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ARTICLES

NOTES

E-COMMERCE SECURITY IN THE LAND OF THE PHARAOHS: REFINING EGYPT'S ELECTRONIC SIGNATURE LAW

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I. INTRODUCTION

Egypt's Electronic Signature Law (ESL), enacted in 2004, created the Information Technology Industry Development Authority (ITIDA) to implement, license, and oversee the certification authorities (CA). Under the law, a secure electronic signature attached to an electronic document may comply with statutory signature, writing, and evidentiary admissibility requirements. Licensed CAs issue certificates to verify that the holder of a private key is the party named in the certificate. The ESL is a commendable first step in creating a legal framework for e-commerce law, but this framework can be improved with certain additions.

This Article introduces the reader to Egypt, its economy, and the role of e-commerce in its economic development. Second, this Article discusses the basic aspects of electronic signatures and public key infrastructure technology, as well as the role of certification authorities. This Article also describes and evaluates the electronic signature law of Egypt. Finally, it makes recommendations to improve Egypt's electronic signature law.

II. EGYPT, ITS ECONOMY, AND ITS E-COMMERCE

Egypt became a unified kingdom around 3200 B.C. giving rise to one of the greatest civilizations in world history during the next three millennia. In 341 B.C., the Persians conquered the last native dynasty. Later, Egypt was successively controlled by the Greeks, Romans, Byzantines, Arabs, Mamluks, the Ottoman Turks, and finally the British. Egypt gained partial

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independence from Britain in 1922. Full independence followed in 1952.[2]

A period of confrontation with Israel ensued over the next three decades. President Anwar Sadat launched a war with Israel in 1973. That war was unsuccessful, and Israel gained control of the Sinai Peninsula. Later, in an about-face, Sadat visited Israel, leading to the successful Camp David peace talks and a peace treaty with Israel in 1979, which restored the Sinai Peninsula to Egypt. Islamic extremists assassinated Sadat in 1981. His replacement, Hosni Mubarak, was President of Egypt until he was forced out of office due to a popular revolt in early 2011.[3]

During the administration of President Nasser from 1956 to 1970, Egypt's economy utilized centralized planning. However, since 1970 the economy has become much more open and marked by free market characteristics. Nevertheless, Egypt has been plagued with high unemployment and insufficient economic growth during much of the past four decades. From 2001 to 2003, foreign direct investment was stagnant and the annual growth rate of the gross domestic product (GDP) was only two to three percent. The Egyptian currency was allowed to float in 2003, which led to a sharp decline in its value and an increase in inflation.

In an attempt to stimulate the economy, the government enacted sweeping economic reforms in 2005, reducing personal and corporate tax rates, customs fees, energy subsidies, and privatizing some publicly-owned businesses. Although the government's budget deficit increased, the economic reforms had dramatic positive effects, including a stock market boom, GDP growth of six percent per year since 2006, and increased foreign direct investment. One of Egypt's potential sources of future economic growth is the development of its natural gas reserves.[4]

Additionally, in terms of economic investment, "Egypt has long been the cultural and information center of the Arab world."[5] Since 1985, the government has invested in its infrastructure of both communication and information technology.[6] Although, out of a population of eighty-three

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2. *Introduction: Egypt, The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last updated Mar. 23, 2011).

3. *Background Note: Egypt*, BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE (Nov. 10, 2010), http://www.state.gov/r/pa/ei/bgn/5309.htm; *Government: Egypt, The World Factbook*, CIA (2011), https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last updated Mar. 23, 2011).

4. *Communications: Egypt, The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last updated Mar. 23, 2011).

5. *Background Note: Egypt, supra* note 3, at 11.

6. Sherif Kamel & Maha Hussein, *The Emergence of E-Commerce in a Developing Nation: Case of Egypt*, 9:2 BENCHMARKING: AN INTERNATIONAL JOURNAL 146, 146–53 (2002), *available at* http://www.emeraldinsight.com/Insight/viewContentItem.do;jsessionid=07E05F64F61893C0AFB15728FB88F6F3?contentType=Article&contentId=843047. For

million, only 8.62 million (slightly more than ten percent) of Egyptians are Internet users, the number of households with access to broadband continues to increase. By 2008, one million Egyptians had access to broadband Internet. Additionally, over twenty-eight percent use Internet cafes as their primary Internet access point.[7] Egypt has fifty Internet service providers and 175,000 Internet hosts.[8] Despite this growth, business-to-consumer e-commerce in Egypt has been hindered by several factors, including a preference to use cash instead of credit cards;[9] security concerns; lack of instant gratification from e-purchases; limited access to the Internet for many households; the desire for direct conversation with sellers and the opportunity to haggle over the purchase price; poorly designed, bug-infested websites; and inconsistent return policies by web sellers.[10]

Although business-to-consumer e-commerce has lagged, business-to-business e-commerce has grown steadily in Egypt.[11] One aspect of this growing e-commerce in Egypt is the cost-plus based market for electronic signatures (e-signatures). The market for e-signatures is competitive and the market size is small, resulting in a high potential growth rate for e-signatures. Consequentially, large private firms have often outsourced e-signature and public key infrastructure (PKI) services for financial and other operations.[12] Additionally, Egyptian public utilities and other government departments have adopted PKI services and e-signatures. As a result, the demand for PKI and e-signature systems in Egypt is expected to grow markedly.[13]

III. ELECTRONIC SIGNATURES

Contract law worldwide has traditionally required contracting parties

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an analysis of Egypt's communications infrastructure, see *National Profile for the Information Society in Egypt*, U.N. ECON. & SOC. COMM. FOR W. ASIA (2005), *available at* http://www.escwa.un.org /wsis/reports/docs/Egypt_2005-E.pdf.

7. Mohamed Marwen Meddah, *Almost One Million Egyptians Have Broadband Internet Access*, STARTUPARABIA (Apr. 28, 2008), http://www.startuparabia.com/2008/04/almost-one-million-egyptians-have-broadband-internet-access/.

8. *Economy: Egypt, The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last updated Mar. 23, 2011).

9. Ibrahim Elbeltagi, *E-Commerce and Globalization: An Exploratory Study of Egypt*, 14:3 CROSS-CULTURAL MGMT: AN INT'L J., 196, 196–201 (2007).

10. *Introduction to E-Commerce*, LINKEGYPT, http://www.linkegypt.com/blogs/b/Introduction-to-ecommerce/22/Introduction-to-ecommerce.html (last visited Apr. 2, 2011).

11. Economist Intelligence Unit, *Egypt: Overview of E-Commerce*, GLOBAL TECH. F. (Aug. 3, 2007), http://globaltechforum.eiu.com/index.asp?layout=printer_friendly&doc_id=11174.

12. See *infra* notes 28, 30–32 for a discussion of PKI and e-signatures.

13. Abdel-Hameed Nawar, E-Signature and the Digital Economy in Egypt (Aug. 28, 2006) (Working Paper), *available at* http://ssrn.com/abstract=926584.

to affix their signatures to a document.[14] With the onset of the electronic age, the e-signature made its appearance. The e-signature has been defined as "any letters, characters, or symbols manifested by electronic or similar means and executed or adopted by a party with the intent to authenticate a writing."[15] Alternatively, e-signatures have been described as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."[16] An e-signature may take a number of forms, like a digital signature, a digitized fingerprint, a retinal scan, a pin number, a digitized image of a handwritten signature that is attached to an electronic message, or merely a name typed at the end of an e-mail message.[17]

A. Online Contracts: Four Levels of Security

When entering into a contract online, four degrees of security are possible. The first level of security merely requires a party to click an "I Agree" button on a computer screen in order to accept the offer.[18] The second level of security is invoked through the use of a password or credit card number to verify a party's intention to purchase goods or services.[19] The third level requires the use of biometrics. Biometric methods involve a unique physical attribute of the contracting party. These are inherently extremely difficult to replicate by a would-be cyber thief. Examples include a voice pattern, facial recognition, a scan of the retina or the iris, a digital reproduction of a fingerprint,[20] or a digitized image of a handwritten signature that is attached to an electronic message. In all of these, a sample is taken from the person in advance and is stored for later comparison with a person purporting to have the same identity.[21] For example, if a person's

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14. *See*, e.g., U.C.C. §§ 2-201, 209 (2011).

15. Thomas J. Smedinghoff, *Electronic Contracts: An Overview of Law and Legislation*, 564 P.L.I. PAT 125, 162 (1999).

16. Directive 1999/93/EC, of the European Parliament and of the Council of 13 Dec. 1999 on a Community Framework for Electronic Signatures, art. 2, 2000 O.J. No (L 13) 12 (EU). The directive is covered in detail *infra* Part IV.

17. David K.Y. Tang, *Electronic Commerce: American and International Proposals for Legal Structure, in* REGULATION AND DEREGULATION: POLICY AND PRACTICE IN THE UTILITIES AND FINANCIAL SERVICES INDUSTRIES 333 (Christopher McCrudden ed., 1999).

18. Jonathan E. Stern, Note, *Federal Legislation: The Electronic Signatures in Global and National Commerce Act*, 16 BERKELEY TECH. L. J. 391, 395 (2001).

19. *Id.*

20. With the highly successful Hong Kong identity card, two thumb prints are used as a biometric identifier. *See* Rina C.Y. Chung, *Hong Kong's "Smart" Identity Card: Data Privacy Issues and Implications for a Post-September 11th America*, 4 ASIAN-PAC. L. & POL'Y J. 442, 446, 459 (2003).

21. Stern, *supra* note 18, at 395–96; *The Legality of Electronic Signatures Using Cyber-Sign is Well Established*, CYBER-SIGN, http://replay.web.archive.org/20060428170844/http://www.cybersign.com/news_news.htm (last visited April 21, 2011).

handwriting is the biometric identifier, the "shape, speed, stroke order, off-tablet motion, pen pressure and timing information" during signing is recorded. This information is almost impossible for an imposter to duplicate.[22]

The fourth level of security utilizes digital signatures. The digital signature is considered the ultimate level of security because it is more complex and provides more security than biometrics. Many laypersons erroneously assume that the digital signature is merely a digitized version of a handwritten signature. This is not the case; the digital signature refers to the entire document.[23] It is "the sequence of bits that is created by running an electronic message through a one-way hash function and then encrypting the resulting message digest with the sender's private key."[24] A digital signature has two major advantages over other forms of electronic signatures. First, it verifies authenticity that the communication came from a designated sender. Second, it verifies the integrity of the content of the message, giving the recipient assurance that the message was not altered.[25]

Digital signatures have at least two advantages over biometrics as a form of electronic signature. First, for biometrics, the attachment of a person's biological traits to a document does not ensure that the document has not been altered. That is, it "does not freeze the contents of the document."[26] Second, the recipient of the document must have a database of biological traits of all signatories dealt with in order to verify that a particular person sent the document.[27] The digital signature does not have these two weaknesses. Most seem to view the digital signature as preferable to biometric identifiers.[28] Many also recommend the use of both

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22. *Id.*

23. The Hong Kong e-commerce law is typical in that it defines a digital signature as:

> [A]n electronic signature of the signer generated by the transformation of the electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can determine: (a) whether the transformation was generated using the private key that corresponds to the signer's public key; and (b) whether the initial electronic record has been altered since the transformation was generated.

Electronic Transactions Ordinance, No. 1, (2000) 553 O.H.K., § 2, *available at* http://www.hklii.org/hk/legis/en/ord/553/.

24. Smedinghoff, *supra* note 15, at 146.

25. Christopher T. Poggi, *Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation*, 41 VA J. INT'L L. 224, 250–51 (2000).

26. K.H. Pun, Lucas Hui, K.P. Chow, W.W. Tsang, C.F. Chong & H.W. Chan, *Review of the Electronic Transactions Ordinance: Can the Personal Identification Number Replace the Digital Signature?*, 32 H.K. L. J. 241, 256 (2002).

27. *Id.* at 257.

28. *Id.* However, one expert in computer law and technology, Benjamin Wright, is a notable exception. Wright contends that biometrics is a preferable authentication method in the case of the general public. He concedes that digital signatures using PKI are preferable

methods. The Hong Kong government took the course of using both methods in designing its identity card.[29]

B. Digital Signature Technology: Public Key Infrastructure

The technology used with digital signatures is public key infrastructure (PKI).[30] PKI consists of four steps:

1. The first step in utilizing PKI is to create a public-private key pair. The private key will be kept in confidence by the sender, but the public key will be available online.

2. The second step is for the sender to digitally sign the message by creating a unique digest of the message and encrypting it. A hash value is created by applying a hash function—a standard mathematical function—to the contents of the electronic document. The hash value, ordinarily consisting of a sequence of 160 bits, is a digest of the document's contents. Once processed, the hash function is encrypted, or scrambled, by the signatory using his private key. The encrypted hash function is the digital signature for the document.[31]

3. Once encrypted, the sender attaches the digital signature to the message and sends both to the recipient.

4. Finally, the recipient decrypts the digital signature by using the sender's public key. If decryption is possible, the recipient knows the message is authentic, that it came from the purported sender. Finally, the recipient will create "a second message digest of the communication and compare it to the decrypted message digest. If they match, the recipient knows the message has not been altered."[32]

IV. THREE GENERATIONS OF ELECTRONIC SIGNATURE LAW

A. The First Wave: Technological Exclusivity

In 1995, Utah became the first jurisdiction in the world to enact an

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for complex financial deals carried out by sophisticated persons. In PKI, control of the person's "private key" becomes all -important. The person must protect the private key; all of the eggs are placed in that basket, and the person carries a great deal of responsibility and risk. With biometric methods, the member of the general public shares the risk with other parties involved in the transaction, and the need to protect the private key is not so compelling. *See* Benjamin Wright, *Eggs in Baskets: Distributing the Risks of Electronic Signatures*, 32 UWLA L. REV. 215, 225–26 (2001).

29. Chung, *supra* note 20, at 482.

30. Susanna Frederick Fischer, *California Saving Rosencrantz and Guildenstern in a Virtual World? A Comparative Look at Recent Global Electronic Signature Legislation*, 7 B. U. J. SCI. & TECH. L. 229, 233 (2001).

31. Pun et. al., *supra* note 26, at 249.

32. Jochen Zaremba, *International Electronic Transaction Contracts Between U.S. and E.U. Companies and Customers*, 18 CONN. J. INT'L L. 479, 512 (2003).

electronic signature law.[33] The Utah statute recognized digital signatures but not other types of electronic signatures.[34] The authors of the Utah statute believed, with some justification, that digital signatures provide the greatest degree of security for e-transactions. Utah was not alone in this belief; other jurisdictions grant exclusive recognition to the digital signature, including Argentina,[35] Bangladesh,[36] India,[37] Malaysia,[38] Nepal,[39] New Zealand,[40] and Russia.[41]

Unfortunately, these jurisdictions' decisions to allow only one form of technology are burdensome and overly restrictive. Forcing users to employ digital signatures provides greater security, but this benefit may be outweighed by the digital signature's possible disadvantages. Digital signatures are more expensive than other types of e-signatures because of the fee paid to the certification authority. Digital signatures are less convenient because the use of a certification authority is required. Additionally, users are forced to use one type of technology to the exclusion of others when another type of technology might be better suited to a particular type of transaction. They are also forced to use a more complicated technology that may be less adaptable to technologies used in

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33. UTAH CODE ANN. §§ 46-3-101 to -602 (West 1995) *repealed by* 2006 Utah Laws 21 (2006) codified as amended at UTAH CODE ANN. §§ 46-4-101 to -503 (West 2011).

34. *Id.*

35. Digital Signature Decree, Law No. 2628/02, Dec. 19, 2002, B.O. 20/12/2002 (Arg.), *available at* http://infoleg.mecon.gov.ar/infoleginternet/anexos/80000-84999/80733/norma.htm, *amended by* Law No. 724/06, June 8, 2006, B.O. 13/06/06, *available at* http://infoleg.mecon.gov.ar/infolegIntenet/anexos/115000-119999/116998/norma.htm. *See generally* Stephen E. Blythe, *A Critique of Argentine E-Commerce Law and Recommendations for Improvement*, GOLDEN GATE U. SCH. L. ANN. SURV. INT'L & COMP. L. (forthcoming 2011).

36. LAW COMM'N OF BANGL., FINAL REPORT ON THE LAW OF INFORMATION TECHNOLOGY (2000) *available at* http://www.lawcommissionbangladesh.org/wplit.pdf.

37. Information Technology Act, No. 21 of 2000, INDIA CODE (2000), *available at* http://www.dot.gov.in/Acts/itbill2000.pdf. *See generally* Stephen E. Blythe, *A Critique of India's Information Technology Act and Recommendations for Improvement*, 34 SYRACUSE J. INT'L L. & COM. 1 (2006).

