diseconomies of size." U.S. DEP'T OF AGRIC., A TIME TO CHOOSE: SUMMARY REPORT ON THE STRUCTURE OF AMERICAN AGRICULTURE 57-58 (1981); *see also* Baker, *Structural Issues in U.S. Agriculture and Farm Debt Perspectives*, 34 KANSAS L. REV. 457, 458 (1986) ("[the family farm] is . . . a source of low cost food for consumers, rapid absorption of new technologies, and stable employment for a substantial, though dwindling, proportion of the nation's labor force.").

The persistence of the family farm is attested to by the fact that, as of 1982, there were 1,945,639 farms operated by an individual or family, constituting 65.1% of all land being farmed. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF AGRICULTURE, GRAPHIC SUMMARY 46-7 (1982). For helpful discussions of the role of the small farm in American agriculture, *see* J. MACFADYEN, GAINING GROUND: RENEWAL OF AMERICA'S SMALL FARMS (1984); J. BELDEN, DIRT RICH, DIRT POOR: AMERICA'S FOOD AND FARM CRISIS (1986).

6. *See* W. BERRY, *supra* note 1, at 14; Baker, *supra* note 5, at 460 ("The capacity to adjust is a strong testimony to the robustness of the family-centered commercial farm.").

7. The impact of a crippling debt burden on the agricultural economy is chronicled in, *e.g.*, Harl, *supra* note 4, at 430 ("[If present trends continue] more than one-third of the farmers nationally will move to insolvency within three to four years . . . ."); Baker, *supra* note 5;

farmers cannot repay loans needed to finance their farming operations, they are economic dinosaurs marked for extinction. Tragically, though, much of the debt that is suffocating the American family farm is not the result of prudent and necessary borrowing linked to the maintenance of family farming operations, but is the residue of a misguided attempt by the federal government to force-feed expansion capital into the farm economy during the 1970s.[8]

During the early '70s, short-term market factors created an artificial worldwide demand for American agricultural products,[9] a fact not lost on geopolitical cold-warriors who saw food as America's ultimate weapon.[10] One government response was to pump capital for expansion into the farm economy in the form of government loans, secured by mortgages on increasingly valuable farm real estate.

FmHA local supervisors brought these expansive lending policies into America's local farm communities.[11] When policymakers in Washington de-

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Stewart & Bland, *Insolvencies in Farming and Agribusiness*, 73 KY. L.J. 795 (1985); Harl, *Problems of Debt in Agriculture*, 6 J. AGRIC. TAX'N & L. 689 (1985); Harl, *Financial Revolution in Agriculture*, 60 N.D.L. REV. 387 (1984). A helpful compilation of materials on the problem is collected in Harl, *supra* note 4, at 425, n.1.

> [The FmHA] has three general ways of forcing liquidation: sale of security property by FmHA or the borrower; civil suit against the borrower; and claims in bankruptcy court. The forced sale is the FmHA's primary means of liquidation. It includes the preferred method of 'voluntary' sales by the borrower and FmHA arranged liquidations including foreclosure.

CENTER FOR RURAL AFFAIRS, FMHA FARM LOAN HANDBOOK 57 (1983) [hereinafter FARM LOAN HANDBOOK]. As of December 1986, the FmHA had foreclosed on or forced the "voluntary" conveyance of over 5,000 farms containing over 1.5 million acres worth just under one billion dollars. CENTER FOR RURAL AFFAIRS, FMHA FARM LOAN HANDBOOK SUPPLEMENT 9 (1987).

8. *See* Harkin, *America's Decision: Will We Save the Family Farm?* 15 N.Y.U. REV. OF L. & SOC. CHANGE 283, 285 (1987) ("During this time, economists, government officials, bankers, and credit officials all advised farmers to expand and to borrow."); *see generally* CONGRESSIONAL QUARTERLY INC., FARM POLICY: THE POLITICS OF SOIL, SURPLUSES, AND SUBSIDIES (1985) [hereinafter FARM POLICY POLITICS]; J.SARKOFF, THE POLITICS OF FOOD (1985); BELDEN, *supra* note 5. For descriptions of a similar policy followed by private lenders, *see* Harl, *Financial Revolution in Agriculture*, 60 N.D.L.REV. 387, 388 (1984); Stewart & Bland, *Insolvencies in Farming and Agribusiness*, 73 KY. L.J. 795, 796 (1985).

9. *See, e.g.*, Harkin, *supra* note 8, at 284-85; *see generally* SARKOFF, *supra* note 8.

10. BELDEN, *supra* note 5, at 130.

11. An applicant for an FmHA loan must satisfy both a county committee of area farmers, and the FmHA's county supervisor/agent. *See* FARM LOAN HANDBOOK, *supra* note 7, at 25-43. The FmHA prides itself on a decentralized structure that vests significant authority in the FmHA county supervisor. The county supervisor is the official who collects the necessary application support material and interprets the applicants' records, farm plan, and application for the county committee. "Even if an application is found eligible by the committee, the supervisor can still deny FmHA assistance by disapproving the loan application." *Id.* at 17; *see* 7 C.F.R. § 1910.6(a) (1987). The approval is based upon adequate security, repayment ability, soundness of the Farm and Home Plan (a plan imposed by the FmHA that regulates the use of the borrowed funds and provides a budget for repayment), and suitability of the farm. 7 C.F.R. 1941.33(b), § § 1943.24(a), 1943.33(b) (1987). "The two most important criteria [when private banks are making real estate and operating loans] are adequate collateral and repayment ability. In the FmHA scheme these two factors are decided by the county supervisor." FARM LOAN HANDBOOK, *supra* note 7, at 20.

cided to expand the productive capacity of the agricultural sector,[12] FmHA was given substantial sums to lend.[13] The task of deciding how much money to lend to whom and for what fell to FmHA's county supervisors, many of whom were inexperienced, inadequately prepared and supported, and some of whom were downright incompetent.[14] Thousands of family farmers with stable, though modest, farming operations were foolishly encouraged by FmHA officials to incur substantial debt burdens to finance expansion in the false expectation that the worldwide demand was permanent.