38. Digital Signature Act (Act No. 562/1997) (Malay.) *available at* http://www.msc.com.my/cyberlaws/act_digital.asp.

39. Electronic Transactions Act, Ordinance No. 32 of 2061 B.S. [2005], 54 KATHMANDU EXTRAORDINARY ISSUE 60 (Nepal) *available at* http://www.entrec.org.np/trade/files/ The%20Electronic%20Transactions%20Ordinance%20%202005.pdf. *See generally* Stephen E. Blythe, *On Top of the World, and Wired: A Critique of Nepal's E-Commerce Law*, 8:1 J. HIGH TECH. L. (2008).

40. Electronic Transactions Act 200 (N.Z.), *available at* http://www.med.govt.nz/templates/ContentTopicSummary____9829.aspx.

41. Elektronnaya Tsifrovaya Podpis' Zakona [Electronic Digital Signature Law], Jan. 10, 2002, No. 1-FZ (Russ.). *See* Beiten Burkhart, *The Law on Digital Signatures Has Been Adopted in the Russian Federation*, OUTSOURCING-RUSSIA.COM (Feb. 7, 2002), http://www.russoft.org/docs/?doc=166; Fischer, *supra* note 30, at 234–37.

other nations or by other people within the same nation. Further, with the use of this technology, there is an inappropriate risk allocation between users if fraud occurs. Ultimately, the decision to allow only one technology creates a potential disincentive to invest in the development of alternative technologies.[42]

B. The Second Wave: Technological Neutrality

Jurisdictions in the second wave overcompensated when they reversed the first wave. They did not include any technological restrictions in their statutes. They did not insist upon the utilization of digital signatures or any other form of technology to the exclusion of other types of e-signatures. These jurisdictions have been called "permissive" because they take an open-minded, liberal perspective on e-signatures and do not contend that any one of them is necessarily better than the others. In other words, they are technologically neutral. The United States[43] is a member of the second wave. The overriding majority of U.S. jurisdictions (forty-five states, the District of Columbia, Puerto Rico, and Virgin Islands) have enacted the Uniform Electronic Transactions Act, either in its entirety or with minor amendments; that statute is a permissive second-generation model law.[44] Australia has also enacted a second-generation statute.[45]

The permissive perspective, however, does not take into account that some types of electronic signatures *are* better than others. A PIN number and a person's name typed at the end of an e-mail message are both forms of electronic signatures, but neither is able to provide the degree of security provided by the digital signature.

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42. Amelia H. Boss, *The Evolution of Commercial Law Norms: Lessons To Be Learned From Electronic Commerce*, 34 BROOK. J. INT'L L. 673, 689–90 (2009). It is debatable whether technological neutrality or technological specificity is the correct road to take. *See* Sarah E. Roland, *The Uniform Electronic Signatures in Global and National Commerce Act: Removing Barriers to E-Commerce or Just Replacing Them with Privacy and Security Issues?*, 35 SUFFOLK U. L. REV. 625, 638–45 (2001).

43. For an analysis of U.S. law, *see* Stephen E. Blythe, *E-Commerce and E-Signature Law of the United States of America*, UKR. J. BUS. L. (Nov. 2008). For concise coverage of American, British, European Union, and United Nations law, *see* Stephen E. Blythe, *Digital Signature Law of the United Nations, European Union, United Kingdom and United States: Promotion of Growth in E-Commerce with Enhanced Security*, 11 RICH. J. L. & TECH. 6 (2005) [hereinafter *Digital Signature Law*].

44. Unif. Elec. Transaction Act §§ 1–21 (2009). Washington state is the only U.S. jurisdiction that currently has a first-generation statute. The following states have third-generation statutes: Alabama, Georgia, Florida, and Ohio. *See also* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2011).

45. *Electronic Transactions Act 1999* (Cth)(Austl.), *available at* http://www.comlaw.gov.au/Details/C2007C00371. *See* Fischer, *supra* note 30, at 234–37.

C. The Third Wave: A Hybrid

Singapore was in the vanguard of the third wave. In 1998, Singapore adopted a middle-of-the-road position on the various types of electronic signatures.[46] Singapore's lawmakers were influenced by the UNCITRAL Model Law on Electronic Commerce.[47] In terms of technological neutrality, Singapore adopted a hybrid model—a preference for the digital signature in terms of greater legal presumption of reliability and security, but not to the exclusion of other forms of electronic signatures.[48] Singapore did not want to become hamstrung by tying itself to one form of technology.[49] Singaporean legislators realized that technology is continually evolving and that it would be unwise to require one form of technology to the exclusion of others.[50] The digital signature is given more respect under the Singapore statute, but it is not granted a monopoly, as it was in Utah.[51] Singapore allows employment of other types of electronic signatures.[52] This technological open mindedness is commensurate with a global perspective and allows parties to more easily consummate electronic transactions with parties from other nations.[53]

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46. *See infra* note 53 and accompanying text.

47. Model Law on Electronic Commerce, G.A. Res. 51/162, U.N. Doc. A/51/148 (1997) [hereinafter MLEC]. *See generally Digital Signature Law*, *supra* note 43.

48. Fischer, *supra* note 30.

49. *Id.*

50. *See* Stephen E. Blythe, *Singapore Computer Law: An International Trend-Setter with a Moderate Degree of Technological Neutrality*, 33 OHIO N.U. L. REV. 525, 525–62 (2006) [hereinafter *Singapore Computer Law*].

51. *Id.*

52. *Id.*

53. Electronic Transactions Act (Act No. 16/2010) (Sing.), *available at* http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2010-ACT-16-N&doctitle=ELECTRONIC%20TRANSACTIONS%20ACT%202010%0a&date=latest&method=part&sl=1 [hereinafter ETA]. Although the original Singapore statute of 1998 granted legal recognition to most types of electronic signatures, it made a strong suggestion to users—in two ways—that they should use the digital signature because it is more reliable and more secure than the other types of electronic signatures: (1) Digital signatures were given more respect under rules of evidence in a court of law than other forms of electronic signatures. Electronic documents signed with them carried a legal presumption of reliability and security. These presumptions were not given to other forms of electronic signatures. (2) Although all forms of electronic signatures were allowed in Singapore, its electronic signature law established comprehensive rules for the licensing and regulation of certification authorities, whose critical role is to verify the of authenticity and integrity of electronic messages affixed to electronic signatures. *See Singapore Computer Law*, *supra* note 50. The ETA was amended in 2010 pertaining to application and consent, electronic originals, time and place of dispatch and receipt, invitation to make offers, automated message systems, and e-government. Another amendment opens up the possibility of technological neutrality, for example that the ETA may eventually become applicable to other security procedures like biometrics. *Differences Between Electronic Trasnactions Act*

Recently, more and more nations have joined the third wave. These nations recognize the security advantages afforded by the digital signature and indicate a preference for the digital signature over other forms of electronic signatures.[54] They exhibit this preference by requiring a digital signature using a PKI system. They require these signatures for (1) authenticating an electronic record;[55] (2) showing that an electronic record complies with any statutory requirement that a record be in paper form;[56] and (3) indicating that an electronic signature complies with a statutory requirement that a pen-and-paper signature be affixed.[57] Nevertheless, third wave jurisdictions do not appear to be as technologically restrictive as first wave jurisdictions.

The moderate position adopted by Singapore has become the progressive trend in international e-signature law. The hybrid approach has been taken by the European Union,[58] Armenia,[59] Azerbaijan[60] Barbados,[61]

1998 and Electronic Transactions Act 2010, IDA SINGAPORE, http://www.ida.gov.sg/Policies%20and%20Regulation/20100630114202.aspx (last visited Mar. 11, 2011). However, because the attainment of technological neutrality remains to be seen, the author declines to reclassify Singapore as a member of the second wave at this point.

54. *See generally* Zaremba, *supra* note 32.

55. *Id.*

56. *Id.*

57. *Id.*

58. Directive 1999/93/ED, *supra* note 16; *see* Blythe, *Digital Signature Law*, *supra* note 43, at 8–10. For concise coverage of European Union law, *see* Stephen E. Blythe, *E-Signature Law and E-Commerce Law of the European Union and its Member States*, UKR. J. BUS. L., May 2008, at 22–26. In an assessment of the effectiveness of its E-Signature Directive in 2006, the European Commission concluded that contracting parties had been slow to use digital signatures but that "many other simpler electronic signature applications had become available." Stephen E. Blythe, *E-Signature Law and E-Commerce Law of the European Union and its Member States*, UKR. J. BUS. L., May 2008, at 10. Reasons advanced by the commission for the slow rate of adoption of digital signatures include "technical problems in the marketplace, a lack of criteria for certification and mutual recognition, a lack of interoperability at national and cross-border levels, and the existence of isolated areas where certificates were used for a single purpose." *Id.* Overall, the primary reason advanced was economic caused by a typical user's decision to eschew development of a multi-application digital signature in favor of an e-signature, which is applicable to its own industry, e.g., the banking sector. *Report on the Operation of Directive 1999/93/EC on a Community Framework for Electronic Signatures*, COM (2006) 120 final (Mar. 15, 2006), *cited in* Boss, *supra* note 42, at 695–96. Despite the less than enthusiastic reception of the digital signature in Europe and elsewhere, that rate of acceptance is expected to be given a boost felt worldwide by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Feb. 2, 2009). The Rotterdam Rules became effective on September 23, 2009, and recognize the legal validity of electronic bills of lading. *Id.* In order to comply with the security requirements of Article 38 of the Rotterdam Rules, it will apparently be necessary to employ a digital signature. Felix W.H. Chan, *In Search of a Global Theory of Maritime Electronic Commerce: China's Position on the Rotterdam Rules*, 40 J. MAR. L. & COM. 185 (2009). Accordingly, as in Mark Twain's rumored death, any notion that the digital signature is passé appears to have been "an exaggeration." *Comprehensive Publication List*

Bermuda,[62] Bulgaria,[63] Burma,[64] China[65] Colombia,[66] Croatia,[67] Dubai,[68]

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of Known Interviews with Samuel Langhorne Clemens (SLC) aka Mark Twain, TWAINQUOTES.COM, *available at* http://www.twainquotes.com/interviews/interviewindex 2006b.html. The digital signature appears to have a bright future because, presently at least, it provides the epitome of security.

59. Law on Electronic Document and Electronic Signature of Dec. 14, 2004, LA-40-S (Arm.), *available at* http://www.parliament.am/law_docs/150105HO40eng.pdf. *See generally* Stephen E. Blythe, *Armenia's Electronic Document and Electronic Signature Law: Promotion of Growth in E-Commerce via Greater Cyber-Security*, ARM. L. REV. (May 2008).

60. Digital Electronic Signature Law of 2003 (Azer.) *available at* http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018111.pdf. *See generally* Stephen E. Blythe, *Azerbaijan's E-Commerce Statutes: Contributing to Economic Growth and Globalization in the Caucasus Region*, 1 COLUM. J. E. EUR. L. 44, 44–75 (2007).

61. Electronic Transactions Act, 1 L.R.O. 2001, (2001) (Barb.) *available at* http://www.commerce.gov.bb/Legislation/Documents/CAP%20308B.PDF. *See generally* Stephen E. Blythe, *The Barbados Electronic Transactions Act: A Comparison with the U.S. Model Statute*, 16 CARIBBEAN L. REV. 1 (2006).

62. Electronic Transactions Act (Act No. 26/1999) (Berm.) *available at* http://www.bermudalaws.bm/Laws/Annual%20Laws/1999/Acts/Electronic%20Transactions %20Act%201999.pdf. *See* Fischer, *supra* note 30, at 234–37.

63. Zakon za elektronniya dokument i elektronniya podpis [Law for the Electronic Document and Electronic Signature], Apr. 6, 2001, SG. 34/6 2001 (Bulg.) *available at* http://clict.lex.bg/CLICT_files/documents/laws/LEDES.pdf. *See generally* Stephen E. Blythe, *Bulgaria's Electronic Document and Electronic Signature Law: Enhancing E-Commerce with Secure Cyber-Transactions*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 361 (2008).

64. Electronic Transactions Law (Act No. 5/2004) (Myan.), available at http://ibiblio.org/obl/docs/Electronic-transactions.htm. *See generally* Stephen E. Blythe, *Rangoon Enters the Digital Age: Burma's Electronic Transactions Law as a Sign of Hope for a Troubled Nation*, 3 INT'L BUS. RES. 151 (2010), *available at* http://ccsenet.org/ journal/index.php/ibr/article/view/4725.

65. Diànzǐ qiānmíng fǎ (电子签名法) [Electronic Signature Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2004, effective Apr. 1, 2005) (China). *See generally* Stephen E. Blythe, *China's New Electronic Signature Law and Certification Authority Regulations: A Catalyst for Dramatic Future Growth of E-Commerce*, 7 CHI.-KENT J. INTELL. PROP. 1 (2007); Felix W.H. Chan, *E-Commerce All at Sea: China Welcomes Digital Bills of Lading Under the Electronic Signature Law 2005*, 3 OKLA. J. L. & TECH. 31 (2006).

66. L. 527/99, agosto 18, 1999, DARIO OFICIAL [D.O.] art. 26–27 (Colom.). *See generally* Stephen E. Blythe, *Computer Law of Colombia and Peru: A Comparison with the U.S. Uniform Electronic Transactions Act*, *in* PEER-TO-PEER NETWORKS AND INTERNET POLICIES ch. 2 (D. Vergos & J. Saenz, eds., 2010).

67. Zakon o elektroničkom potpisu [Electronic Signature Act] OG 10/2002., as amended, (Croat.). *See generally* Stephen E. Blythe, *Croatia's Computer Laws: Promotion of Growth in E-Commerce via Greater Cyber-Security*, 26 EUR. J. L. & ECON. 75, 75–103 (2008).

68. Law of Electronic Transactions and Commerce No. 2/2002 of Feb. 12, 2002 (U.A.E. Emirate of Dubai), *available at* http://www.tecom.ae/law/law_2.htm. *See generally* Stephen E. Blythe, *The Dubai Electronic Transactions Statute: A Prototype for E-Commerce Law in the United Arab Emirates and the G.C.C. Countries*, 23 J. ECON. & ADMIN. SCI. 103 (2007).

Finland,[69] Hong Kong,[70] Hungary,[71] Iceland,[72] Iran,[73] Jamaica,[74] Japan,[75] Jordan,[76] Lithuania,[77] Pakistan,[78] Peru,[79] Slovenia,[80] South Korea,[81]

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69. Act on Electronic Signatures No. 14/2003 (Fin.) *available at* http://www.finlex.fi/en/laki/kaannokset/2003/en20030014.pdf. *See generally* Stephen E. Blythe, *Finland's Electronic Signature Act and E-Government Act: Facilitating Security in E-Commerce and Online Public Services*, 31 HAMLINE L. REV. 443, 445–69 (2008).

70. Electronic Transactions Ordinance, (2000) Cap. 553, § 2 (H.K.) *available at* http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/99A98E9A0159CC63482573090 0 2AA880?OpenDocument. *See* U.C.C. §§ 2-201, -209 (2011). In its original statute, Hong Kong only recognized digital signatures and was, therefore, a member of the first wave. However, after amendments enacted in 2004, Hong Kong joined the third wave. Electronic Transactions Amendment Ordinance, (2004) Cap. 533 (H.K.). *See* Stephen E. Blythe, *Electronic Signature Law and Certification Authority Regulations of Hong Kong: Promoting E-Commerce in the World's 'Most Wired' City*, 7 N.C. J. L. & TECH. 1 (2005).

71. ACT XXXV of 2001 On Electronic Signature (2001) (Hung.), *available at* http://www.techlawed.org. *See generally* Stephen E. Blythe, *Hungary's Electronic Signature Act: Enhancing Economic Development with Secure E-Commerce Transactions*, 16 INFO. & COMM. TECH. L. 47-71 (2007).

72. Act No. 28/2001 On Electronic Signatures (2001) (Ice.), *available at* http://eng.idnadarraduneyti.is/laws-and-regulations/nr/1179. *See generally* Stephen E. Blythe, *Cyber Law of Iceland: Providing Secure E-Commerce to a Highly Computer-Literate Nation*, 37 RUTGERS COMPUTER & TECH. L.J. (forthcoming 2011).

73. Electronic Commerce Law of 2004 (Iran). *See generally* Stephen E. Blythe, *Tehran Begins to Digitize: Iran's E-Commerce Law as a Hopeful Bridge to the World*, 18 SRI LANKA J. INT'L L. 23 (2006) *available at* http://www.cmb.ac.lk/jilnew/node/27.

74. Electronic Transactions Act, (Act No. 15/2006) (Jam.), *available at* http://www.our.org.jm/index.php?option=com_content&view=article&id=761:the-electronic-transaction-act-act-15-2006&catid=123:act&Itemid=390. *See generally* Stephen E. Blythe, *Internet Law as a Potential Catalyst for Growth of Caribbean E-Commerce: Jamaica's Statute as a Model, in* READINGS BOOK OF THE ACADEMY OF BUSINESS ADMINISTRATION GLOBAL TRENDS CONFERENCE (2009).