In *Allison v. Cavanaugh*,[15] the court noted an all-too-common pattern:

> Each year the FmHA county agent encouraged Allison to increase his hog herd. He followed that advice . . . Hog prices plummeted . . .
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> Allison sought assistance from FmHA. In 1973 . . . the new FmHA agent reviewed plaintiffs' 1973 books, including their record of repayment, and proposed an expansion of plaintiffs' farming operation by the acquisition of an additional 80 acres of land through FmHA financing. . . . Although plaintiffs had considered only renovating the existing farmhouse which was then in need of repair, [the agent] indicated that a new structure was needed to meet FmHA regulations. . . .
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> In the fall of 1977, . . . the FmHA county agent, approached Allison with a proposal that he expand his hog-raising activities to increase the cash flow of the farm operation. . . . To solve the prob-

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> Regardless of the power of the local supervisors to determine the terms of credit, FmHA officials will sometimes make decisions based on their perceptions of economies of size. They may recommend or require purchases of bigger machinery or more livestock to realize perceived economies of size. These bigger purchases can mean more complication, more debt, more interest expenses and more vulnerability when market prices slip . . . . Whenever possible low-equity farmers should fully utilize family labor before considering capital intensive investments which add to their financial vulnerability but do not necessarily add to the profitability of their farm operations.

Id. at 23. This power caused the FARM LOAN HANDBOOK's authors considerable concern: "As the lender of last resort, FmHA serves a low-equity clientele. As such, FmHA security requirements must be more flexible than those offered by commercial lenders . . . *[f]amily farmers should] not [be] forced to purchase a bigger farm, simply for the sake of securing farm improvements.*" *Id.* at 39 (emphasis added).

12. *See* FARM POLICY POLITICS, *supra* note 8 at 135; *see also supra* notes 9-10 and accompanying text.

13. *See* BELDEN, *supra* note 5, at 32-3.

14. This is certainly not to say that FmHA field personnel are universally incompetent or improperly motivated. However, a combination of policy-level disregard or indifference to change, chronic understaffing, lack of training and support, influence of politically appointed state directors and the pressure generated by the deepening farm economic crisis has resulted in ineffective and insensitive program administration in many instances.

Massey, *Farmers in Crisis: A Challenge to Legal Services*, 18 CLEARINGHOUSE REV. 702, 716 (1984).

15. No. 80-4226, slip op. (W.D.Mo. Jan. 14, 1983).

> lem of [Allison's inability to pay back some FmHA loans], [the agent] proposed that Allison construct and operate a modern farrowing house and a grain storage bin.[16]

Although "Allison was reluctant to expand his operation by incurring greater debt in light of his existing FmHA loans which were then outstanding,"[17] he undertook the loans upon assurances by the FmHA that he would have ample time to complete the improvements and start operations.[18] When, however, circumstances beyond Allison's control delayed the construction of the farrowing house, FmHA commenced foreclosure proceedings.[19]

Marty Strange, Director of the Center for Rural Affairs in Nebraska, relates a similar incident:

> I know a farmer, and I'm sure you all do, who wanted to borrow a modest amount of money to remodel a 30-cow dairy barn and was told, "That's not progressive. We won't lend you enough to remodel a 30-cow dairy barn. We will lend you enough to build a new one-hundred cow barn."[20]

The pattern repeats itself in the story told to me recently by an Idaho farmer. For forty years, his family had successfully operated a modest but economically viable potato farm. In the early 1970s, he approached the local FmHA agent for a loan of $25,000 to build a storage shed for his potato crop. He believed that this would allow him to take advantage of occasional higher market prices, thus increasing his economic stability. The agent, who had recently graduated from agricultural school, visited the farm and inspected the premises. He was skeptical about the storage shed loan because, in his opinion, the profit potential of potatoes was limited. He noted, however, that the climate and terrain of that part of Idaho were ideal for raising sheep. The FmHA agent suggested a much larger loan, secured by the potato farm, to purchase a flock of sheep and the necessary equipment. Despite misgivings on the part of the potato farmer, the loan was made.

The sheep farm was a disaster. Interest on the sheep loan ate up the potato farm's modest profits. The FmHA refused to make annual operating loans for the potato farm because the farmer's combined debt burden rendered the potato farm hopelessly unprofitable, and, after the farmer had poured his life's savings into a vain attempt to save his core farming operation, FmHA foreclosed on the potato farm.

Officials in Washington had virtually no incentive to probe the wisdom of these individual loans, because the FmHA loans were secured by mortgages

16. *Id.* at 3-4.
17. *Id.* at 4.
18. *Id.* at 6, 8.
19. *Id.* at 7.
20. M. Strange, Address to An Ecumenical Event on the Future of Family Farming in Wisconsin (Mar. 8, 1985) (copy on file at the New York University Review of Law & Social Change).

on farmland the value of which was rapidly increasing. The net result was literally thousands of loans to small farmers that were not only unnecessary and ill-advised, but downright foolish.

The rest is melancholy history. Worldwide demand predictably declined to lower levels, interest rates soared, commodity prices dropped, land values declined, and, suddenly, thousands of family farmers were buried under a debt burden that turned their efforts into hopeless paper losses.[21] The FmHA, which had led family farmers into insupportable debt in the first place, moved to liquidate thousands of its low-equity borrowers.[22] With farm real estate values declining because of lower income received from falling agricultural prices and higher real interest rates, many family farmers saw the paper value of their pledged collateral fall below their outstanding FmHA debts.[23] Having encouraged thousands of these family farmers to incur unnecessary and unwise debt burdens, FmHA denied them annual operating loans[24] and triggered a spate of farm foreclosures that continues to the present day.[25]

I believe that when an FmHA agent has mistakenly encouraged a family

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21. *See* Stewart & Bland, *supra* note 7; the impact of debt on current farming operations is described *supra* notes 7, 8 and accompanying text.

22. *See* CENTER FOR RURAL AFFAIRS, FMHA FARM LOAN HANDBOOK SUPPLEMENT, *supra* note 7. For discussion of the unconstitutional nature of certain FmHA foreclosure procedures, such as forcing farmers into so-called voluntary liquidations by cutting off their income stream, *see* Coleman v. Block, 562 F.Supp. 1353, 1364-66 (D.N.D. 1983); *see also* Curry v. Block, 541 F.Supp. 506 (S.D. Ga. 1982) *aff'd* 738 F.2d 1556 (11th Cir. 1984); Allison v. Block, 556 F.Supp. 400 (W.D. Mo. 1982). "[These] cases, and the plaintiffs' stories behind them, carry a clear, compelling and poignant message about the plight of low-income farm families in the '80s." Massey, *supra* note 12, at 707.