75. Denshi shomei oyobi ninshō gyōmu nikansuru hōritsu [Law Concerning Electronic Signature and Certification Services], Law No. 102 of 2000 (Japan). *See generally* Stephen E. Blythe, *Cyber-Law of Japan: Promoting E-Commerce Security, Increasing Personal Information Confidentiality and Controlling Computer Access*, 10 J. INTERNET L. 20 (2006).

76. Act No. 85 of 2001 (Electronic Transactions Law) (Jordan), *available at* http://www.cbj.gov.jo/uploads/Electronic_Transactions_Law.pdf. *See generally* Stephen E. Blythe, *E-Commerce Security in the Hashemite Kingdom: Calibrating Jordan's Electronic Transactions Law, in* ELECTRONIC COMMERCE (Frank Columbus ed., forthcoming 2011).

77. Law VIII – 1822 of July 11, 2000 Elektroninio Parašo Įstatymas [Law on Electronic Signature], Valstybės žinios, July 26, 2000, no. 61-1827 (Lith.). *See generally* Stephen E. Blythe, *Lithuania's Electronic Signature Law: Providing More Security in E-Commerce Transactions*, 8 BARRY L. REV. 23 (2007).

78. Electronic Transactions Ordinance, No. 51 of 2002, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Sept. 11, 2002 (Pak.) *available at* http://www.tremu.gov.pk/tremu1/workingroups/pdf/ETO%20Readable.pdf. *See generally* Stephen E. Blythe, *Pakistan Goes Digital: The Electronic Transactions Ordinance as a Facilitator of Growth for E-Commerce*, 2 J. ISLAMIC ST. PRAC. INT'L L. 5 (2006).

Taiwan,[82] Tunisia,[83] Turkey,[84] United Arab Emirates,[85] Vanuatu,[86] and in

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79. Law 27269, Ley de Firmas y Certificados Digitales [Law Regulating Digital Signatures and Certificates] May 28, 2000 (Peru), *available at* http://natlaw.com/interam/pe/ec/st/tnpeec1.htm. *See generally* Blythe, *supra* note 66, at 20–24.

80. O ELEKTRONSKEM POSLOVANJU IN ELEKTRONSKEM PODPISU [ZEPEP] [ELECTRONIC COMMERCE AND ELECTRONIC SIGNATURE ACT] URADNI LIST REPUBLIKE SLOVENIJE [UR.L. RS] No. 57/2000 as amended (Slovn.), *available at* http://e-uprava.gov.si/eud/e-uprava/en/ECAS-Act-in-English.pdf. *See generally* Stephen E. Blythe, *Slovenia's Electronic Commerce and Electronic Signature Act: Enhancing Economic Growth with Secure Cyber-Transactions*, 6 I.C.F.A.I. J. CYBER L. 8, 8–33 (2007).

81. Jeonjaseomyeongbeob [Digital Signature Act], Act No. 5792, Feb. 5, 1999, *amended by* Act No. 6360, Jan. 16, 2001, *amended by* Act. No. 6585, Dec. 31, 2001 (S. Kor.). *See generally* Stephen E. Blythe, *The Tiger on the Peninsula is Digitized: Korean E-Commerce Law as a Driving Force in the World's Most Computer-Savvy Nation*, 28 HOUS. J. INT'L L. 573, 601–26 (2006).

82. Diànzǐ qiān zhāngfǎ [Electronic Signatures Act] (2001) (Taiwan), *available at* http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=944&msgType=en&keyword. *See generally* Stephen E. Blythe, Taiwan's Electronic Signature Act: Facilitating the E-Commerce Boom with Enhanced Security address at the Sixth Annual Hawaii International Conference on Business (May 25–28, 2006).

83. Law No. 83 of 2000 (Electronic Exchanges and Electronic Commerce Law), (Tunis.) *translated in Tunisia's Electronic Exchanges and Electronic Commerce Law No. 83 of 2000,* RAMI OLWAN (last updated Nov. 10, 2008), http://www.olwan.org/attachments/168_Tunisia%20E-commerce%20Law.pdf. *See generally* Stephen E. Blythe, *Computer Law of Tunisia: Promoting Secure E-Commerce Transactions with Electronic Signatures*, 20 ARAB L. Q. 240, 247-58 (2006).

84. [Law 5070 of Jan. 23, 2004, Electronic Signature Law], [Official Gazette 25355] (Turk.), *translated in* Telecomm. Auth., *5070: Electronic Signature Law*, BILGI TEKMOLOJILERI VE ILETIŞIM KURUMU, http://www.tk.gov.tr/eng/pdf/Electronic_Signature_Law.pdf (last visited Apr. 4, 2011). *See generally* Stephen E. Blythe, *Improving Cyber-Security in Turkey via Refinement of E-Commerce Law*, 28 INT'L J. MGMT (forthcoming 2011); Stephen E. Blythe, Improving Cyber-Security in the Crossroads of Eurasia: Refining Turkey's E-Commerce Law address at the International Conference on Business Management (Mar. 28–29, 2011).

85. [Federal Law No. 1 of 2006,Electronic Commerce and Transactions], [Official Gazette 442] (U.A.E.) *available at* http://www.tra.ae/pdf/legal_references/Electronic%20Transactions %20%20Commerce%20Law_Final%20for%20May%203% 202007.pdf. *See generally* Stephen E. Blythe, *Fine-Tuning the E-Commerce Law of the United Arab Emirates: Achieving the Most Secure Cyber Transactions in the Middle East*, 1 INT'L J.BUS. & SOC. SCI. 163, 165–68 (2010); Stephen E. Blythe, The New Electronic Commerce Law of the United Arab Emirates: A Progressive Paradigm for Other Middle Eastern Nations to Emulate address at the Annual International Conference on Global Business, Dubai, U.A.E. (May 10–13, 2009).

86. Electronic Transactions Act, Act. No. 24 (2000) (Vanuatu). The e-commerce law of the Commonwealth of Bermuda was used as a model for this statute. *Vanuatu E-Commerce*, LOWTAX, http://www.lowtax.net/lowtax/html/jvaecom.html (last visited Apr.10, 2011). For a discussion of the ETA by the former prime minister of Vanuatu, who introduced the bill in Parliament, see Hon. Prime Minister Barak T. Sope Maautamate, *The E-Business Act of 2000, The International Companies (E-Commerce Amendment) Act of 2000, The Companies (E-Commerce Amendment) Act of 2000: A Plain English Explanation. See generally* Stephen E. Blythe, *South Pacific Computer Law: Promoting E-Commerce in Vanuatu and*

the proposed statute of Uganda.[87] Many other nations are either currently using the hybrid approach or are considering its adoption, including Egypt.

V. EGYPT'S ELECTRONIC SIGNATURE LAW

Egypt enacted its Electronic Signature Law (ESL)[88] in 2004. The statute is remarkable because it is one of the few in the world that does not contain exclusions.[89] The ESL created the Information Technology Industry Development Authority (ITIDA). ITDIA is a public corporation affiliated with the Ministry of Communications and Information.[90]

A. Goals

ITIDA was established to work toward the following goals: (1) promote the development and transfer of information technology (IT); (2) increase the value of exports of IT products and services; (3) encourage investment in IT firms and advise small and medium sized IT firms on how to be successful; (4) promote research and development in IT and the

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Fighting Cyber-Crime in Tonga, 10: 1 J. S. PAC. L. (2010), *available at* http://www.paclii.org/ journals/fJSPL/vol10/2.shtml.

87. Electronic Signatures Bill, 2004 (Uganda) (draft), *available at* http://www.sipilawuganda.com/files/electronic%20signatures%20bill%202004.pdf. *See generally* Stephen E. Blythe, *The Proposed Computer Laws of Uganda: Moving Toward Secure E-Commerce Transactions and Cyber-Crime Control*, 11 J. MGMT POL'Y & PRACT. (2010), *available at* http://www.na-businesspress.com/jmppopen.html.

88. Law No. 15 of 2004 (E-Signature and Establishment of the Information Technology Industry Development Authority), *Al-Jarida Al-Rasmiyya*, Apr. 21, 2004 (Egypt), *available at* http://www.uneca.org/aisi/NICI/Documents/egypt-e-signature-law.doc.

89. Other nations without exclusions include Azerbaijan and Montenegro. *See* Digital Electronic Signature Law of 2003 (Azer.), *available at* http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018111.pdf; Electronic Signature Law of 2003, OFFICIAL GAZETTE REPUBLIC MONTENEGRO No.80/04, *available at* http://www.mipa.co.me/userfiles/file/Electronic%20Commerce%20Law.pdf. Accordingly, Egypt does not have a legal presumption against the legal validity of use of the electronic form in documents pertinent to wills and testamentary trusts, marriage and divorce, real estate deeds, contracts for the sale of real estate, or in any other type of transaction. This is commendable and should promote acceptance of the electronic form in virtually all situations. For example, the worldwide aversion to electronic wills is dissipating. In 2005, Tennessee became the first American jurisdiction to recognize the legal validity of a will that is executed with an electronic signature. *See* Chad Michael Ross, *Probate—Taylor v. Holt—The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will*, 35 U. MEM. L. REV. 603 (2005).

90. Law No. 15 of 2004 (E-Signature and Establishment of the Information Technology Industry Development Authority), *Al-Jarida Al-Rasmiyya*, Apr. 21, 2004, art. 2 (Egypt), *available at* http://www.uneca.org/aisi/NICI/Documents/egypt-e-signature-law.doc. The minister of communications and information was charged with issuing the ESL's implementation regulations within six months of the date of publication of the ESL. *Id.* art. 29. The ESL was published in the *Official Gazette* (*Al-Jarida Al-Rasmiyya)* shortly after April 21, 2004 and went into effect the day after it was published. *Id.* art. 30.

implementation of the knowledge gained; and (5) regulate certification authorities, the verifiers of electronic signatures.[91]

B. Authority

ITIDA is empowered by the ESL to establish technical standards for e-signatures. In regulating these standards, ITIDA issues certification authority (CA) licenses to qualified applicants. ITIDA conduct audits of CAs and determines what services CAs are qualified to perform. ITIDA helps to settle disputes involving CAs by serving as a sounding board for customer complaints regarding CA services. ITIDA also provides technical advice pertinent to disputes between CAs, subscribers, and relying third parties.

In addition to regulating CAs and e-signature standards, the ITIDA provides technical advice to IT firms and training advice for their personnel. In its support role to IT firms, the ITIDA sponsors IT trade fairs, inside and outside of Egypt, and works with firms interested in the development of the IT industry. ITIDA also helps developers of original software and databases to protect their work through "depositing, recording, and registration."[92]

C. Revenue and Budget

The ITIDA derives its revenue from various sources. First, a one percent business tax of business firms'[93] revenues participating in the IT industry is deposited in an account, which is used for development of the IT industry. Second, fees are charged[94] for issuance and renewal of CA licenses.[95] Additionally, the federal government makes a budgetary allocation; fees are charged to third parties for services rendered by ITIDA; gifts and donations are made; loans and grants are received; and returns on investment of ITIDA funds are received.[96]

ITIDA independently develops its budget based upon rules adopted for economic authorities. It has the same fiscal year as the federal government.[97] ITIDA is required to maintain a bank account for deposit of its revenues at the Central Bank of Egypt; accounts at other banks are

91. *Id.* art. 3.
92. *Id.* art. 4.
93. The ITIDA board of directors decides which firms are to be taxed. *Id.* art. 5.
94. The amount of the license fee and the procedure governing its application are to be determined by the ITIDA board of directors. *Id.* art. 5.
95. *Id.*
96. *Id.* art. 6.
97. *Id.* art. 7.

subject to the approval of the minister of finance.[98] Any budgetary surpluses incurred are carried forward to the following fiscal year.[99] After consultation with the minister of finance, part of a budget surplus may be deposited within the state treasury.[100]

D. Board of Directors

The Prime Minister of Egypt is authorized to appoint ITIDA's board of directors.[101] The board of directors is responsible for the management of ITIDA.[102] The minister of communications and information technology serves as chairman of the board of directors and has policy jurisdiction over the entity.[103] Board membership consists of the following: (1) executive head; (2) advisor from the State Council;[104] (3) representative from the Ministry of Defense;[105] (4) representative from the Ministry of Interior;[106] (5) representative from the Ministry of Finance;[107] (6) representative from the Presidential Authority;[108] and (6) seven other persons[109] with relevant expertise.[110]

The members of the board of directors serve for a renewable term of three years.[111] The prime minister issues an executive order pertinent to the compensation of the board members.[112] The board is authorized to form committees consisting of various members assigned to work on specific tasks. Some of the duties may also be assigned to the chairperson or to the ITIDA executive head.[113]

The board of directors is charged with developing the technical rules and procedures pertinent to e-signatures and electronic commerce (e-commerce). The board of directors determines the services that ITDA is authorized to perform for third parties and the fees that should be charged for those services. In addition to determining these fees, the board must

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* art. 8.
102. *Id.*
103. *Id.*
104. The head of the State Council will choose the incumbent of this position. *Id.*
105. The minister of defense will choose the incumbent of this position. *Id.*
106. The minister of the interior will choose the incumbent of this position. *Id.*
107. The minister of finance will choose the incumbent of this position. *Id.*
108. The head of the Presidential Department (Diwan) will choose the incumbent of this position. *Id.*
109. The minister of information and communications will choose these seven persons. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

consider ITIDA's budgetary requests each year and approve its annual budget. A part of these budgetary considerations is drafting personnel regulations. ITIDA must adhere to these regulations as it carries out its compensation and employee evaluation functions, though ITIDA is an independent agency and not subject to the constraints imposed by the federal government. Beyond compensation, the board also drafts the essential training programs to be implemented for ITIDA employees.[114] Aside from determining the services provided by ITIDA and its budget for providing those services, the board drafts standard operating procedures to serve as corporate policy of ITIDA as it carries out its "technical, financial and administrative affairs." They also develop qualifications for issuance of CA licenses as well as a code of conduct for entities and persons participating in the IT and CA industries.

The board of directors meets at least once a month and whenever its chairperson decides to convene.[115] A quorum exists if a majority of its members are in attendance. Motions are passed by a majority of the board members' votes. If there is a tie in the voting, the chairperson is empowered to break the tie. The board is authorized to invite whoever it pleases in order to attain the specific expertise it needs for decision making, but the invitee will not have the right to vote.[116]

E. ITIDA Management

On a daily basis, ITIDA is led by its executive head.[117] The executive head represents ITIDA before the courts and in its interactions with external parties. She has general accountability to the board of directors for the management of ITIDA and for the execution of its "technical, administrative and financial activities."[118] Specifically, the executive head executes the board's decisions, carries out special tasks delegated by the board, and supervises the work of ITIDA. The executive head also prepares periodic evaluations of the authority's activities, highlighting performance failures, and developing action plans for rectifying the failures. The executive head must also engage in other duties specified in the organizational regulations,[119] such as filling in for the chairperson in her

114. *Id.* art. 9. The minister of communications and information technology will issue an executive order to implement this article. *Id.*

115. *Id.* art. 10.

116. *Id.*

117. *Id.* art. 11. The executive head will be appointed by the prime minister. The amount of the executive head's compensation will be publicized in an executive order of the prime minister "based on the recommendation of the Minister with policy jurisdiction." *Id.*

118. *Id.*

119. *Id.*

absence,[120] and reviewing and acting on "reports, statistics or information" that are received from IT firms, firms with e-commerce activities, and CAs.[121]

F. Electronic Signatures: Compliance with Signing Requirement

E-signatures have the same legal force and admissibility as traditional written signatures if they follow stringent technological requirements and are considered secure.[122] Furthermore, if a statute mandates that an ink signature must be executed on a paper document to incur a legal right in a transaction, that requirement is deemed to be met with the attachment of a secure e-signature to an electronic document.[123] To be admissible as evidence, e-signatures must (1) have only one signatory; (2) ensure the signatory has sole control over the e-signature's private key; and (3) ensure any changes to the data pertinent to the e-signature or to the document to which it is attached can be detected.[124]

G. Digital Signatures and Certification Authorities

The purpose of a certificate is to identify the holder of a private key used to create a digital signature. [125] Certificates can only be issued by licensed CAs [126] after verification of information pertinent to the prospective subscribers.[127] ITIDA licenses CAs if they meet the qualifications and have paid the license fee.[128] The number of CAs will be

120. *Id.* art. 12.

121. *Id.* art. 13. However, such reports are not required of presidential authorities, the armed forces, the minister of interior, the General Intelligence Agency, or the Administration Monitoring Authority. *Id.* art. 28.

122. *Id.* art. 14.

123. *Id.* Electronic signatures created under stringent technological standards comply with the admissibility rules expressed in the Evidence Law. *Id.* The Evidence Law requirements override the provisions of the ESL in determining the validity of e-documents and e-signatures. *Id.* art. 17.

124. *Id.* art. 18.

125. The implementation regulations of the ESL contain the types of information which must be included in the certificate. *Id.* art. 20.