23. *See* Barkema, *Farmland Values: The Rise, The Fall, The Future*, ECON. REV., April, 1987, at 19, 20-22 (discussion of the decline in land values and its impact); Johnson, *Nebraska Farm Real Estate Market Trends*, 42 BUS. IN NEB., May, 1987, at 1 ("[T]oday's average value of Nebraska farmland [is] just 41% of its peak value in 1980-81. . . .This represents a considerable loss of wealth to rural Nebraska, impacting retirees and other rural residents as well as operating farmers. Both the private and the public sectors of rural communities will continue to bear the consequences of this loss for years to come.").

24. FmHA loans fall into two general categories: Farm Ownership loans (which allow farmers to enlarge or improve their farms) and Operating Loans (which allow farmers to, among other things, finance ongoing operations and family living expenses). Unless a farmer can persuade the county supervisor that she will be able to repay the loans, they will not be made. Thus, in order to receive an operating loan, a farmer must prepare a "Farm and Home Plan" which anticipates income sufficient to repay the operating loan, as well as servicing other existing loans. *See* FARM LOAN HANDBOOK, *supra* note 7, at 2, 35. When anticipated income falls below the amounts needed to service existing loans and repay the new one, FmHA often refuses the operating loan, forcing farmers into liquidation. *See* Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983). Farmers have been caught in the squeeze between rising interest rates, which made it more expensive to service existing farm ownership loans, and falling income. The FmHA's refusal to defer repayment of existing capital improvement loans during periods of soaring commercial interest rates was the death knell for thousands of small family farmers. *Id.*

25. As of July 31, 1987, the percentage of all FmHA borrowers delinquent in their loans payments was 27%. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., FARM AND HOUSING ACTIVITY REPORT at 11 (July 1987). In the year preceding July 31, 1987, the number of FmHA cases sent to the Office of General Counsel to pursue foreclosure was 2,882 nationwide. *Id.* at 13.

farmer to assume a debt burden that dooms an otherwise viable farming unit, FmHA ought not be permitted to take advantage of its own bad advice by foreclosing on the farmer's land.[26] While the debt's principal should eventually be repaid with reasonable interest, the spectacle of the government foreclosing on loans that were incurred because of the government's mistake in persuading farmers to incur the debt in the first place should shock the conscience. With FmHA playing Mephistopheles to the farmers' Faust and with the ultimate lending decisions being made by FmHA county agents with little experience or financial sophistication, an unacceptably high number of unnecessary and unwise loans were foisted on family farmers. Today, these loans threaten their survival.

Not all FmHA loans fall into this category.[27] Often, the family farmer took the initiative in obtaining FmHA credit needed to operate the core farming operation. Such prudent and necessary loans, and the security arrangements that protect them, should not be subject to equitable defenses. Thus, if FmHA had lent the Idaho farmer the $25,000 for his potato shed, no equitable defense to a foreclosure action keyed to that debt would exist. However, where FmHA took the initiative in making unnecessary loans to small family farmers, not simply to maintain their core farming operations but to expand their productive capacities in accordance with unwise national agricultural policy, an attempt to foreclose on the loans should be subject to one or more of three equitable defenses.

When the government gives terrible financial advice to the small family farmer pursuant to a seriously flawed national agricultural policy and the advice causes dreadful harm to the farmer, the government ought not be permitted to enforce legal obligations arising out of the advice when the enforcement of the obligations will, 1) exacerbate the harm; and, 2) result in a windfall profit to the government. If we focus on the "harm" aspect of the transaction, the doctrine of equitable estoppel should provide a defense. If we focus on the "windfall profit" component, the doctrine of unjust enrichment should provide a defense. Finally, if we focus on the quasi-fiduciary relationship that exists between the FmHA and family farmers, the Good Samaritan doctrine should preclude foreclosure and might even provide the basis for a partial setoff against the underlying debt.

26. The level of FmHA wrongdoing needed to trigger a defense is discussed below. The level of fault lies somewhere between recklessness and negligence.

The required level of fault should be keyed to the fact that farmers do not seek a defense to the underlying debt; they merely seek a defense to the foreclosure. Thus, the question is not what level of fault should shift loss to the government; rather, it is what level of fault should preclude the government from profiting by its own terrible advice.

27. Not all FmHA officials can be charged with culpable behavior. Many FmHA officials struggle against difficult odds to perform their principal role as support for the family farming system.

III.
EQUITABLE ESTOPPEL AS A DEFENSE TO FMHA FORECLOSURE

When one private person wrongfully induces another to perform a detrimental act, the doctrine of equitable estoppel precludes the wrongdoer from enforcing rights arising out of her wrongful activity when enforcement would impose an unfair burden on the innocent party.[28] Similarly, when a private person wrongfully induces the government to engage in detrimental reliance, the private person is equitably estopped from reaping an unfair advantage from her behavior.[29]

Unfortunately, the Supreme Court has never explicitly applied the equitable estoppel doctrine *against* the government, at least not in the context of unauthorized mistaken or inept advice by a government agent.[30] Whatever

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28. *See* 3 J. POMEROY, EQUITY JURISPRUDENCE § 804 (1941). The roots of equitable estoppel are in the maxim that no one should be permitted to found an action in equity on her own wrongdoing. At common law, the necessary elements of a claim of equitable estoppel are:

1) The party to be estopped must have been in possession of the relevant facts.
2) She must have intended that her conduct be acted upon by the injured party.
3) The injured party must have been ignorant of the relevant facts.
4) The injured party must have relied upon the conduct to her detriment. *Id.*

As applied to the farmers' situation:

1) The FmHA was in actual or constructive possession of relevant facts concerning the level of risk associated with the loans. Specifically, the likelihood of a decline in worldwide demand and a rise in interest rates was known to FmHA, especially since these factors are affected by federal farm policy.
2) The FmHA certainly intended that farmers act consistently with its advice. Indeed, farmers who did not accept FmHA's advice were not likely to receive any loans at all.
3) Small family farmers were typically less knowledgeable than FmHA officials and at times were understandably ignorant of the geopolitical and economic risks associated with carrying expansionary loans secured by inflated real property values.
4) The harm to farmers who took FmHA's advice is all too apparent.

29. *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934).