126. CAs that were already in business at the time of enactment of the ESA were given six months in which to obtain a license and to comply with the other provisions of the ESA and its implementation regulations. *Id.* art. 27.

127. CAs are legally responsible for ensuring the confidentiality of all information they receive from applicants for certificates, and it must not be disclosed to third parties without the permission of the applicant. *Id.* art. 21.

128. Unlike most other countries, Egypt does not seem to want to allow an unlimited number of CAs. Instead, the ESL states that CAs are to be "selected under public competition." The amount of the fee will be determined by ITIDA's board of directors and must comply with the implementation regulations of the ESL but does not have to comply with Law No. 129/1947 on public utilities. *Id.* art. 19.

limited because they will be "selected under public competition."[129] The validity period of the license will be determined by the board and must not exceed ninety-nine years.[130] ITIDA has responsibility for the establishment of the supervisory, financial, and technical oversight necessary for the licensing process.[131]

Once licensed, CAs are not allowed to cease their activities, merge with another firm or waive their license with respect to a third party without the prior written permission of ITIDA.[132] Foreign entities may be issued a CA license. Thereafter, they may issue certificates if they have complied with all of the requirements determined by ITIDA's board of directors.[133]

H. Computer Crimes

The following crimes may be punished by imprisonment and the payment of a fine in the range of E£10,000 to 100,000:[134] (1) issuance of digital certificates by a person or entity that does not have a CA license; (2) damaging an e-signature, e-document or electronic communication medium, or engaging in fraudulent activity regarding same; (3) violation of ESL articles nineteen and twenty-one; (4) procuring access to an e-signature, e-document or electronic communication medium through deceit; or (5) tampering with or making inoperable an e-signature, e-document or electronic communication medium.[135] The identification of persons committing the above crimes will be published in two daily newspapers with wide circulation at the expense of the offender.[136] The chief administrator of the entity that violated the above crimes will incur the same penalty as the entity if it is proven that she had knowledge of the crimes or her negligence led to the crimes.[137]

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* CAs who violate the licensing conditions or any of the provisions of ESL Article 19 may have their license suspended or revoked. It will not be reinstated until the causes of the violations have been rectified. Additionally, if criminal acts have been committed, the CA may be subject to criminal penalties pursuant to ESL Article 23. *Id.* art. 26.

133. *Id.* art. 22.

134. As of November 19, 2009, this corresponds to a range of approximately $1,832 to $18,320, according to http://www.XE.com. The penalty range will be doubled if there are repeat violations. Law No. 15 of 2004 (E-Signature and Establishment of the Information Technology Industry Development Authority), *Al-Jarida Al-Rasmiyya*, Apr. 21, 2004, art. 23 (Egypt), *available at* http://www.uneca.org/aisi/NICI/Documents/egypt-e-signature-law.doc. Furthermore, these offenses may result in more stringent punishments pursuant to the penalty code or other laws. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* art. 24.

A less serious crime occurs if a CA fails to file a required report, statistical data, or other information to ITIDA. Such a violation is punishable with a fine in the range of E£ 5,000 to 50,000.[138] Additionally, the minister of justice, acting in conjunction with the minister of information and communications, may issue an executive order authorizing ITIDA employees to serve in the capacity of a law enforcement officer in reference to computer crimes which pertain to employees' professional responsibility.[139]

VI. RECOMMENDATIONS FOR IMPROVING EGYPT'S E-COMMERCE LAW

With the enactment of its e-signature law, Egypt has taken a commendable first step toward attaining a sound legal framework for e-commerce. However, more needs to be done before that goal is realized. First, Egypt should implement e-commerce contractual rules pertaining to automated contracts; attribution; acknowledgment of receipt; time and place a message is assumed to have been sent and received; and carriage contracts. For automated contracts, the U.S. Uniform Electronic Transactions Act offers a good model.[140] For attribution, South Korea's Electronic Commerce Act offers a good model.[141] For acknowledgement of receipt, look to Singapore's Electronic Transactions Act.[142] For time and place, use Holland's Electronic Commerce Act.[143] For carriage contracts,

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138. *Id.* art. 23. As of November 19, 2009, this corresponds to a range of approximately U.S.D. $916 to $9,160 according to http://www.XE.com. The penalty range will be doubled if there are repeat violations. Law No. 15 of 2004 (E-Signature and Establishment of the Information Technology Industry Development Authority), *Al-Jarida Al-Rasmiyya*, Apr. 21, 2004, art. 24 (Egypt), *available at* http://www.uneca.org/aisi/NICI/Documents/egypt-e-signature-law.doc.

139. *Id.* art. 25.

140. Unif. Elec. Transaction Act, § 14 (2009).

141. Framework Act on Electronic Commerce, Act No. 5834, 1999 (S. Kor.) *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN025692.pdf. The Korean Legislative Research Institute (KLRI) is an independent non-profit organization funded by the Republic of South Korea. The KLRI's charge is to translate all Korean federal statutes into English. They do an admirable job of this. The statutes' twenty volumes, in loose-leaf form, are continually updated. This is one of the Korean government's globalization thrusts. Of course, the official statutes are the ones in Korean as originally enacted. However, given that the Korean government finances the KLRI's work, the English language versions of the statutes used in research for this article could be described as "*quasi*-official." *See* Blythe, *supra* note 71.

142. Electronic Transactions Act (Act No. 16/2010), § 13 (Sing.), *available at* http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2010-ACT-16-N&doctitle=ELECTRONIC%20TRANSACTIONS%20ACT%202010%0a&date=latest&method=part&sl=1.

143. Information Society Services Act, April 14, 2004, art. 11 (Neth.). *See* Blythe, *supra* note 43.

Colombia's Electronic Trade Law has a commendable paradigm.[144]

After creating additional e-commerce contractual rules, Egypt should seek to comply with additional requirements from other jurisdictions. The Egyptian statute is less thorough than other nations' e-commerce laws, as it only mentions the statutory requirements pertaining to writing and signing. In contrast, the New Zealand statute states that the electronic form may be sufficient to meet statutory requirements for several types of requirements that are not covered in Egypt's statute. For example, in New Zealand (1) an e-signature may be used to satisfy a statutory requirement that a signature or a seal be witnessed if the e-signature is reliable given the circumstances, it identifies the witness, and it indicates the signature or seal has been witnessed; (2) an e-document may be used to satisfy a statutory requirement to store a paper document; (3) if a statute mandates that information be retained in electronic form, the electronic form chosen must be reliable and must be easily accessible for reference at a later time; (4) if a statute requires that a comparison be made with an original paper document, that mandate may be met by comparison with a digital copy of the original document if the integrity of the original paper document is maintained by the e-document; and (5) in all instances mentioned here, neither the generation of a digital copy nor transmission of information in an electronic communication shall be held to be in violation of copyright law.[145] These rules, which are pertinent to compliance with other statutory requirements, should be added to the Egyptian statute. Specifically, regarding the statutory language from other jurisdictions that Egypt should adopt, two important provisions are included in the Jordanian statute. First, Egypt should allow for the transferability of electronic notes. Second, Egypt should enable the electronic transfer of funds.[146]

A further flaw in the ESL is that it fails to include consumer protections for e-commerce buyers. As a model, Egypt can look to Tunisia for an example of a nation with good consumer protections for e-commerce buyers. All of Tunisia's e-commerce consumer protections are commendable.[147] Tunisia provides buyers with a last chance to review the order before entering into it. Buyers have a ten-day window to withdraw from the agreement after it has been made. If the goods are late or if they do not conform to the specifications, buyers are entitled to a refund.

144. L. 527/99, agosto 18, 1999, DARIO OFICIAL [D.O.] art. 26–27 (Colom.).

145. Electronic Transactions Act 2000, §§ 26–32 (N.Z.), *available at* http://www.med.govt.nz/templates/ContentTopicSummary____9829.aspx.

146. Act No. 85 of 2001 (Electronic Transactions Law) arts. 19–29 (Jordan), *available at* http://www.cbj.gov.jo/uploads/Electronic_Transactions_Law.pdf.

147. Law No. 83 of 2000 (Electronic Exchanges and Electronic Commerce Law), arts. 25–37 (Tunis.) *translated in Tunisia's Electronic Exchanges and Electronic Commerce Law No. 83 of 2000,* RAMI OLWAN, http://www.olwan.org/attachments/168_Tunisia%20E-commerce% 20Law.pdf (last updated Nov. 10, 2008).

Additionally, Tunisia has required sellers to provide buyers with a ten day trial period after the goods have been received; during this window the risk remains with the seller.[148]

Beyond these consumer protections, Egypt should expand the list of computer crimes in the ESL. The following computer crimes, with appropriate penalties, should be recognized: (1) unauthorized tampering with computer information; (2) unauthorized use of a computer service; (3) unauthorized interference in the operation of a computer; (4) unauthorized dissemination of computer access codes or passwords; and (5) injection of a virus into a computer. The Singapore Computer Misuse Act can be used as a model for such additions.[149]

In order to make these regulations stronger, e-government provisions within the ESL should be strengthened. These provisions are relatively weak because they are permissive; they should be mandatory. If financial resources are available, Egypt should purchase state-of-the-art computer information systems for their governmental departments. Over the long run, the investment should pay for itself in reduced cost of government services.[150] Additionally, as Egyptians rely more and more on the Internet, this will make government services more convenient and accessible to Egyptian citizens. Accordingly, governmental departments should begin to provide services online. Hong Kong is an excellent example of a jurisdiction that has successfully implemented e-government. In Hong Kong, a substantial number of government services may now be accessed online, including scheduling an interview for a visa or scheduling a wedding before a public official.[151]

In order to properly enforce these new regulations, Egypt should create information technology (IT) courts. Because of the specialized knowledge often required in the adjudication of e-commerce disputes, information technology courts should be established as a court of first instance for e-commerce disputes. These IT courts should be tribunals

148. South Korea is one of the few nations that may offer better consumer protections than Tunisia. South Korea has enacted a separate statute focusing exclusively on e-commerce consumer protections. *See* Consumer Protection in Electronic Commerce Act, Law No. 6687, Mar. 30, 2002 *amended by* Act No. 7315, Dec. 31, 2004, *amended by* Act No. 7344, Jan. 27, 2005 (S. Kor.). Furthermore, the CPA recently underwent a major overhaul with substantial amendments in Act No. 7487 of March 31, 2005, which became effective on April 1, 2006. For a thorough analysis of the CPA, *see* Blythe, *supra* note 71. Iran also provides good consumer protections, including a window of opportunity to withdraw from an e-transaction previously entered into. However, the window in Iran is only seven days, as opposed to Tunisia's ten days. *See* Blythe, *supra* note 63.

149. Computer Misuse Act, Cap. 50A (Aug. 30, 1993) (Sing.), *available at* http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_gettopo.pl?actno=1998-REVED-50A. *See generally* Blythe, *supra* note 47.

150. Chung, *supra* note 20.

151. *See* Blythe, *supra* note 70, at 3.

consisting of three experts. The chairperson would be an attorney versed in e-commerce law, and the other two people would be an IT expert and a business management expert. The attorney would be required to hold a law degree and be a member of the bar with relevant legal experience; the IT expert would be required to hold a graduate degree in an IT related field and have experience in that field; and the business management expert would be required to hold a graduate degree in business administration and have managerial experience. The e-commerce law of Nepal can be used as a model.[152]

In order to give these regulations full weight, Egypt should consider the fact that many e-transactions will occur between Egyptian citizens and residents and parties outside the borders of Egypt. Thus, it would be prudent for Egypt to formally state its claim to long-arm jurisdiction against any party who is a resident or citizen of a foreign country, so long as that party has established minimum contacts with Egypt.[153] Minimum contacts will exist, for example, if a cyber seller outside Egypt makes a sale to a party living within Egypt. The ESL should be applicable to the foreign person or entity outside of Egypt because that person or firm has had an effect on Egypt through the transmission of an electronic message received in Egypt. The foreign party should not be allowed to evade the Egyptian courts' jurisdiction merely because that party is not physically present in the country. After all, e-commerce is an inherently international phenomenon, unlimited by national borders.

Beyond the need to create effective regulations is the need to promote the utilization of e-signatures among the general public and to make them cheaper and more accessible. In order to accomplish this goal, Egypt's post office should be designated as a licensed CA. Several nations have successfully experimented with this idea, including Belgium. In Belgium, a national ID card contains a computer chip, which can be activated at the post office to become an e-signature of the cardholder. The Belgian post office has also implemented a promotional campaign to educate the general public about e-signatures and their availability through the post office.[154]

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152. Electronic Transactions Act, Ordinance No. 32 of 2061 B.S. [2005], 54 KATHMANDU EXTRAORDINARY ISSUE 60, §§ 60–71 (Nepal), *available at* http://www.entrec.org.np/trade/files/The%20Electronic%20Transactions%20Ordinance%20%202005.pdf.

153. The Republic of Tonga is an example of a nation that has claimed long-arm jurisdiction over e-commerce parties. Its statute may be used as a model. *See* Blythe, *supra* note 86, at 14.

154. Wet Houdende Vaststelling van Bepaalde Regels in Verband met het Juridisch Kader voor Elektronische Handtekeningen en Certificatiediensten [Legal Framework for Electronic Signatures and Certification Services] of July 9, 2001, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Sept. 29, 2001, 33070. This statute was supplemented by the Royal Decree Organizing the Supervision and Accreditation of Certification Service Providers Issuing Qualified Certificates. Koninklijk Besluit Houdende Organisatie van de

Finally, to increase the number of locations offering CA services throughout Egypt, the Office of Registration Agents (RA) should be created. An RA is employed by a CA and works under the authority granted in the CA's license; an RA does not need a separate license. The RA is able to operate branch locations of the CA. The RA's responsibilities should include processing applications for certificates and confirming the identification documents those applicants submit. Several nations have experimented with RAs, including Peru[155] and the Slovak Republic.[156]

VII. SUMMARY AND CONCLUSIONS

Because of its stagnant rate of economic growth, the Egyptian government implemented sweeping reforms of its economic policies in 2005, including reductions in tax rates, energy subsidies and customs fees, and the privatization of some industries previously operated by the government. Those changes seem to have paid off. Since 2006, the rate of growth in GDP has significantly increased.

Currently, only ten percent of Egyptians have Internet access, but that percentage continues to grow as the country moves toward broadband and away from the much slower dial-up connections.[157] Business-to-consumer e-commerce has lagged because of limited Internet access, a preference to use cash in business transactions, and an aversion to credit cards.[158] However, business-to-business e-commerce is flourishing.[159] Additionally, more and more bureaucratic departments are switching to e-government;[160] this should reduce the cost of government services and make them more accessible and convenient for Egyptians as the percentage of Internet penetration increases. In 2004, Egypt demonstrated significant investment into e-commerce by passing the ESL.

The ESL was a commendable first step in the creation of a legal framework for e-commerce law. This framework can be improved by

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Controle en de Accreditatie van de Certificatiedienstverleners die Gekwalificeerde Certificaten Afleveren [Royal Decree Organizing the Supervision and Accreditation of Certification Service Providers Issuing Qualified Certificates] of Dec. 6, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 17, 2003. *See generally* Blythe, *supra* note 43.

155. Law 27269, Ley de Firmas y Certificados Digitales [Law Regulating Digital Signatures and Certificates] May 28, 2000, art. 13 (Peru), *available at* http://natlaw.com/interam/pe/ec/st/tnpeec1.htm.

156. 215/2002 (III.15) O Elektronickom Podpise a o Zmene a Doplnení Niektorých Zákonov [On Electronic Signature and on Amendment of Some Acts] art. 21 (Slovk.), *available at* http://www.nbusr.sk/ipublisher/files/nbusr.sk/elektronicky-podpis/legislativa/1-3/215_2006en.pdf. *See generally* Blythe, *supra* note 43.

157. Meddah, *supra* note 7.

158. *Introduction to E-Commerce*, *supra* note 10.

159. *Egypt: Overview of E-Commerce*, *supra* note 11.

160. Nawar, *supra* note 13.

adding e-contract rules that recognize the electronic form as a means of compliance with virtually all types of requirements contained in other statutes. These e-contract rules relate to attribution, acknowledgement of receipt, time and place of transmission and reception, automated contracts and carriage contracts. Further, there should be additional provisions relating to transferability of electronic notes and electronic funds, consumer protections, several new computer crimes, and mandatory e-government. In order to enforce these provisions, information technology courts should be created and given explicit long-arm jurisdiction. Additionally, in order to promote access to e-commerce, Egypt's post office should be made a certification authority, and registration agents should be granted the authority to accept and process applications for certificates on behalf of a certification authority.