30. The Supreme Court has considered the application of equitable estoppel in the context of mistaken or inept advice by government officials on at least eight occasions. *Lee v. Munroe*, 7 U.S. (1 Cranch) 366 (1813); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Montana v. Kennedy*, 366 U.S. 308 (1961); *INS v. Hibi*, 414 U.S. 5 (1973); *Schweiker v. Hansen*, 450 U.S. 785 (1982) (per curiam); *Miranda v. INS*, 459 U.S. 14 (1982) (per curiam); *Heckler v. Community Health Services of Crawford*, 467 U.S. 51 (1984). *See also Bowen v. City of New York*, 476 U.S. 467 (1986), and *United States v. Locke*, 471 U.S. 84 (1985).

For helpful law review comment on the doctrine, *see, e.g.*, Note, *Equitable Estoppel of the Government*, 47 BROOKLYN L. REV. 423 (1981); Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026 (1986); Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 ST. JOHN'S L. REV. 114 (1981); *Recent Development, Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609 (1982); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391 (1969); Comment, *Estoppel Against State, County and City*, 23 WASH. L. REV. 51 (1948). For a general assault on the reluctance to apply equitable estoppel against the government, *see* Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954). For a defense of the current rules, the correctness of the Court's traditional reluctance to apply equitable estoppel against the government, the doctrine should apply when a farm foreclosure arises out of FmHA's negligent loan advice to a family farmer.[31] Even the Supreme Court's cautious approach to equitable estoppel against the government should be satisfied when estoppel: 1) is deployed solely as a shield, rather than a sword; 2) impacts on the government in its role as a participant in the economy; and 3) is triggered by culpable government behavior encouraged, if not formally authorized, by existing government policies.

The Supreme Court's first brush with equitable estoppel against the government took place in *Lee v. Munroe*.[32] Lee, a creditor, consulted government land agents to determine whether Morris and Nicholson, two land speculators, were authorized to convey government land to him to satisfy a debt they owed to him. The government land agents assured Lee that Morris and Nicholson were authorized to convey the land. When Lee presented the government land agents with the instrument conveying the lots, however, he was informed that Morris and Nicholson still owed substantial sums on the lots and that they could not be conveyed to him until the balance was paid. Lee sought a set-off against the government for $3,000 based upon his reliance on the agents' erroneous representation that Morris and Nicholson were authorized to convey title. The Supreme Court declined to apply equitable estoppel against the United States, reasoning that the agents' duties did not remotely extend to giving out such information. The Court seemed extremely reluctant to recognize the doctrine, fearing that equitable estoppel would permit collusive activity to bind the public fisc.[33]

In *Utah Power & Light Co. v. United States*[34], the *Lee* principle was applied to equitable estoppel asserted as a shield against the government. In

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see Braustein, *In Defense of Traditional Immunity — Toward an Economic Rationale for Not Estopping the Government*, 14 RUTGERS L.J. 1 (1982).

31. The Supreme Court has applied equitable estoppel against the government in the context of *authorized* conduct, even when the authorized conduct was of questionable wisdom. *See* Hollerbach v. United States, 233 U.S. 165, 172 (1914) (government estopped from arguing legal position contrary to lawful contract).

It is possible to characterize the conduct of FmHA supervisors in urging farmers to undertake imprudent loans as authorized behavior, because it resulted from a national policy of pumping capital for expansion into the farm economy. On the other hand, the government probably did not intend to mislead farmers to their detriment. The FmHA ostensibly intended to benefit the family farm. *See supra* note 2 and accompanying text. It would, however, be unwise for the availability of an equitable estoppel defense to turn on whether one characterizes a loan as "authorized" or "unauthorized." Under such a test, the more flagrant the agent's behavior, the less likely the existence of an equitable defense.

32. 7 U.S. (1 Cranch) 366 (1813).

33. Lee claimed that by physically surrendering the promissory notes to Morris and Nicholson in reliance on the agents' representation, he had lost the ability to enforce his debt against Morris and Nicholson. The Supreme Court expressed grave doubt about whether Lee, in fact, had impaired his ability to enforce the debt. *Id.* at 369. If the debt remained enforceable, Lee suffered no detrimental reliance as a result of the government's advice. In fact, Lee's attempt to invoke equitable estoppel appears to have been an imaginative attempt to avoid the consequences of Morris and Nicholson's insolvency and not a true invocation of equitable estoppel.

34. 243 U.S. 389 (1917).

Utah Power & Light, the government sought to eject three power companies from continued use and occupancy of congressionally defined forest reservation land. The companies sought to defend themselves on the ground that unnamed forest service officials had erroneously assured them that forest reservations would not be used to interfere with hydroelectric plants. The companies argued that they had expended substantial sums, with the forest service's knowledge, in reliance on the erroneous representations. Once again, the Supreme Court refused to apply the equitable estoppel doctrine, reasoning that the representations of unnamed officials could not bind the United States to act contrary to statute.[35]

Lee and *Utah Power & Light* were applied to farmers' reliance upon incorrect governmental advice in *Federal Crop Insurance Corp. v. Merrill*.[36] In *Merrill*, an agent of the federal government overlooked a regulation and assured two farmers that spring wheat planted on winter wheat acreage was fully insured. In fact, the regulation, which had been published in the Federal Register, prohibited coverage. Several months later, when the farmers sought to collect the insurance proceeds, they were informed that no lawful insurance policy had ever issued. The Idaho Supreme Court applied classic principles of equitable estoppel against the Federal Crop Insurance Corporation, and held that the farmers had detrimentally relied on erroneous representations.[37] The Supreme Court reversed, reasoning that the farmers were responsible for knowing the contents of the Federal Register in which the insurance regulation was published.[38]

The first hint that equitable estoppel might be available against the government in an appropriate case was dictum by Justice Harlan in *Montana v. Kennedy*.[39] In *Montana*, an alien claimed citizenship through equitable estoppel, arguing that a consular official had wrongfully delayed the alien's pregnant mother's return to the United States and had thus caused the alien to be born in Italy. Justice Harlan noted that, at most, the consular official had merely advised against travel, and therefore that it was unnecessary to decide

35. *Utah Power & Light* is a particularly unappealing case for the invocation of equitable estoppel, since it involves a collision between the mistaken advice of an official and an Act of Congress. When a bureaucrat flatly contradicts a congressional statute known to the parties, one can hardly argue that detrimental reliance on the representation is reasonable. The will of Congress should not be subject to such a veto by officials of the executive branch.