JUDICIAL INDEPENDENCE AT THE CROSSROADS: GRAPPLING WITH IDEOLOGY AND HISTORY IN THE NEW NEPALI CONSTITUTION

David Pimentel*

I. INTRODUCTION

Nepal is struggling to produce a new constitution, the blueprint for a new post-monarchic state. The political and ideological history of Nepal, including a checkered history with constitutionalism, complicates the picture, particularly as it applies to the structure of the new Nepali judiciary. The rhetoric of the various parties seems similar in terms of what each envisions in the new constitution, but the conflicts beneath the rhetoric loom large. While there appears to be consensus among diverse political interests in Nepal that the new state will be secular and have some type of federal structure, the substantive agreement ends there.[1]

The rhetorical similarities are deceiving, as ideology can vest the same words with different, even contradictory meanings. For example, during the Cold War, "democratic" had a profoundly different meaning in West Germany than it did in East Germany, which called itself the "German Democratic Republic" notwithstanding its socialist/communist ideology.[2] Similarly, the rhetoric in the debate over the new judiciary in Nepal consistently calls for a judiciary that is "independent and accountable." But there is no consensus on what these terms mean, or should mean, in Nepal today.

These concepts of independence and accountability conflict with each other to some degree, but there is no one-size-fits-all approach to balancing

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1. Damakant Jayshi, *Parties at Odds, Peace at Risk*, INTER-PRESS SERVICE (Jan. 5, 2010), http://ipsnews.net/news.asp?idnews=49886 ("[T]he parties disagree on all major issues to be incorporated in the Constitution–preamble, fundamental rights, federal model, the number and nature of federal states and distribution of natural resources.").

2. Bureau of European & Eurasian Affairs, *Background Note: Germany*, U.S. DEP'T STATE (Nov. 10, 2010), http://www.state.gov/r/pa/ei/bgn/3997.htm ("The G.D.R. established the structures of a single-party, centralized, communist state.").

them. Despite talk about international best practices,[3] the appropriate balance between these competing priorities cannot be imported from elsewhere. It must be determined with respect to Nepali culture, history, and politics. Both historical and ideological factors in present day Nepal tip the scales in favor of accountability at the expense of judicial independence. The challenge will be to find or create a judicial governance model that can heighten accountability while minimizing political or other interference with independent decision-making.

Similarly, competing definitions of "separation of powers" point in opposite directions on the issue of judicial review. However, by reaching beyond the deceptive rhetorical similarities and understanding the history and ideologies that inform the debate, it becomes clear that a new constitutional court, separate from the Supreme Court of Nepal, is the best path forward. A new institution, a departure from the status quo, is important for the reinvention of Nepali government.

If the parties can move beyond the rhetoric and appreciate each others' differing ideological stances, as well as the checkered history of Nepal's courts, there is room for consensus. Such a compromise, one that creates new institutions and enhances judicial accountability without infringing too much on judicial independence, is essential to reach an agreement on the new constitution and to establish a fair and effective Nepali judiciary.

II. BACKGROUND

A. EXPERIENCE WITH THE 1990 CONSTITUTION

Everything happening in Nepali politics today is, at some level, a reaction to Nepal's experience with the 1990 constitution (The Constitution of the Kingdom of Nepal) and the regime that existed under it.[4] This includes the drafting of the judiciary provisions of the new constitution.[5]

Although Nepal flirted with constitutionalism for forty years, the first

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3. Sagar Prasai, *Nepal's Constituent Assembly Gets New Lease, but Politics Go Back to Square One,* IN ASIA (June 2, 2010), http://asiafoundation.org/in-asia/2010/06/02/nepals-constituent-assembly-gets-new-lease-but-politics-go-back-to-square-one/.

4. *See generally* United Nations Development Programme, The Interim Constitution of Nepal, 2063 (2007) as Amended by the First, Second and Third Amendments (2008), *available at* http://ccrinepal.org/files/downloads/37ddc770102c2dcf8b25892721729b5e.zip ("Among the shortcomings of the [1990] Constitution in the eyes of many were the insistence that Nepal is a Hindu kingdom; the inclusion of many important economic and social rights as 'directive principles' only, which means they were not able to be used as the basis for legal claims; inadequate provisions for civilian control of the army; excessive power given to the King; and provisions that were not clear enough about the King's powers, thus making it possible for those powers to be abused.").

5. *Id.*

true and meaningful constitution in Nepal came in 1990,[6] establishing a constitutional monarchy, formally recognizing royal powers, and declaring Nepal a Hindu state.[7] Dissatisfaction with the 1990 constitution fostered the Maoist insurgency,[8] which mobilized those disenfranchised by the Hindu caste system, among others, to resist the constitutional regime.[9] The Maoists[10] became the primary critics of the regime and the champions of anyone aggrieved by it.[11]

Among the Maoists' complaints were problems with the Nepali judiciary.[12] The 1990 constitution reflected, in large part, the prevailing international best practice of an independent judiciary governed by a judicial council.[13] In theory, this is still the best constitutional structure for the Nepali judiciary.[14] In practice, however, the Nepali judiciary under the 1990 constitution was dysfunctional and corrupt, or at least widely perceived to be.[15] Against this historical backdrop, the advantages of an independent judiciary and an autonomous judicial council to govern it are more difficult to defend.

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6. *See generally* David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 9 WASH. U. GLOB. STUD. L. REV. 283, 285–89 (2010) [hereinafter *Constitutional Concepts*].

7. Enayetur Rahim, *Nepal: Government and Politic, The Constitution of 1990, in* NEPAL & BHUTAN: COUNTRY STUDIES (Andrea Matles Savada, ed., 3d ed. 1993), *available at* http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+np0101).

8. Alastair Lawson, *Who are Nepal's Maoist Rebels?*, BBC NEWS, June 6, 2005, http://news.bbc.co.uk/2/hi/3573402.stm ("The disillusionment of the Maoists with the Nepalese political system began after democracy was re-introduced in 1990.").

9. *Id.* ("[The Maoist rebels] have stayed consistent . . . in their demand for an end to Nepal's constitutional monarchy. Another key grievance of the rebels was the resentment felt by lower caste people against the authority wielded by the higher castes.").

10. The term "Maoists" is used throughout the article and denotes specifically the Maoist group that is active within Nepali politics.

11. Lawson, *supra* note 8 ("[A] substantial number of people in Nepal . . . see the Maoists as the only genuine alternative to the old, repressive social order.")

12. *See, e.g.*, *Maoists Wrath Against Nepal Judiciary*, TELEGRAPH NEPAL, Mar. 26, 2009, http://www.telegraphnepal.com/headline/2009-03-26/maoists-wrath-against-nepal-judiciary.

13. CONSTITUTION OF THE KINGDOM OF NEPAL, 1990, para. 93, § 1.

14. *Constitutional Concepts*, *supra* note 6.

15. *Nepal Country Profile: Judicial System*, BUS. ANTI-CORRUPTION PORTAL, http://www.business-anti-corruption.com/country-profiles/south-asia/nepal/corruption-levels/ judicial-system/ (last visited Mar. 27, 2011) (citing the *Bertelsmann Transformation Index 2010 Nepal Country Report*, BERTLERSMANN FOUND. (2009) http://www.bertelsmann-transformation-index.de/117.0.html?&L=1). "The judiciary is perceived to be among the most corrupt institutions in Nepal. According to Bertelsmann Foundation 2010, court officials are perceived as the main facilitators of corruption." *Id.*

B. POLITICAL AND IDEOLOGICAL CLIMATE

The political revolution in Nepal that gave rise to the new constitution-making process is a direct product of the Maoist insurgency and the 2006 settlement of its demands that brought an end to the monarchy.[16] Accordingly, the Maoists claim a right to sit at the table and dictate many of the terms of the government that will be established by the new constitution. If the elections had given them a clear majority, the Maoists would be able to do precisely that. However, the Maoists do not enjoy an outright majority in the present legislature, known as the Constituent Assembly (CA). Therefore, they do not have the power to control the constitution-making process.[17] In fact, as of May 2009, the Maoists are no longer part of the coalition government.[18] But because the Maoists have, by far, the largest bloc of any party in the CA, they remain a powerful political force.[19] The upshot is that they must reach compromises with the other political parties for the constitution-making process to move forward.

Compromises will be difficult, however, given the ideological differences and mindset of the Maoists. Because the Maoists literally fought for change in Nepal, anything that smacks of the status quo is entirely unacceptable to them, [20] including constitutional provisions for a judicial structure. While much of the drafting process appears to be mired in disagreements and political discord, the Maoists have already drafted a proposed constitution, presumably for discussion purposes.[21] While it is not a polished document, it unambiguously sets forth the Maoists' policies and priorities for the new constitution.[22]

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16. *See Timeline: Nepal,* BBC NEWS, http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1166516.stm (last updated Feb. 17, 2011, 15:42 GMT).

17. Prassi, *supra* note 3.

18. *Id.* ("The Maoists are the largest party in the Constituent Assembly, but a 22-party coalition has managed to push them to the fringes of national politics.").

19. Bureau of S. & Cent. Asian Affairs, *Background Note: Nepal,* U.S. DEP'T STATE (Dec. 20, 2010), http://www.state.gov/r/pa/ei/bgn/5283.htm. In the 2008 elections, the Maoists secured 229 of the 601 seats, which was almost exactly twice as many as the next largest bloc (Nepali Congress Party with 115 seats) but far short of the majority they would need to control the Constituent Assembly outright. *Id.*

20. Interview by Ben Peterson with Manushi Bhattarai, Maoist Student Leader, (June 13, 2009), *available at* http://www.socialistunity.com/?p=4213 (characterizing the other parties in Nepal as "status quo-ist" and highlighting the challenge to fight the "status quo" forces).

21. S. Chandrasekharan, *NEPAL: Draft Constitution of Maoists Unveiled,* S. ASIA ANALYSIS GROUP (Mar. 18, 2009), http://www.southasiaanalysis.org//notes6/note502.html.

22. *Id.* ("While this document may not be the ultimate draft of the constitution, it reveals the mind and the intention of the Maoists of the type of configuration they are looking for in the new constitution.").

C. *STATUS OF THE CONSTITUTION DRAFTING PROCESS*

The status of the constitutional drafting process changes daily. The CA, shortly after its creation under the Interim Constitution in 2008, set May 28, 2010, as the deadline to complete the new constitution.[23] Delays, largely due to the political difficulties detailed above, made it impossible to meet that deadline.[24] The CA voted in the closing minutes of its existence to extend its own life for another year, establishing a May 2011 deadline to produce a new constitution.[25] While some have questioned the authority of the CA to take such actions,[26] the practical necessity of these actions has calmed dissenting voices. If the government under the Interim Constitution had been allowed to expire, it would have left a vacuum of leadership and legal authority, a vacuum few wanted.[27]

Accordingly, there is a new deadline and hope for Nepal's constitutional future, although the process has been strained. Under the chairmanship of Nilambar Acharya, the Constitutional Committee (CC)[28] established a roadmap and timetable for the drafting process. In addition to the CC, which oversees the entire process, ten thematic committees were appointed from the membership of the CA. Each committee had responsibility for certain subject matter in the new constitution and was charged with creating a concept paper detailing provisions on that topic that should be included in the constitution. Most of these committees attempted to arrive at some kind of consensus, with limited success and consequent

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23. C. Balaji, *Nepal 28 May 2010 Due Date for Nepal Constitution to be Finalized,* WORLD NEWS FORECAST (May 28, 2010), http://www.newsahead.com/preview/2010/05/28/nepal-28-may-2010-due-date-for-nepal-constitution-to-be-finalized/index.php.

24. *Id.* ("Reuters reports that the political deadlock has delayed the preparation of a new constitution.").

25. By the time this article went to print, the new deadline of May 28, 2011, for the production of a new constitution had also been missed. On May 29, 2011, the political parties averted a crisis (*see infra,* note 27), reaching an agreement to extend the deadline another three months. Whether that deadline can or will be met is anyone's guess. Kiran Chapagain, *Nepal Averts Crisis Over Constitution Deadline,* N.Y. TIMES, May 29, 2011, *available at* http://www.nytimes.com/2011/05/30/world/asia/30nepal.html.

26. United Nations Development Programme, *supra* note 4, at 116. Indeed, it seems obvious that the CA had no such authority, as the Interim Constitution specifies a term of two years for the CA. *Id.* But the Interim Constitution doesn't allow for new elections either. *Id.*

27. Balaji, *supra* note 23. "There are fears that Prime Minister Madhav Kumar Nepal will declare a state of emergency if the Constituent Assembly fails to deliver [a constitution] by the due date. An unmet deadline for a constitution acceptable to all parties could trigger another civil war, while increasing India's and China's tug-of-war for the Himalayan Kingdom." *Id.*

28. *NC Leader Elected Head of Nepal Constitution-Drafting Body,* ZEE NEWS, http://www.zeenews.com/news559032.html (last updated Aug. 28, 2009 4:24 PM).

delay.[29] In contrast, the forty-three member Committee on the Judicial System took an up-or-down vote on each proposed revision[30] and was therefore able to complete its Report Preliminary Draft with the Concept Paper (CJS Concept Paper) promptly, by the fall of 2009.[31] The problem with the Committee on the Judicial System's approach was that the end product did not reflect consensus and engendered a great deal of opposition even within the committee. Seven dissenting opinions are appended to the CJS Concept Paper, six of them signed by a bloc of nineteen committee members detailing their objections to the paper's recommendations.[32]

Committee reports and concept papers are not the definitive word on each subject. They must go through the CC, which draws from them but is not bound by them in drafting the constitution. Indeed, the CC will *have* to make changes, as some elements of the concept papers are in direct conflict. For example, the Report and Concept Paper of the Committee on State Restructuring specifically calls for the creation of a "Constitutional Court" to resolve questions of constitutional interpretation.[33] It even specifies the composition of that court.[34] On the other hand, the CJS Concept Paper did not provide for the creation or existence of such a court.[35] Accordingly, the Reports need to be harmonized, and until then, the underlying issues remain open for negotiation and resolution through ongoing dialogue. These issues are considered by the powerful "Gaps and Overlaps Committee," which is already appointed for the purpose of reconciling inconsistencies, before going to the CC for final resolution.[36] Whether there will be a

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29. *Whither Constitution Writing?*, NEPALI TIMES, May 28, 2010, http://www.nepalitimes.com.np/issue/2010/05/28/ConstitutionSupplement/17125. As of May 28, 2010, which was the original deadline for completion of the constitution, "only three committees' draft papers ha[d] been passed unanimously." *Id.*

30. Interview with Kumar Regmi, Constitutional Lawyer, in Kathmandu, Nepal (July 18, 2010), (notes on file with the author). The Maoists' proposals prevailed in the Committee on the Justice System, for the most part, because the Madhesi party representatives chose to vote with the Maoists on most issues. *Id.*; *see* COMM. ON JUDICIAL SYS. TO THE CONSTITUENT ASSEMBLY, A REPORT PRELIMINARY DRAFT WITH THE CONCEPT PAPER (2009), *available at* http://www.ccd.org.np/new/resources/concept_paper_Judiciary_System_ENG.pdf [hereinafter CJS CONCEPT PAPER].

31. *Id.*

32. *Id.* at 68–84. Eighteen committee members signed the seventh dissenting opinion. *Id.* at 68.

33. CONSTITUENT ASSEMBLY, RESTRUCTURING OF THE STATE AND DISTRIBUTION OF STATE POWER COMMITTEE, REPORT ON CONCEPT PAPER AND PRELIMINARY DRAFT art. 11, § 11 (2010), *available at* http://www.ccd.org.np/new/resources/Concept_Paper_Restructuring_State_GTZ_ENG.pdf.

34. *Id.* at 38.

35. CJS CONCEPT PAPER, *supra* note 30.

36. *See Constitution Building e-Bulletin: What's Happening at the Constituent Assembly (CA)*, CENTER FOR CONST. DIALOGUE, at para. 6 (May 1, 2010), http://ccd.org.np/new/index.php?newsletter_detail_id=16 (referencing the role of the Gaps and Overlaps

Constitutional Court, separate from the Supreme Court, and what jurisdiction it may have, remain open questions.

III. COMPETING CONCEPTS FOR THE NEPALI JUDICIARY

A. IDEOLOGY AND THE ROLE OF THE JUDICIARY

The vision of the Maoists, who represent the political left in Nepal, differs significantly from the Marxist-Socialist views of Chairman Mao Zedong or of the Soviet-era Warsaw Pact nations. The International Crisis Group described them as follows:

> Despite having an authoritarian outlook, the Maoists maintained a culture of debate within their party; key issues have been widely discussed and hotly contested. From the end of the 1990s, they have moved gradually toward a more moderate stance. They changed positions in acknowledging the 1990 democracy movement as a success (they had earlier characterised it as a "betrayal"), in abandoning the immediate goal of a Mao-style "new democracy" and, in November 2005, by aligning themselves with the mainstream parties in favour of multiparty democracy.[37]

While the Maoists do not advocate for a traditional communist regime, their perspective and rhetoric are inevitably infused with Marxist ideology, which, in turn, informs their perception of the role of the judiciary. On Nepal's political right is the Nepali Congress Party, which controlled the government during most of the period that the country was operating under the 1990 constitution. The Unified Marxist–Leninists, popularly viewed as moderates, have been in the middle as the third largest party,[38] but there are as many as twenty other parties operating in Nepal.[39]

In common law regimes, the judiciary historically has protected the people from the abuses of government.[40] This Western perspective defines

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Committee).