36. 332 U.S. 380 (1947).

37. 67 Idaho 196, 200, 174 P.2d 834, 836 (1946).

38. Thus, *Merrill* extended *Utah Power & Light* by holding that detrimental reliance on erroneous advice in conflict with a published regulation was not reasonable. The dissent stressed the difference between charging persons with knowledge of congressional statutes, as in *Utah Power & Light*, and charging them with knowledge of the contents of the Federal Register.

A more persuasive rationale for denying relief in *Merrill* flows from the fact that no commercial crop insurance was available to the farmers. Thus, they did not engage in detrimental reliance, since the erroneous advice did not make them any worse off. Only if it is assumed that no crop would have been planted at all without insurance can the erroneous advice be said to have induced detrimental reliance. No evidence was introduced tending to show that the erroneous advice induced the farmers to plant the crop.

39. 366 U.S. 308 (1961).

whether "misconduct" might estop the government from denying citizenship.[40]

In *Immigration & Naturalization Service v. Hibi*,[41] the Court found that the Executive's failure to publicize broadly a short-lived option to seek American citizenship, which Congress had granted to Filipino men serving in the American armed forces, did not estop the United States from denying a naturalization petition filed by such a Filipino 19 years later. As in *Montana*, the Court observed that since no "affirmative misconduct" had occurred, it was unnecessary to decide whether "affirmative misconduct" would trigger equitable estoppel.[42]

Emboldened by the dicta in *Montana* and *Hibi* that equitable estoppel might lie against the government in "affirmative misconduct" cases, lower federal courts, especially in the Ninth and Second Circuits, explored the possibility of estopping the government. The Supreme Court's reaction to the lower courts' experiments was swift and negative. In *Schweiker v. Hansen*,[43] the Court summarily reversed the Second Circuit's attempt to estop the government from denying retroactive benefits to a Social Security applicant who had been erroneously informed that she was ineligible and who therefore had refrained from filing an application for one year. The Court's *per curiam* opinion stressed that the error had not prevented the applicant from ultimately qualifying for Social Security and did not constitute "affirmative misconduct."[44] Similarly, in *Miranda v. Immigration & Naturalization Service*,[45] the Court ruled summarily that an 18-month delay in processing a visa application premised on the applicant's marriage to an American citizen did not estop the government from denying the application based on the applicant's divorce at the end of the 18-month period. The Court ruled that since the government's delay did not amount to "affirmative misconduct," no basis for equitable estoppel existed.[46]

Finally, the Supreme Court's most recent brush with equitable estoppel occurred in *Heckler v. Community Health Services of Crawford*.[47] In *Community Health Services*, a health care provider participating in the Medicare and CETA programs expanded its activities after receiving advice from a government agent that certain CETA activities qualified for double reimbursement under the two programs. The Third Circuit ruled that although the advice

40. *Id.* at 314-15.

41. 414 U.S. 5 (1973).

42. *Id.* at 8-9. As with many of the equitable estoppel cases, proof of detrimental reliance causally linked to the government's wrongdoing is quite thin in *Hibi*. Since the citizenship application in *Hibi* was filed nineteen years after the expiration of the eligibility period, it is unclear whether the government's failure to have publicized the option caused Hibi to fail to file in a timely fashion.

43. 450 U.S. 785 (1982) (per curiam).

44. *Id.* at 790.

45. 459 U.S. 14 (1982) (per curiam).

46. *Id.* at 19.

47. 467 U.S. 51 (1984).

was erroneous, the government was estopped from proceeding under the correct regulation, which did not provide for double reimbursement, because Community Health Services had detrimentally relied on the erroneous advice. The Supreme Court reversed. However, the Court carefully observed that equitable estoppel against the government might be available if "the public interest" required.[48]

Despite the Supreme Court's obvious reluctance to apply equitable estoppel against the government, I believe that equitable estoppel against FmHA foreclosures on improvident loans is fully consistent with existing case law. Seven of the eight Supreme Court cases involved attempts to use equitable estoppel as a sword to obtain an affirmative benefit from the government.[49] Only *Utah Power & Light* sought to use equitable estoppel as a shield to prevent ejectment, but it tried to use alleged representations made by unnamed middle level officials of the executive branch to contravene the clear intent of a congressional statute. The reliance was unreasonable and thus could not support the use of estoppel.[50] Unlike the "sword" cases, the estoppel used in an FmHA foreclosure context would be purely defensive. And, unlike *Utah Power & Light*, estoppel would not be used to contravene a statute, but would actually further the goals of Congress's farm policy.[51]

Moreover, in all of the cases described the government performed a sovereign function that did not resemble private sector business activity in either theory or practice.[52] In the FmHA foreclosure context, on the other hand, the government has chosen to act like a private sector investment advisor and banker. Indeed, it is precisely because the government has insisted upon claiming all the perquisites of a private creditor that the FmHA debt burden is so crippling. Having chosen to act like a private banker, the government can hardly complain if, for equitable estoppel purposes, it is treated like a private banker and not like a sovereign.[53]

In all eight Supreme Court cases, a government official negligently transmitted inaccurate information to persons whom the Court viewed as capable of verifying the information's accuracy or otherwise protecting themselves from loss. In the Court's view, the injured parties either bore a share of the responsibility for their plight or were not causally injured by the inaccurate

48. *Id.* at 60-61.

49. Lee wanted a $3,000 rebate on his land; Merrill, the proceeds of a crop insurance policy; Montana, Hibi, and Miranda, citizenship; Hansen, retroactive social security benefits; and Community Health Services, double reimbursement of the same expenditure under both Medicare and CETA.

50. *See supra* note 34.

51. Defending against foreclosures would have the effect of protecting the institution of the family farm and would promote its continued growth and viability; this is a primary goal of Congressional farm legislation. *See supra* note 2.

52. In *Lee* and *Utah Power & Light*, the function at issue was the disposition and management of public lands. In *Montana, Hibi* and *Miranda*, it was the grant of citizenship. In *Merrill, Hansen* and *Community Health Services* it was the operation of a government entitlement program.