37. INT'L CRISIS GRP., NEPAL'S MAOISTS: PURISTS OR PRAGMATISTS?: ASIA REPORT NO. 132, at i (2007), *available at* http://www.crisisgroup.org/~/media/Files/asia/south-asia/nepal/132_nepal_s_maoists___purists_or_pragmatists.ashx.

38. *See* Kiran Chapagain & Jim Yardley, *Nepal's Parliament Fails in 5th Try to Select Prime Minister*, N.Y. TIMES Aug. 23, 2010, http://www.nytimes.com/2010/08/24/world/asia/24nepal.html.

39. *See* Prasai, *supra* note 3 (referencing a twenty-two party coalition in the CA, excluding the Maoists).

40. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 17 (3d ed. 2007) ("In the United States and England . . . there was a . . . judicial tradition . . . in which judges

justice on the micro level. Any attempt to subvert individual justice in pursuit of higher societal goals is roundly condemned as evil.

From the Marxist point of view, however, it is not the courts that protect the people (individually) from government, but rather the government that protects the people (collectively) from exploitation by capitalists.[41] Government is not a threat to justice or to the rights of the people; government is the source of social justice and the protector of the people.[42] From this perspective, there is no reason to expect the judicial branch to be independent from the political branches of government. Rather, the judicial branch is perceived as another arm of the government, similarly committed to carrying out the government's agenda.[43]

Indeed, the Soviet Union and other communist-bloc nations shared this concept of the judicial branch. Dallin Oaks, former justice of the Utah Supreme Court, recently recounted his experience with Soviet-style justice:

> I have thought of how our system contrasts with that of the now defunct Soviet Union. During my years as president of BYU [Brigham Young University] (1971–80), I hosted the chief justice of the Supreme Court of the Soviet Union, who was touring the United States in that Cold War period. In a private one-on-one discussion, I asked him how the Soviet system really worked in a highly visible criminal case, such as where a person was charged with an offense like treason or other crimes against the state. He explained that on those kinds of cases they had what they called

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had often been a progressive force on the side of the individual against the abuse of power by the ruler.").

41. *See generally* KARL MARX & FREDRICH ENGELS, THE COMMUNIST MANIFESTO (1848).

42. NIKOLAI BUKHARIN & YEVGENI PREOBRAZHENSKY, THE ABC OF COMMUNISM § 23 (1920) ("For the realization of the communist system the proletariat must have all authority and all power in its hands. The proletariat cannot overthrow the old world unless it has power in its hands, unless for a time it becomes the ruling class. Manifestly the bourgeoisie will not abandon its position without a fight. For the bourgeoisie, communism signifies the loss of its former power, the loss of its 'freedom' to extort blood and sweat from the workers; the loss of its right to rent, interest, and profit. Consequently the communist revolution of the proletariat, the communist transformation of society, is fiercely resisted by the exploiters. It follows that the principal task of the workers' government is to crush this opposition ruthlessly.").

43. *Id.* at § 71 ("In fine, in the long succession of civil and criminal affairs, the proceedings of the courts must be conducted in the spirit of the new socialist society which is in course of construction. For these reasons the Soviet Power did not merely destroy all the old machinery of justice which, while serving capital, hypocritically proclaimed itself to be the voice of the people. It went farther, and constituted new courts, making no attempt to conceal their class character. In the old law-courts, the class minority of exploiters passed judgement upon the working majority. The law-courts of the proletarian dictatorship are places where the working majority passes judgement upon the exploiting minority.").

> "telephone justice." Judges conducted the trial and heard the evidence and then went back to their chambers and had a phone call from a government or party official who told them how to decide the case.
>
> I am grateful that, whatever difficulties we have in our system of justice—and there are many—we are still far away from what he called "telephone justice." What stands between us and that corruption of the judicial system . . . is the independence of our state and federal judges.[44]

Particularly shocking to Western sensibilities is the fact that the Soviet Chief Justice explained the telephone justice system openly and without apparent embarrassment. Most Westerners would unhesitatingly join in Oaks' assessment of that practice as an indicator of a corrupt judicial system.

But again, from the Marxist perspective, the government, or perhaps more specifically the party, is the guardian of the people's rights and interests; no one else should make the decision in sensitive cases. According to this view, entrusting such decisions to individual judges may result in decisions that are in conflict with the best interests of the people overall. In the post-communist state, telephone justice is still talked about.[45] Although it is generally decried in post-communist retrospect, it was accepted as a fact of life, perhaps even a necessary one, under communist regimes.[46] The Marxist will not allow the decision of an individual judge to frustrate the government's pursuit of the best interests of the people. By ideological contrast, the Western capitalist will not let the government's political agenda frustrate justice in an individual case.

The differences may be characterized in terms of trust. Judicial independence places enormous trust in judges, expecting them to do the right thing and to do justice even when there are compelling political or personal reasons to do otherwise. Western society's embrace of judicial independence reflects a distrust of government, even of majoritarian

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44. Elder Dallin H. Oaks, Church of Jesus Christ of Latter-Day Saints, Constitution Day Speech at the Salt Lake Tabernacle: Fundamentals of our Constitutions (Sept. 17, 2010), *available at* http://newsroom.lds.org/article/fundamentals-of-our-constitutions-elder-dallin-h-oaks.

45. Alena Ledeneva, *Behind the Façade: "Telephone Justice" in Putin's Russia, in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 24–36 (2006), *available at* http://se2.isn.ch/serviceengine/Files/ESDP/26627/ichaptersection_singledocument/036BC437-221A-4FC3-9EC3-E82BDECA7084/en/Chap_3_Ledeneva.pdf.

46. *Id.* (citing Peter Solomon, Jr., *Soviet Politicians and Criminal Prosecutions: The Logic of Intervention, in* CRACKS IN THE MONOLITH (James Millar ed., 1992)). "Communist governance resulted in what Peter Solomon has called the 'logic of intervention' or the logic of the 'directive from above' where the Communist party had the last word." *Id.*

government. The belief is that such governments will exploit and victimize unpopular minorities unless they are subject to the checks and balances that come from an independent judiciary.

This idea is reflected in Alexis de Tocqueville's *Democracy in America*, which recognizes the role of the judiciary in protecting the minority from the "tyranny of the majority."[47] This statement is foundational to the American ideological concept of the judiciary: because of their independence from majoritarian politics, only judges can be effective guardians of the rights of unpopular minorities.

In contrast, meetings with prominent Maoists involved in the constitution drafting process revealed that they have much greater trust in the government than in "independent" judges.[48] In Nepal, unlike Soviet-era socialist governments, this trust is not a blind faith in the Communist Party. Whatever else may appear in the new Nepali constitution, it will certainly provide for a parliamentary system where the government is a direct product of popular elections.[49] The Maoists trust the legislature more than the judiciary because the legislature is accountable to the people.[50] Independent judges, unaccountable to anyone, simply cannot command that type of confidence;[51] in the Maoists' view, a judiciary that is independent of parliamentary control is inherently undemocratic and, therefore, not to be trusted.

Summarizing, and perhaps oversimplifying, Western ideology trusts judges to do the right thing as long as they are not pressured by political forces to do otherwise. Maoist ideology in Nepal assumes judges will do the wrong thing unless pressured by political forces otherwise. These conflicting assumptions demand fundamentally different policy prescriptions for Nepal's judicial structure and are not amenable to compromise.

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47. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. 15 (1835). The term "tyranny of the majority" was further popularized by John Stuart Mill, who used it in his essay "On Liberty" (1859). *See* JOHN STUART MILL, ON LIBERTY (Bartleby 1999).

48. Interview with Ek Raj Bhandari, CA Member and Member of the Gaps and Overlaps Committee, in Kathmandu, Nepal (July 14, 2010) (notes on file with author). Mr. Bhandari gave a passionate explanation of the Maoist perspective on judicial independence; he pitched it in terms of his confidence in the democratic process and advocated entrusting the judiciary to the people and making it accountable to the people by placing it squarely under the power and control of those most responsive to the people: the elected legislature. *See also* Interview with Khim Lal Devkota, CA Member and Member of the Committee on the Judicial System, in Kathmandu, Nepal (July 16, 2010) (notes on file with author).

49. *See* Prasai, *supra* note 3 (noting that the Maoists have moderated their position and support a multiparty government now).

50. Interview with Ek Raj Bhandari, *supra* note 48.

51. Interview with Khim Lal Devkota, *supra* note 48. (Mr. Devkota argued that the judiciary must be accessible and transparent; citizens must feel like the judiciary belongs to them and that they want to support it and strengthen it because it gives them justice.).

B. JUDICIAL INDEPENDENCE V. JUDICIAL ACCOUNTABILITY

Scholars have paid considerable attention to the tension between judicial independence and judicial accountability, often attempting to strike an appropriate balance between these two competing policies.[52] This tension exists because a fully independent judiciary is accountable to no one and can render controversial or unpopular judgments without fear of repercussions. On the other hand, an accountable judiciary is answerable for its actions and, therefore, can never be truly independent.[53] As has been previously argued,[54] there is no one-size-fits-all balance to strike between judicial independence and judicial accountability. Nepal presents a compelling case.

Consider the two attributes Westerners prize most in the context of judicial independence and accountability: judges who demonstrate (1) *integrity* to recognize their ethical obligations and uphold them, and (2) *courage* to withstand outside pressure in rendering their decisions.[55] Accountability, in the form of disciplinary mechanisms for miscreant judges is important to encourage integrity; independence, in the form of structural protections for judges, insulating them from repercussions for their decisions, is important to bolster judicial courage.[56] Aside from structures to protect their independence or disciplinary regimes to hold them accountable, every judge comes to the job with a personal endowment of both courage and integrity, an endowment that can be represented as a unique point on the figure below:

52. Symposium, *Judicial Independence and Judicial Accountability: Searching for the Right Balance*, 56 CASE W. RES. L. REV. 899 (2006). In 2006, the Case Western Reserve Law Review conducted a symposium entitled "Judicial Independence and Judicial Accountability: Searching for the Right Balance." *Id.* The title of the symposium alone betrays the nearly axiomatic understanding that these two principles are in fundamental conflict and that a balance must be struck between them.

53. David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 18 (2009) [hereinafter *Reframing the Debate*].

54. *Id.* at 31–32.

55. *Id.* at 20–23.

56. *Id.* at 29.

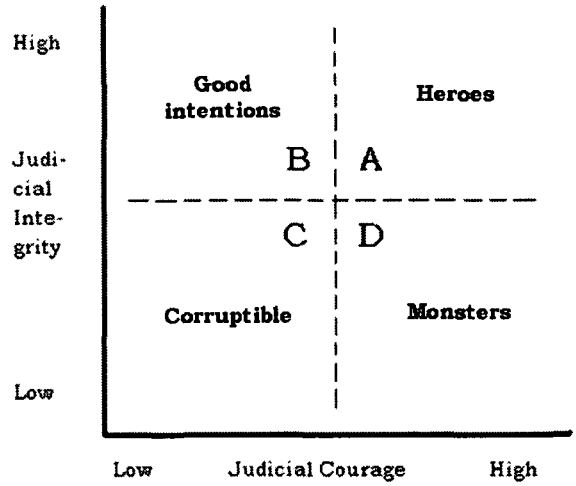

Fig. 1 -- Plotting Judicial Courage and Integrity on a Graph

> [I]n the Northeast quadrant (Quadrant A), we find the judges of the highest integrity and the highest courage. These are our "heroes." In the Northwest quadrant (Quadrant B), we find judges who want to do the right thing, but are vulnerable to outside threats and pressures; their integrity is high, but their courage is lacking. Quadrant C, in the Southwest, includes the "corruptible" judges, whose integrity is dubious, and who, lacking courage, are susceptible to pressure. Here is where you might find judges who pander to the whims of the executive branch or [who might] even be in the pocket of the mob. They are not bent on pursuing their own corrupt agenda (see Quadrant D, *infra*) as they lack the courage for such an enterprise, but are manipulable, and may well end up doing the bidding of others. In the Southeast (Quadrant D) we find the scariest of all, the judges with low integrity and ample courage; these are what Judge Noonan described as "Monsters" in his book on judicial ethics--judges who boldly pursue their own corrupt objectives.[57]

Using this model, one can see that strengthening structural protections for judicial independence may do more harm than good if the judges are

57. *Reframing the Debate*, *supra* note 53, at 27–28 (citing THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 35–47 (JOHN T. NOONAN, JR. & KENNETH I. WINSTON eds., 1993)).

located in the bottom half of the graph. A judge who lacks integrity will only be emboldened in his corruption by a regime that immunizes him from outside pressures. Structural protections for judicial independence are helpful only if the judges have already demonstrated a reasonable degree of integrity. The Western system that trusts judges assumes this threshold level of integrity; the Maoist ideology does not.

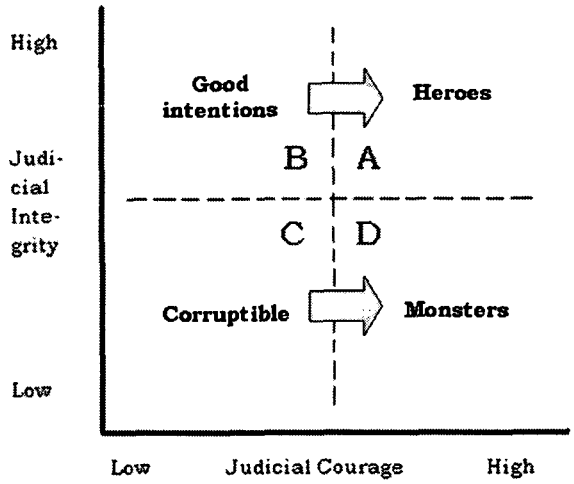

Fig. 2 -- Impact of strengthened structural protections for judges[58]

C. HISTORICAL BAGGAGE IN THE NEPALI JUDICIARY

History complements ideology as a critical and perhaps controlling factor in the future of the Nepali judiciary. The 1990 constitution *did* afford the judges a high degree of independence. That independence was strengthened further by the fact that the disciplinary body, the judicial council, rarely exercised its power to police the judiciary.[59] The result was, according to popular perception, a judiciary that earned the confidence of no one and a bench that distinguished itself more by its corruption than by anything else.[60] The Western model of trusting judges failed to work. The general perception in Nepal is that the judges were unworthy of such trust.[61]

58. *Id.* at 29–30.

59. Interview with Khim Lal Devkota, *supra* note 48. Mr. Devkota cited the failures of the Judicial Council, which, he said, despite obvious corruption throughout the system has never removed a judge in twenty years. This author has not attempted to verify the claim, but it is worth noting that this perception comes from a member of the CA and the Committee on the Judicial System. *See id.*

60. *See Nepal's Judiciary Is Most Corrupt: TI Report,* NEPAL BIZ NEWS.COM (May 25, 2007), http://www.nepalbiznews.com/newsdata/Biz-News/judicial.html (citing Transparency INTERNATIONAL, GLOBAL CORRUPTION REPORT: CORRUPTION IN JUDICIAL

Unsurprisingly, the popular outcry in Nepal—and not just from the Maoists—is for a judiciary that is *accountable.*[62] Judicial independence advocates cannot effectively argue that the Nepali people should trust their judges and accord them the independence to do the right thing. Trusting the judges too much and giving them too much independence is widely perceived by Nepali citizens as one of the sources of the present problem.

IV. THE RHETORICAL GAP

No one in the current Nepali constitutional debate is openly advocating against an independent judiciary. The rhetoric from all sides is consistent that judicial independence is desirable. The CJS Concept Paper contains thirteen separate references to judicial independence, mostly justifying provisions on the grounds that judicial independence requires them, including the following:

"The constitution has to provide functional independency to judges."[63]

"As the judicial independency is an essential condition for the fair justice, the person who is dispensing justice should also be fair, competent, capable, impartial."[64]

"The meaning of the independence of judiciary refers not only to be free from intervention in the judicial process by any person, authority or bodies other than judiciary, but also free from influence of any level or office-bearer of and within the judiciary itself."[65]

"The judicial independency is an essential condition in order to carry out judicial proceeding according to law."[66]

Despite these concessions on the importance of judicial independence, the CJS Concept Paper itself entrusts the governance of the judiciary, including all appointments, oversight, discipline, and removal, to a Special Committee of the Legislature (Special Legislative Committee).[67]

SYSTEMS (2007)) ("A country report on judicial corruption released . . . by Transparency International Nepal said Nepal's judiciary is one of the most corruption-affected sectors in the country. The Global Corruption Report 2007 prepared by senior advocate Krishna Prasad Bhandary on behalf of Transparency International (TI) said though corruption and irregularities are rife in Nepal's judiciary, initiatives are not being taken to curb such malpractices.").

61. *See generally,* Sewanta Kattel, *Local Level Perception of Corruption: An Anthropological Inquiry,* 3 DHAULAGIRI J. SOC. & ANTHROPOLOGY (2009) (analyzing the sources of the public perception of public corruption, including judicial corruption).

62. Interview with Ek Raj Bhandari, *supra* note 48; interview with Khim Lal Devkota *supra* note 48.

63. CJS CONCEPT PAPER, *supra* note 30, at 15.

64. *Id.* at 16.

65. *Id.* at 31.

66. *Id.* at 27.

67. *Id.* at 39.

This Special Legislative Committee is conceived as an eleven-person body, chaired by the Deputy Speaker of the Legislature and composed of the Minister for Law and Justice and nine additional members of the legislature.[68] The rationale for the Special Legislative Committee is articulated in the CJS Concept Paper in terms of "democratiz[ing]" the courts:

> The foundation of Democracy is the Civilian Supremacy. As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. One of the major reasons behind the judiciary in the past that the people never realized ownership over it was lack of judiciary's responsibility to the people. Therefore, it is necessary to democratize the judiciary according to the present context.[69]

As noted, a substantial minority of the Committee on the Judicial System dissented from the CJS Concept Paper on a variety of issues. One of those dissents, which objects to the power of the Special Legislative Committee, strongly invokes the concept of judicial independence:

> [I]f judges are recommended by the legislature or any committee at the legislature, and approval or ratification of the appointment by the legislature on the recommendation, the judiciary becomes likely a body under the legislature. In a democratic system under the principle of separation of power, the power of the states is divided in which the legislature makes laws, the executive implements the laws and the judiciary interprets the laws. Provided that, if the legislature holds the sole power of the State to form an organ of the state or holds power to supervise, control and monitor the state organs, the judiciary can not be imagined as an independent and competent. Consequently, the country heads toward dictatorship and anarchism. While writing a written Constitution, if the legislative [sic] is made more powerful than the Constitution itself, there is highly a chance of centralizing the power at the legislature, which we never have wished.[70]

68. *Id.*
69. *Id.*
70. *Id.* at 77.

The ideological divide becomes apparent in this debate, even though both sides are invoking principles of democracy, independence, and accountability. Notwithstanding the predictions of doom in the dissenting opinion, the Maoists *do* appear to believe in some degree of parliamentary supremacy. Maoists argue that the check on the legislature's power or abuse thereof rests with the people who can always vote out a legislature that abuses the public trust. Maoists believe that one cannot trust an unaccountable judiciary to play such a responsible role.[71]

The Nepal Bar Association (NBA) has also staked out a strong position against the CJS Concept Paper by publishing its own position paper on judiciary issues. It decries the CJS Concept Paper's approach for its failure to "uphold the principle of independence of judiciary and the separation of powers which is one of the fundamental pillars of democracy."[72] The NBA position paper goes on to "emphasize[] that legislative interference (federal or provincial) with judicial appointments and dismissals is not acceptable."[73]

The President of the NBA has expressed his confidence—based on conversations he has had with the highest level Maoist leaders—that even the Maoists share the NBA's commitment to an independent judiciary.[74] However, the concrete proposals coming from the Maoists suggest that judicial independence to the Maoists means something very different from what it means to the NBA.

V. SEPARATION OF POWERS

Both the dissenting opinion and the NBA position paper make specific reference to the concept of separation of powers, the latter identifying it as "one of the fundamental pillars of democracy."[75] While the Maoists speak of independence and accountability, they do not speak of separation of powers, much less tout it as a pillar of democracy. The CJS Concept Paper illustrates that the Maoist concept of democracy militates against separation of powers and favors bringing the judiciary under the control of the legislature as a means of "democratiz[ing]" the judiciary."[76]

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71. Interview with Ek Raj Bhandari, *supra* note 48.

72. NEPAL BAR ASS'N, THE JUDICIAL SYSTEM UNDER NEPAL'S NEW CONSTITUTION 11 (2010).

73. *Id.*

74. Interview with Mr. Prem Bahadur Khadka, NBA President, in Kathmandu, Nepal (July 13, 2010) (notes on file with author).

75. CJS CONCEPT PAPER, *supra* note 30, at 77; NEPAL BAR ASS'N, *supra* note 72, at 11.

76. CJS CONCEPT PAPER, *supra* note 30, at 39 ("As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. . . . [I]t is necessary to democratize the judiciary according to the present context.").

The concept of separation of powers, raised first in the discussion of judicial appointments, arises again in the context of constitutional interpretation. The question of *who* should have the power of constitutional interpretation in Nepal is sufficiently controversial and important to deserve mention here. In the United States, constitutional interpretation is entrusted to the Supreme Court. Americans are untroubled by the fact that by making interpretive judgments the Court may actually be making law.[77] In common law jurisdictions, the concept of judge-made law is neither novel nor threatening.[78] This concept follows the traditional role of the common law judiciary articulated above: to protect the public from the government. Indeed, the power of the judiciary was invoked historically in common law England as a check on the power of the king.[79]

The tradition of the civil law is profoundly different. Judges were expected to *apply* the law but not interpret it.[80] From this perspective, ambiguities in the law are to be referred to legislative bodies, not judiciaries, for clarification.[81] The rationale is that such interpretation and clarification is inherently a legislative act.[82] This ideology was established under Roman legal tradition and revitalized by the French revolutionaries. French revolutionaries did not see the judiciary as a champion of the rights of the people, as in England, but rather as a barrier and a threat to democratic governance.[83]

Under civil law tradition, it is inappropriate to entrust issues of interpretation, especially of the constitution, to the regular courts. Civil law jurisdictions have developed separate institutions for such interpretation.[84] In many of these countries, constitutional courts operate independently from a supreme court and address issues of constitutional interpretation, leaving a supreme court to function simply as the ultimate court of appeals–the court of last resort.[85] Conceptually, these constitutional courts

77. MERRYMAN & PÉREZ-PERDOMO, *supra* note 40, at 17 ("The fear of judicial lawmaking [in the United States and England] . . . did not exist. On the contrary, the power of the judges to shape the development of the common law was a familiar and welcome institution.").

78. *Id.*

79. *Id.*

80. *Id.* at 30 ("[T]he function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case . . . ."); *Id.* at 39 ("[Prussian] judges were forbidden to interpret the code.").

81. *Id.* at 40 ("A new governmental organ was created by the legislature and given the power to quash incorrect interpretations by the courts . . . . [The Tribunal of Cassation] was not a part of the judicial system, but rather a special instrument created by the legislature to protect legislative supremacy from judicial usurpation.").

82. *Id.* at 30 ("Experience with the pre-revolutionary courts had made the French wary of judicial law-making disguised as interpretation of laws.").

83. *Id.* at 35–36.

84. *Id.* at 37–38.

85. *Id.* at 37–38; *see also, e.g., Differences Between the Constitutional Court and the*

were not to be courts at all and were not considered to be part of the judicial branch, although over time they have assumed an increasingly judicial character.[86] Thus, although judicial review of legislative action has been a sacred element of common law jurisprudence since *Marbury v. Madison*,[87] judicial review, like any act of judicial interpretation, would be considered a violation of separation of powers under the civil law tradition.

The CJS Concept Paper and the Maoists' draft both provide that issues of constitutional interpretation will be entrusted to the Special Legislative Committee, which is a legislative body.[88] The NBA disagrees, invoking the principle of separation of powers:

> The NBA holds the position that the judiciary, and, ultimately, the Supreme Court, should be the final body to interpret the law, including the constitution, as per the principle of the separation of powers and independence of the judiciary. Accordingly, the NBA expresses grave concern with the provision of the JS Concept Paper with respect to the interpretation of constitution by a committee of the federal legislature.[89]

The NBA view, therefore, reflects the perspective and ideology of a common law jurisdiction. Such a perspective may not be surprising given the profound influence of India in the region and the assistance and support the NBA has received from Canadian sources.[90]

Supreme Court of Justice, NISGUA, *available at* http://www.nisgua.org/themes_campaigns/impunity/Differences%20Between%20Constitutional%20Court%20and%20Supreme%20Court%20of%20Justice.pdf (describing the different jurisdiction of these two bodies in Guatemala).

86. MERRYMAN & PÉREZ-PERDOMO, *supra* note 40, at 37–38.

> [T]hese special [constitutional] courts, which are not a part of the ordinary judicial system and are not operated by members of the ordinary judiciary, were established in response to the civil law tradition that judges . . . cannot be given such power to review statutes for constitutionality. In time, many of these institutions have acquired judicial character, particularly in jurisdictions that follow the Germanic civil law tradition, and in Latin American civil law tradition.

Id. at 134–42.

87. 5 U.S. 137 (1803).

88. CJS Concept Paper, *supra* note 30, at 39; CONSTITUTION OF THE PEOPLE'S FEDERAL REPUBLIC OF NEPAL, (2067/2008) (Proposed Integrated Draft) § 172, at 69, *available at* http://southasiarev.files.wordpress.com/2011/01/new_draft_nepal_consitution.pdf.

89. NEPAL BAR ASS'N, *supra* note 72, at 13.

90. *See* NEPAL BAR ASSOCIATION: DEVELOPING DEMOCRACY IN NEPAL (DDN–II), http://nba-cba.org.np/new/index.php?option=CMS&task=detail&cid=5, (detailing the cooperation and support of the Canadian Bar Association with and for the Nepal Bar Association).

A lawyer from a civil law jurisdiction would likely conclude, however, that entrusting constitutional interpretation to the supreme court would be the more serious violation of separation of powers. It is the legislature, after all, that decides what the law is; the courts, with judges operating as mere functionaries, are empowered only to apply the law—ideally mechanically, to the extent that is possible—to individual cases.

There is nothing sacred about entrusting constitutional interpretation issues to the Supreme Court of Nepal. While the principle of constitutional supremacy is a vital one, fundamentally in conflict with the legislative supremacy favored by the Maoists' and CJS Concept Paper's proposals, there is nothing offensive to the core principles of judicial independence in the creation of a separate constitutional court.[91] Further, there may be great advantages to such a court, particularly in its potential to attract consensus both from separation of powers advocates and those who find the status quo unacceptable.

VI. WHERE TO GO FROM HERE? RECONCILING IT ALL

Ultimately, any compromises that are reached for the new Nepali judiciary must reflect the ideological and historical forces at play in Nepal. The largely independent judiciary of the past two decades utterly failed to win public confidence and trust .[92] The new judiciary for Nepal must be more accountable and, thus, necessarily less independent than in the past. The status quo is entirely unacceptable; serious changes have to be made, which will come largely with greater accountability measures. Even the NBA position paper—the fiercest defense of judicial independence seen in the debate—speaks strongly about the importance of accountability:

> In the survey conducted by the NBA the overwhelming majority of respondents opined that judiciary should be established as a corruption-free sector, and the code of conduct should be implemented strongly against judges. It is obvious that so as to maintain accountability of the

91. Most models for constitutional courts in other countries place the court reasonably beyond the control of any one branch of government. The Indonesian Constitutional court, for example, is composed of nine justices put forward by the three branches of government: three by the President, three by the Supreme Court, and three by the legislature (the People's Representative Council). Mohammad Mahfud, *Separation of Powers and Independence of Constitutional Court in Indonesia*, at 9, (paper presented by the Chairman of the Indonesian Constitutional Court at the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro, Brazil on Jan., 16–18, 2011), *available at* http://www.venice.coe.int/WCCJ/Rio/Papers/INA_Mahfud_E.pdf.

92. *See Nepal's Judiciary Is Most Corrupt: TI report*, *supra* note 60.

> judiciary, the effective implementation of codes of conduct and impeachment proceedings must be strictly enforced.[93]

However, the judiciary must also not be held accountable to majoritarian forces. Even if the Maoists prefer to trust the people and see themselves as the champions of the oppressed, Nepal has a long and ugly history of discrimination against unpopular and disenfranchised minorities.[94] The majority can be expected to protect the rights of the majority through legislative action, but someone must guarantee the rights of Nepal's minorities, including women, Dalits, religious minorities, and a host of ethnic subgroups.

The international consensus on best practice for enforcing judicial accountability is to entrust enforcement of ethics codes, and the policing of judicial misconduct and corruption to an independent judicial council.[95] However, the failure of the previous judicial council to perform this function[96] and the political imperative to avoid anything that appears to perpetuate the status quo,[97] militate in favor of creating a new institution to assume this role. The ideological and historical forces at play in Nepal require no less.

Notwithstanding the Maoists' best intentions, however, this new institution should *not* be a body of the legislature. A better approach would be for the new constitution to create a Judicial Complaints Commission (JCC) within the judicial branch, empowered to investigate charges of judicial misconduct and recommend disciplinary action, including removal of judges found to violate ethical standards. This JCC may be appointed with participation by political actors, but once appointed it should remain one step removed from majoritarian political forces.[98] Otherwise, the JCC could be pressured to harass judges who render unpopular decisions that

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93. NEPAL BAR ASS'N, *supra* note 72, at 14.

94. *See, e.g.*, Press Release, Asian Human Rights Comm'n, NEPAL: Implementation of Anti-Discrimination Laws (July 24, 2010), *available at* http://www.scoop.co.nz/stories/WO1007/S00470/nepal-implementation-of-anti-discrimination-laws.htm (giving an assessment of the failure to protect human rights of Dalits in Nepal).

95. The author made precisely this recommendation in an earlier article about the Nepali judiciary. *Constitutional Concepts*, *supra* note 6, at 294–310. This article reconsiders and amends that position.

96. Interview with Khim Lal Devkota, *supra* note 48; *see supra* text accompanying note 59.

97. *See supra* text accompanying note 20.

98. There are various ways to insulate JCC members from political interference. One option might be to select JCC members from the ranks of the judiciary, have them serve one term on the JCC, and then return to a secure post in the judiciary. Under this option they need not worry about pleasing the appointing authorities since they cannot be renewed anyway. Further, JCC members need not worry about using their influence to ingratiate themselves to future employers since they have a secure post in the judiciary to which to return in any case.

protect the rights of minorities or judges whose politics or interests are at odds with the ruling party.

Constitutional interpretation should also be at least one step removed from the legislature, lest constitutional standards become subject to the whims of the majority. Again, the judiciary's inability to muster public confidence in the past weighs in favor of a new institution, such as a constitutional court, to perform this role. This new institution, without a history of corruption or politicization, may be the best hope for sound constitutional administration in a new Nepal.

VII. CONCLUSION

Nepal must come together and find common ground and consensus for the structure and character of its new government, which will be reflected in the drafting of the new constitution. The debate over the structure and role of the judiciary is divisive, is exacerbated by all sides using similar rhetoric to argue for very different, even inconsistent approaches.

Reconciliation of this war of words and ideas requires an appreciation of the historical and ideological origins of the conflict. Moreover, Nepal cannot merely adopt or import foreign models; it needs its own institutions tailored to the nation's priorities in light of its culture, history, and ideological orientations. For Nepal, this means a judicial structure that strikes a balance between accountability and independence, decidedly favoring the former. Most likely, it means creating new institutions like (1) a Judicial Complaints Commission to enforce accountability, rather than continuing to rely on a historically ineffective judicial council to do so, and (2) a new, freshly empowered constitutional court to interpret and apply constitutional protections and limitations, rather than continuing to rely on its supreme court to perform this function. Only by replacing the tried-and-failed, or at least tried-and-flawed, institutions against which the Maoists have rebelled for so many years can Nepal hope to forge some semblance of a consensus on the terms of its new constitution and chart a new future for the people of Nepal.

THE STATUTE OF LIMITATIONS FOR ALIEN TORTS: A REEXAMINATION AFTER *KIOBEL*[1]

Alka Pradhan[2]

The recent Second Circuit ruling in *Kiobel v. Royal Dutch Petroleum*[3] that corporations may not be held liable under the Alien Tort Statute (ATS, formerly ATCA)[4] has shaken many human rights activists and internationalists. If this holding is upheld, it will require major reformulation of pending complaints. Although *Kiobel* may make the road difficult for ATS plaintiffs, the court's insistence on adhering solely to customary international law in determining jurisdictional issues may benefit ATS plaintiffs in other areas, most notably by contributing to the argument against the imposition of a statute of limitations on claims under the ATS.[5] Contrary to this position, the Ninth Circuit, in *Wesley Papa, et al.* v. *United States and the U.S. Immigration & Naturalization Service*, was the first to apply a ten year statute of limitations to ATS claims.[6] This holding has been cited in several other cases within the Ninth and Second Circuits.[7] However, the imposition of time limitations on ATS claims has been rebuffed by other U.S. courts.[8] This article concludes that not only does imposition of a statute of limitations negate the purpose of the ATS,[9] but also the Ninth Circuit's reasoning in favor of time limitations does not hold in the face of *Kiobel*.[10]

I. THE PURPOSE OF THE ATS:[11] UPHOLDING *JUS COGENS* NORMS

The ATS,[12] a simple pronouncement within the Judiciary Act of 1789, states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

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1. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, (2d Cir. 2010).