53. *See* U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 737 (1979).

information, or both. In the FmHA foreclosure context, however, the government agents did more than negligently transmit incorrect data, subject to verification by the client. FmHA supervisors affirmatively urged increased debt.[54] Moreover, although a farmer might be presumed to know the contents of the Federal Register, a small family farmer cannot be presumed to be an economic forecaster. When the government told the farmer that leveraged debt was the wave of the future, there was no rulebook for the farmer to consult to verify the accuracy of this assertion. It is the government and its agents who are presumed to have the expertise in market indicators, not the family farmer. A low-equity, low-income family farmer who was nearly totally dependent for her necessary credit on FmHA was incapable of realistically assessing an FmHA county supervisor's market forecasts and credit recommendations.

Perhaps most importantly, the wrongful government activity in all prior Supreme Court equitable estoppel cases was unauthorized, nearly always in violation of a statute or regulation. Permitting estoppel in such situations allows an executive official, often quite far down the hierarchy, to trump the policy enunciated by Congress or responsible higher executive officials. In contrast, in the FmHA foreclosure context, using leveraged debt to finance an explosive increase in farm productivity, designed to serve and manipulate a supposedly captive world market, was the authorized policy of the federal government. Estoppel would merely force the government to share in the economic consequences of such a foolish gamble.

Finally, in all of the Supreme Court cases except for *Hansen*,[55] estopping the government would have either caused the government a net loss or bestowed an unwarranted net gain on a private person, or both.[56] Only in *Hansen* did the agent's mistake reward the government financially. Even in *Hansen*, the Court stressed that prospective benefits were ultimately paid and causation was doubtful. In the context of an FmHA foreclosure, however, the government would reap a net economic benefit from its wrongdoing. While the artificially depressed agricultural real estate market often leaves the government after foreclosure with a paper loss, especially when the debt's cumulative annual interest rates are included in the calculations, the government gains title to farmland which is a tangible, income-producing asset highly likely to increase in value.

Justice O'Connor's concurring opinion in *United States v. Locke*[57] pro-

54. *See, e.g., supra* notes 11-19 and accompanying text. The FmHA's "affirmative" role in persuading farmers to undertake unwise debt burdens may constitute the type of "affirmative misconduct" referred to by the Supreme Court in *Hibi*.

55. *See supra* notes 43-4 and accompanying text.

56. In *Lee*, the government would have been out the rebate on the land. In *Utah Power & Light*, it would have lost valuable forest lands. In *Merrill*, it would have been forced to pay for a crop that it had declined to insure. In *Montana*, *Hibi*, and *Miranda*, the stake was citizenship. In *Community Health Services*, the government would have been obliged to pay twice for the same service. *See supra* notes 30-48 and accompanying text.

57. 471 U.S. 84, 111 (1985) (O'Connor, J., concurring).

vides hopeful insight into the current Court's view of estoppel against the government. In *Locke*, a case involving plaintiffs whose mining claims had been extinguished because they had allegedly relied on misleading information supplied by a Bureau of Land Management employee, the majority observed that estoppel was a possible defense to failure to meet a statutory filing deadline, but declined to decide the case on those grounds.[58] Justice O'Connor's concurring opinion noted that the Court's previous decisions had left open the possibility of applying estoppel against the government:

> The Court properly notes that the estoppel issue was not addressed by the District Court and will be open on remand. In this regard, I merely note that in my view our previous decisions do not preclude application of estoppel in this context. In *Heckler v. Community Health Services of Crawford County*, we expressly declined to adopt "a flat rule that estoppel may not in any circumstances run against the Government." Such a rule was unnecessary to the decision in that case, and we noted our reluctance to hold that "there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."
>
> Although "it is well settled that the Government may not be estopped on the same terms as any other litigant," we have never held that the Government can extinguish a vested property interest . . . merely because the private owners relied on advice from agency personnel. . . . Thus, if the District Court ultimately determines that appellees reasonably relied on communications from the BLM . . . our previous decisions would not necessarily bar application of the doctrine of equitable estoppel.[59]

The reasonable reliance described by Justice O'Connor is present in the farm foreclosure scenario.

Attempts to use equitable estoppel as a sword to cancel the farmer's underlying indebtedness should not succeed. It would leave the government with a net loss and would unjustly enrich the farmer. However, use of estoppel solely as a defense to foreclosure leaves the participants and the government in an economically neutral position.[60] The government will suffer no net loss, since it will, over time, recover the loan's principal with reasonable interest. The farmer will enjoy no net gain, since the improvident loans must be repaid. Equitable estoppel as a defense to foreclosure would prevent the fed-

58. *Id.* at 94 n.10.

59. *Id.* at 111-12 (citations omitted) (emphasis in original).

60. Granted, this policy might result in some loss to the government of the time value of money. However, this factor is slight in comparison to the alternative: the family farmer's forced loss of her home and livelihood.

eral government from reaping an unjustifiable gain from its mistaken loan policy, and would preserve the family farmer from catastrophic loss.

IV.
CONSTITUTIONAL ESTOPPEL, UNJUST ENRICHMENT AND FMHA FORECLOSURE

The doctrines of equitable estoppel and unjust enrichment flow from the maxim that no one should be permitted to benefit from her wrongful acts. While equitable estoppel tends to focus on minimizing loss to the innocent, unjust enrichment seeks to limit the gain to the wrongdoer. Unfortunately, litigants seeking to enforce either aspect of the equitable maxim against the United States have had relatively little success.

I have argued that, properly analyzed, Supreme Court precedent should permit the use of equitable estoppel as a defense to many FmHA foreclosures. There is a second line of cases applying aspects of the doctrine of unjust enrichment against the government which should also prevent unjust FmHA foreclosures. "Constitutional estoppel" as applied by the Supreme Court precludes the government from gaining an unfair advantage when its wrongful act deprives a person of a constitutionally protected liberty or property interest.

In *Moser v. United States*,[61] for example, an agent of the government erroneously assured Mr. Moser that claiming a draft exemption, pursuant to a bilateral treaty exempting Swiss nationals residing in the United States, would not affect his ability to secure American citizenship.[62] Although the Court did not explicitly couch its opinion in estoppel terms, it refused to permit the government's erroneous advice to deprive Mr. Moser of his ability to qualify for American citizenship. Similarly, in *United States ex rel. Accardi v. Shaughnessy*,[63] the Court refused to permit the government to take advantage of an administrative ruling obtained by a procedure contrary to agency regulations.[64] Once again, although the opinion does not rely on estoppel explicitly, the animating principle is that the government ought not be permitted to gain an advantage from its wrongful behavior, especially when that behavior de-

61. 341 U.S. 41 (1951).

62. Prior to seeking the exemption, Mr. Moser had signed a revised application form which omitted any mention of the fact that claiming a treaty exemption from military service disqualified a person from becoming an American citizen. The revision in the form had occurred after the Swiss legation complained to the State Department that it violated the treaty to condition its enjoyment on a waiver of citizenship.

63. 347 U.S. 260 (1954).

64. In *Accardi*, an alien who was concededly deportable challenged a refusal by the Board of Immigration Appeals to suspend his deportation, arguing that the Attorney General had given the Board an *ex parte* list of "unsavory characters" who should be deported. The Court ruled that since the Attorney General had delegated his discretionary authority to suspend deportation to the Board, he could not seek to usurp that discretion by attempting to dictate the outcome secretly. *Id.* at 267.

prives a private person of a constitutionally protected liberty or property interest.

In *Raley v. Ohio*,[65] the Court unanimously reversed the contempt convictions of three witnesses before the Ohio Un-American Activities Commission who had declined to testify after they had been erroneously assured by the Commission that they were entitled to remain silent under Ohio's self-incrimination rules. Justice Brennan, writing for the Court, held:

> While there is no suggestion that the Commission had any intent to deceive the appellants, . . . to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State — convicting a citizen for exercising a privilege which the State clearly had told him was available to him.[66]

In *Mapp v. Ohio*,[67] the Court prevented the government from using the fruits of an illegal search and seizure as evidence in a criminal case. While *Mapp* and the related "exclusionary rule" cases[68] rarely talk in terms of estoppel, the Court's refusal to permit the government to reap a law enforcement benefit from its own wrongdoing is a classic exercise of estoppel principles. In *Mapp*, as in *Raley*, *Accardi* and *Moser*, when government wrongdoing threatened a constitutionally protected liberty or property interest, principles of constitutional estoppel precluded the government from benefitting from its wrongdoing.

In *Honda v. Clark*,[69] the Court construed a statute of limitations that governed the distribution of property held by the Alien Property Custodian to permit equitable tolling, making it unnecessary to pass on the equitable estoppel argument advanced by petitioners. Thus, while the formal holding of *Honda* does not involve estoppel, the case is yet another example of the Supreme Court's reluctance to permit the government to obtain a windfall from its questionable behavior.

The principle of constitutional estoppel next surfaces in *Santobello v. New York*.[70] In *Santobello*, a defendant had pleaded guilty in return for a prosecutor's promise to make no recommendation on sentence. At sentencing, a new prosecutor, who was unaware of the bargain, successfully urged the judge to impose the maximum sentence. The Court ruled that, having induced the plea, the government was obliged to live up to its bargain, either by permitting a withdrawal of the plea or granting specific performance of the bargain.

Similarly, in *United States v. Pennsylvania Chem. Corp.*,[71] the defendant

65. 360 U.S. 423 (1959).
66. *Id.* at 438.
67. 367 U.S. 643 (1961).
68. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
69. 386 U.S. 484 (1967).
70. 404 U.S. 257 (1971).
71. 411 U.S. 655 (1973).

had been convicted of discharging industrial pollutants into a navigable waterway in violation of the Rivers and Harbors Act of 1899. The defendant argued that the Corps of Engineers had consistently interpreted the statute to forbid discharges only when navigation was affected, thus affirmatively misleading defendants about the statute's reach. The Court, explicitly noting the relevance of estoppel principles to its decision, forbade the prosecution if defendant had reasonably relied on the Corps' advice.[72]

In *Doyle v. Ohio*,[73] the Court applied constitutional estoppel to prevent the government from using a defendant's post-*Miranda* silence against him in a subsequent criminal proceeding. The Court reasoned that it would be "fundamentally unfair" to permit the State to impeach a defendant in this way, since the Miranda warnings carry with them the implicit assurance that silence carries no penalty.

In *Logan v. Zimmerman Brush Co.*,[74] the Court was confronted with the government's negligent failure to hold a required mediation hearing within the statute of limitations period. The Court ruled that such governmental wrongdoing could not be permitted to destroy a constitutionally protected property interest.

Finally, in *Bowen v. City of New York*,[75] the Court unanimously imposed an equitable toll on the statute of limitations governing judicial review of the Social Security Administration's denial of disability benefits. The Court did so because the government had failed to disclose the challenged policy until after the limitations period had run.

In each of the constitutional estoppel cases, governmental wrongdoing threatened to cause the loss of a constitutionally protected property or liberty interest. In each case, the wrongdoing, if unrectified, would have benefitted the government. Similarly, in many FmHA foreclosure actions, governmental wrongdoing induced farmers to assume debt. If default is enforced by foreclosure, the government will benefit from its wrongdoing by obtaining valuable farmland, and deprive family farmers of the property interest in their land. Principles of constitutional estoppel should prevent so unfair a result.

If erroneous government action could not be used to eliminate Mr. Moser's claim to citizenship, to destroy Mr. Accardi's ability to seek suspen-

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72. *Id.* at 674. The Court cited to a law review article and note on estoppel and argued that "to the extent that [the defendant was deprived] of fair warnings as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." *Id.*

Pennsylvania Chem. Corp. is consistent with *Utah Power & Light*. In *Utah Power & Light*, the Court refused to permit an agency's erroneous construction of a federal statute to confer vested rights on utilities in forest reserve lands. In *Pennsylvania Chem. Corp.*, the agency's erroneous construction precluded criminal prosecution, but did not grant the Pennsylvania Chemical Corporation a right to continue polluting in the future.

73. 426 U.S. 610 (1976).

74. 455 U.S. 422 (1982).

75. 476 U.S. 467 (1986).

sion of deportation, to impose a contempt sanction on Messrs. Raley, Stern, and Brown, to gain evidence against Ms. Mapp, to eliminate the *Honda* petitioners' claim for compensation, to undermine Mr. Santobello's plea bargain, to entrap Pennsylvania Chemical Corporation into a criminal violation, to induce Mr. Doyle to incriminate himself, to destroy Ms. Logan's statutory rights, or to eliminate disability claimants' entitlements, surely erroneous government action should not result in massive foreclosures on family farms, especially when foreclosure would reward the government for its incompetence by conferring upon it ownership of valuable farmland.

V.
The Good Samaritan Doctrine and FmHA Foreclosure

Both equitable estoppel and unjust enrichment, as doctrines, are designed to control the effects of wrongful behavior. Equitable estoppel seeks to mitigate its harmful consequences; unjust enrichment seeks to drain it of profit. As the cases involving attempts to apply both equitable doctrines against the government demonstrate, courts are often reluctant to saddle the public fisc with the consequences of the misbehavior of a government agent, especially in settings where it was unreasonable to have relied upon the misrepresentation or where the alleged loss may not have been caused by the misrepresentation. In the FmHA foreclosure context, however, it was reasonable for farmers to have relied upon the FmHA's representations and advice, and there is a causal relationship between FmHA ineptitude and farmers' losses. Thus, both doctrines should act to preclude FmHA foreclosure.

Even if doctrines like equitable estoppel and unjust enrichment are held inapplicable, a third doctrine — the Good Samaritan doctrine — should provide relief against FmHA foreclosure of loans that should never have been made.

The Good Samaritan doctrine has not been, traditionally, an equitable defense. Rather, it has been applied to create a duty of care sufficient to support liability for negligence. The doctrine provides that "one who assumes to act, even though gratuitously, may become subject to the duty of acting carefully, if he acts at all."[76] Or, as the Restatement explains, one who undertakes to render to another services which she should recognize as necessary for the protection of that person's self or property becomes liable for resulting harm for her failure to exercise reasonable care, if that failure increases the risk of

76. *Mandel v. United States*, 793 F.2d 964, 968 (8th Cir. 1986), quoting *Haralson v. Jones Truck Line*, 223 Ark. 813, 816, 270 S.W.2d 892, 895 (1954). *Mandel* applied Arkansas law respecting the Good Samaritan doctrine against the United States where it failed to warn of submerged rocks in the swimming area of a national park because 28 U.S.C. § 1346(b) provides that in tort suits where the United States is a defendant, the law of the place of the tort determines liability.

harm or the harm is caused by the person's reliance upon the undertaking.[77]

When the FmHA undertook to render financial services and investment advice to small farmers, it established precisely the type of relationship with a vulnerable partner that triggers a Good Samaritan duty of care. The county supervisor typically undertook, pursuant to regulations, to provide financial advice regarding how much money the farmer should borrow, how the farmer should use it, and otherwise involved herself in the operations of the family farm.[78] Inept advice about incurring debt, or failure to provide adequate warnings about the risks inherent in a given loan transaction, constitute classic breaches of the Good Samaritan duty of care and should provide a basis for liability. In such settings, the Good Samaritan doctrine might well provide a farmer-defendant with a counter-claim in a foreclosure action. At a minimum, it should give rise to an equitable defense against foreclosure.

Most litigation involving attempts to apply the Good Samaritan doctrine against the United States has involved the relationship between the doctrine and section 2680(h) of the Federal Tort Claims Act,[79] which retains sovereign immunity for the tort of misrepresentation. In *United States v. Neustadt*,[80] for example, the Supreme Court held that reliance upon a negligent inspection by the Federal Housing Administration could not give rise to Good Samaritan liability, since the action was essentially for negligent misrepresentation and, thus, was barred by section 2680(h). In *Block v. Neal*,[81] the Supreme Court distinguished *Neustadt* in the context of an FmHA undertaking to supervise construction of a home built with FmHA loan funds. The FmHA had inspected the house on several occasions and issued reports indicating approval. However, when Ms. Neal, the borrower, moved into the home, she discovered defects. When the contractor refused to correct them, Ms. Neal brought an action against FmHA to correct the defects. The Court reasoned that because FmHA had undertaken a general duty to supervise, the tort did not sound solely in misrepresentation, but in a failure to use due care in supervising the construction.[82] Accordingly, the action was not barred by section 2680(h).[83]

77. The Good Samaritan doctrine is described in RESTATEMENT (SECOND) OF TORTS § 323 (1977).

For cases applying the Good Samaritan doctrine against the United States, *see Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *Block v. Neal*, 460 U.S. 289 (1983). *See also*, *United States v. Neustadt*, 366 U.S. 696 (1961).

78. *See, e.g., supra* notes 11, 22.

79. Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1965 & Supp. 1986) provides in relevant part that the provisions of the Federal Tort Claims Act and 28 U.S.C. § 1346(b) (1976 & Supp. 1986) shall not apply to:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights. . . . (emphasis added).

80. 366 U.S. 696 (1961).

81. 460 U.S. 289 (1983).

82. *Id.* at 297.

83. In the wake of *Block v. Neal*, FmHA modified its regulations to provide that its inspections were designed solely to protect its own security interests and could not be relied upon by any purchaser. 7 C.F.R. § 1924.9(a) (1987). Courts have accepted the regulation as a bar to

In the context of a defense to a foreclosure action, though, it should not matter whether section 2680(h) would, or would not, block an affirmative action for damages. Raised as an equitable defense to a foreclosure action, the Good Samaritan doctrine has nothing to do with the Federal Tort Claims Act's waiver of sovereign immunity, since sovereign immunity does not apply to equitable defenses. Accordingly, if breach of the Good Samaritan duty of care by FmHA can be established, foreclosure can be blocked, whether or not an affirmative tort claim would lie.

CONCLUSION

This essay sketches the contours of three equitable defenses to attempts by the FmHA to foreclose on certain FmHA loans to small family farmers that should never have been made. Our national agricultural policy during the early 1970s was deeply flawed by an unrealistic attempt to use highly leveraged debt with a low-equity farm clientele as a way of expanding productivity. Although the policy was doubtlessly well-intentioned, it has had a disastrous impact on small family farmers. Properly applied, the three defenses set forth in this essay should result in a sharing of the losses attributable to our flawed policy, rather than forcing small family farmers to bear the entire cost of our political mistakes.

Good Samaritan liability. *See, e.g., Moody v. United States*, 774 F.2d 150 (6th Cir. 1985). Thus, a *counterclaim* in a foreclosure action based upon the Good Samaritan doctrine is probably not tenable. Significantly, FmHA continues to undertake a general duty to supervise the construction of homes secured by farm income. *See* 7 C.F.R. § 1924.51 (1987).