2. Alka Pradhan is Counsel for The Constitution Project's Task Force on Detainee Treatment and has litigated several Alien Tort Statute (ATS) cases.

3. *Kiobel*, 621 F.3d 111, 121.

4. 28 U.S.C. § 1350 (2011).

5. *Kiobel*, 621 F.3d 111; 28 U.S.C. § 1350.

6. Papa v. U.S., 281 F.3d 1004, 1012–13 (9th Cir. 2002); 28 U.S.C. § 1350.

7. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

8. *See, e.g., In re* Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

9. 28 U.S.C. § 1350.

10. *Kiobel*, 621 F.3d 111.

11. 28 U.S.C. § 1350 (2011).

12. *Id.*

nations or a treaty of the United States."[13] This provision is the mechanism by which civil actions may be filed for violations of international law committed abroad by perpetrators who are found in the United States. In the landmark case of *Filártiga v. Peña-Irala*,[14] the ATS, after lying dormant for nearly 200 years, was invoked against a former Paraguayan official who committed acts of torture in Paraguay, and later moved to the United States.[15] Plaintiffs, the family of a torture victim, filed suit in the Second Circuit, which found the defendant liable. Perhaps recognizing the significance of the case, the court was careful to state that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[16]

Although there is no legislative history for the ATS,[17] it is understood that "violations of the law of nations" was meant to encompass the then generally recognized prohibitions of international law against piracy, violations of safe conduct, and infringement on the rights of ambassadors.[18] Since *Filártiga*,[19] courts have expanded this list of "specific, universal, and obligatory"[20] prohibitions to include prohibitions against "atrocity crimes."[21] These crimes are commonly understood to include genocide, crimes against humanity (including torture, prolonged arbitrary detention, and forced migration or disappearances), and war crimes (also including torture and ethnic cleansing).[22] Additionally, liability under the ATS[23] has been found for aiding and abetting any of these crimes. Atrocity crimes are recognized under international law as *jus cogens* (Latin for "compelling law"), fundamental norms from which no derogation is permitted.[24]

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13. *Id.*

14. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

15. *Id.* at 876–877.

16. *Id.* at 888.

17. 28 U.S.C. § 1350 (2011).

18. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

19. *Filártiga*, 630 F.2d 876.

20. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). *See also* Flores v. S. Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003) (explaining that U.S. courts have consistently used the phrase "customary international law" and the "law of nations" interchangeably).

21. Term coined by David Scheffer, former U.S. Ambassador-At-Large for War Crimes. *See, e.g.*, David Scheffer, *Genocide and Atrocity Crimes*, 1.3 GENOCIDE STUD. & PREVENTION 229 (2006); *see also* David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law,"* 2.1 GENOCIDE STUD. & PREVENTION 91 (2007).

22. Pamela J. Stephens, *Spinning Sosa: Federal Common Law, The Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L. J. 1, 5 (Spring 2007).

23. 28 U.S.C. § 1350 (2011).

24. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (5th ed., 1998); R. v. Bow St. Metro. Stipendiary Magis., *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C.

Violations of *jus cogens* norms are considered to be particularly heinous crimes that, by virtue of their commission, impact all states. While customary international law is determined by *opinio juris* (general agreement by states to be legally bound by such custom) and widespread state practice,[25] *jus cogens* norms have the highest and most significant status under international law. This status has been seen by some commentators as implicating universal jurisdiction by all states and imposing a duty on all states to prosecute or extradite perpetrators.[26] In *Kiobel*, Judge Cabranes stated that "the substantive law that determines our jurisdiction under the ATS is [not] the domestic law of the United States . . . [but] the specific and universally accepted rules [of customary international law]."[27] Therefore, courts should look to customary international law as the substantive law that determines jurisdiction with respect to time limitation of claims brought under the ATS.[28]

II. THE NINTH CIRCUIT'S REASONING IN *PAPA*

In *Papa*,[29] the family of Brazilian national Mauricio Papa filed ATS[30] and other claims against the Immigration and Naturalization Service stemming from Papa's death while in INS custody.[31] Although Papa died in 1991, his family did not file suit until 1999. The District Court initially dismissed the claims under California's one-year statute of limitations for death caused by commission of a tort, but the Ninth Circuit reversed, finding instead that the applicable statute of limitations was ten years, pursuant to the provisions of the Torture Victim Protection Act (TVPA).[32] Because "[t]he TVPA, like the ATCA, furthers the protection of human rights . . . and employs a similar mechanism for carrying out these goals: civil actions."[33] The court concluded, "All these factors point towards borrowing the TVPA's statute of limitations for the ATCA."[34] It has been commented that "[t]he decision in *Papa* should serve as the basis to harmonize the limitations period to be used in ATCA actions and has the potential to bring to an end the inconsistent decisions as to the applicable

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(H.L.) 147, 174 (appeal taken from Eng.). *See also* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

25. Continental Shelf (Libya/Malta), 1985 I.C.J. 13 (Jun. 3).

26. M. Cherif Bassiouni, *Crimes Against Humanity*, CRIMES OF WAR PROJECT, *available at* http://www.crimesofwar.org/thebook/crimes-against-humanity.html.

27. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 118 (2d Cir. 2010).

28. 28 U.S.C. § 1350 (2011).

29. Papa v. U.S., 281 F.3d 1004, 1008 (9th Cir. 2002).

30. 28 U.S.C. § 1350.

31. *Papa*, 281 F.3d 1004.

32. *Id.* at 1012–13; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

33. *Papa*, 281 F.3d at 1012.

34. *Id.*

time period."[35] However, there are several problems with this view.

First, while the TVPA, enacted in 1991, has all too often been referenced interchangeably with the ATS,[36] it is in fact a federal statute governed by U.S. federal law[37] rather than the international law invoked in the 1789 Judiciary Act. The TVPA does provide for civil remedies against individuals who commit acts of torture or extrajudicial killing,[38] but that is where the similarities between the TVPA[39] and the ATS[40] end. The TVPA is narrowly applicable to individuals acting with official authority conferred by a foreign nation.[41] The TVPA also makes no reference to international law or the "law of nations."[42] The ATS,[43] on the other hand, is applicable to individuals (and potentially corporations, pending an appeal of *Kiobel*[44]) who commit any of several atrocity crimes as defined above, whether in private or official capacities.[45]

Moreover, the ATS specifically refers to the "law of nations" as the applicable law,[46] a reference thoroughly embraced and analyzed by the *Kiobel* court in its determination regarding corporate liability.[47] Judge Cabranes noted that the Second Circuit had previously looked to customary international law to determine questions of jurisdiction under the ATS.[48] Therefore, the court reasoned, it must continue to examine jurisdictional issues under the ATS[49] through the lens of international law. It is inappropriate to impose an identical time limitation for ATS and TVPA violations, which are not governed by the same law, merely because the two statutes can be associated by subject matter.

Rather, following the court's analysis in *Kiobel*,[50] customary

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35. J. Romesh Weeramantry, *Time Limitations Under the United States Alien Tort Claims Act*, 851 INT'L REV. RED CROSS, 627, 631 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5SSE46/$File/irrc_851_Weeramantry.pdf.

36. 28 U.S.C. § 1350.

37. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

38. Torture Victim Protection Act § 2(a).

39. *Id.*

40. 28 U.S.C. § 1350.

41. Torture Victim Protection Act § 2(a).

42. *Id.*

43. 28 U.S.C. § 1350.

44. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111 (2d Cir. 2010).

45. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

46. 28 U.S.C. § 1350.

47. *Kiobel*, 621 F.3d 111, 120.

48. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (foreign government officials may be liable for crimes under the ATS); *Kadic*, 70 F.3d at 239–41 (private individuals may be liable for crimes under the ATS); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (aiders and abettors may be liable for crimes under the ATS); 28 U.S.C. § 1350.

49. 28 U.S.C. § 1350.

50. *Kiobel*, 621 F.3d 111.

international law must be examined to determine the statute of limitations for violations that are covered by the ATS.[51] This article will follow Judge Cabranes' pattern of analysis, by examining the pronouncements of international tribunals, international treaties and conventions, state practice, and the work of international legal scholars.[52] This article concludes that one of the main characteristics of *jus cogens* norms violations is that "they do not lapse with time."[53]

III. INTERNATIONAL TRIBUNALS

The decisions of international tribunals have been largely silent on the question of a statute of limitations for crimes within their jurisdiction. This silence is due to the fact that the founding instruments of the tribunals have eschewed such limitations. The Charter of the International Military Tribunal that sat at Nuremberg contained no statute of limitation,[54] nor did the Charter of the International Military Tribunal for the Far East that sat at Tokyo.[55] Additionally, Control Council Law No. 10, which adapted the norms of the Nuremberg Charter for use by the Allied courts in Europe, stated clearly that

> [i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.[56]

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51. 28 U.S.C. § 1350 (2011).

52. *See, e.g.*, *Kiobel*, 621 F.3d at 239–41 (holding that private individuals may be liable for crimes under the ATS); *Filártiga*, 630 F.2d at 880 (2d Cir. 1980) (holding that foreign government officials may be liable for crimes under the ATS); *Presbyterian Church of Sudan*, 582 F.3d at 258–59 (2d Cir. 2009) (holding that aiders and abettors may be liable for crimes under the ATS).

53. Joan Sánchez, *Inter-American Court, Crimes Against Humanity and Peacebuilding in South America*, 20 (Institut Català Internacional per la Pau, ICIP Working Paper 2010/02), *available at* http://www.gencat.cat/icip/pdf/WP10_2_ANG.pdf.

54. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

55. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No. 1), *amended by* General Orders No. 20, Apr. 20, 1946, T.I.A.S. No. 1589, 4 Bevans 20 [hereinafter Tokyo Charter].

56. Control Council Law No. 10, [Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity], Dec. 20, 1945 Official Gazette: Control Council for Germany art. II, para. 5.; 36 I.L.R. 31(1946).

Similarly, the decision of the Supreme Court of Israel in the infamous trial of Adolf Eichmann, while not making a specific pronouncement on time limitations, underscored the "universal character of the crimes in question that vests in each State the power to try and punish anyone who assisted in their commission."[57]

Following the precedent set by the Nuremberg and Tokyo tribunals, the International Criminal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) excluded time limitations from their statutes.[58] Each respective tribunal's jurisdiction extends over acts of genocide, war crimes, crimes against humanity, and grave breaches of the Geneva Conventions,[59] which are the same acts that implicate the jurisdiction of the ATS.[60] However, the ICTY stepped beyond silent acquiescence to the principle of excluding time limitations. In *obiter dictum*, the court in *Prosecutor v. Anto Furundzija*[61] held that "it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that . . . torture may not be covered by a statute of limitation."[62] Following this statement to its natural conclusion, violations of *jus cogens* norms may not be subject to a statute of limitation. This conclusion is borne out by the fact that the rules of the most recent U.N.-established tribunals in Cambodia and East Timor provide explicitly that there shall be no statute of limitations. In Cambodia this rule applies to genocide and crimes against humanity; in East Timor, this rule applies to genocide, war crimes, crimes against humanity, and torture.[63]

Based upon the Nuremberg Charter,[64] both the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights

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57. CrimA 336/61 Eichmann v. Att'y Gen. of Isr. 16(1) IsrSC 2033 [1962] (Isr.), *reprinted in* 36 I.L.R. 277 (1968).

58. Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Int'l Criminal Tribunal for Rwanda, Statute of the International Tribunal (Jan. 2010), http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf.

59. *Id.*

60. 28 U.S.C. § 1350 (2011).

61. Prosecutor v. Anto Furundzija, Case No. IT-95-17/I-T10, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

62. *Id.* ¶¶ 156–57.

63. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes Committed During the Period of Democratic Kampuchea, arts. 4–5, NS/RKM/1004/006, Oct. 27, 2004; U.N. Transitional Admin. in E. Timor (UNTAET), Reg. No. 2000/15, Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET/REG/2000/15, § 17 (June 6, 2000).

64. Nuremberg Charter, *supra* note 54.

(IACHR) have expressly upheld the principle that atrocity crimes have no statute of limitation. France's 1964 law, providing that crimes against humanity were not subject to any statute of limitations,[65] was challenged before the ECHR in the 1990s by two defendants convicted for crimes committed during World War II.[66] The defendants claimed infringement of their rights under Article 7 of the European Convention on Human Rights, which provides, in full:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.[67]

The ECHR found in both cases that the French law was legal pursuant to Article 7(2), as the Nuremberg Charter had established the acts committed by the defendants to be crimes under international law, and had treated them as imprescriptible.[68]

Similarly, the IACHR has reiterated on numerous occasions that "no domestic law or regulation—including amnesty laws and statutes of limitation—may impede the State's compliance with the court's orders to investigate and punish perpetrators of human rights violations. . . . This conclusion is consistent with the letter and spirit of the [American]

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65. Loi 64-1326 du 26 Décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité [Law 64-1326 of Dec. 26, 1964 Tending to Establish the Limitations for Crimes Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 29, 1964, p. 11788.

66. Touvier v. France, App. No. 29420/95, 88-B Eur. Comm'n H.R. Dec. & Rep. 148 (1997); Papon v. France, App.No. 54210/00, 2002-VII Eur. Ct. H.R §90.

67. Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 213 U.N.T.S. 221.

68. *Touvier*, 88-B Eur. Comm'n H.R. Dec. & Rep. 148 ("[[T]he offense of crimes against humanity and its imprescriptibility was included in the Statute of the International Tribunal at Nuremberg (annexed to the Allied Agreement of August 8, 1945), which the French law of December 26, 1964 specifically cites to conclude that crimes against humanity are imprescriptible." (author's translation)); *see also* Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 179–80 (2010) (*quoting* Touvier) ("[T]he only principle in matters of the prescription of crimes against humanity that one may derive from the IMT Charter is the principle of imprescriptibility.").

Convention [on Human Rights], as well as general principles of international law."[69]

Finally, the *Kiobel* court relied heavily on the fact that drafters of the Rome Statute of the International Criminal Court (ICC) specifically excluded corporate liability from the ICC's jurisdiction as evidence that corporate liability has not risen to the level of customary international law.[70] On the point of time limitations, the Rome Statute is clear that "[t]he crimes within the jurisdiction of the Court [genocide, war crimes, and crimes against humanity] shall not be subject to any statute of limitations."[71] Moreover, during the Rome Statute negotiations,

> [w]ith the exception of a handful of delegations . . . no one spoke against the principle that the crimes within the jurisdiction of the [c]ourt should not be subject to any statutory limitations. Even countries that applied a statute of limitations for every crime in their national system accepted this.[72]

Referring back to *Sosa* court's statement that the rule of international law must be "specific, universal, and obligatory," [73] this statement is hard evidence that by 1998, customary international law did not allow statutes of limitation to be applied to the most serious crimes under international law.

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69. Moiwana Village v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (June 15, 2005). *See also* Barrios Altos v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 41 (Nov. 30, 2001); Trujillo Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 106 (Feb. 17, 2002); Gómez-Paquiyauri Brothers v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 151 (July 8, 2004); Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 117, 142 (Sept. 18, 2003); Blanco Romero v. Venezuela, Merits, Reparations, and Costs, Order, Inter-Am. Ct. H.R. (sec. C) No. 138, ¶ 98 (Nov. 28, 2005).

70. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 138 (2d Cir. 2010).

71. Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

72. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 204–05 (Roy S. Lee ed., 1999). *See also*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 18, 1998, *Consideration of the Question Concerning the Finalization and Adoption of a Convention on the Establishment of an International Criminal Court in Accordance with General Assembly Resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997*, ¶¶ 76, 82, U.N. Doc. A/CONF.183/C1/SR.8 (June 19, 1998). The United States later refused to ratify the treaty on other grounds. *See, e.g.*, David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2001–2002).

73. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

IV. INTERNATIONAL TREATIES AND CONVENTIONS

Next, it is important to examine the pronouncements of all relevant international treaties and conventions and analyze state adherence to such agreements as proof of force. The first express pronouncement of the principle of non-prescription for atrocity crimes occurred over forty years ago in the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (U.N. Convention).[74] The U.N. Convention, which came on the heels of the Nuremberg trials,[75] recalled numerous resolutions of the General Assembly and the Economic and Social Council that affirmed the "principles of international law recognized by the Charter of the International Military Tribunal at [Nuremberg]" and noted that "none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation."[76] The U.N. Convention further noted that applying a statute of limitations to war crimes and crimes against humanity prevents the "prosecution and punishment" of perpetrators, finally stating unequivocally that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."[77]

Despite the fact that the United States is not party to the U.N. Convention, there were many other nations at the time of promulgation that

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74. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218, at 40 (Nov. 26, 1968) [hereinafter U.N. Convention].

75. There was a fear that "Nazis who had not yet been brought to justice would escape prosecution because the German Statute of Limitations was about to expire." Sadat, *supra* note 69, at 176.

76. U.N. Convention, *supra* note 75, at pmbl.

77. *Id.* art. 1. Article 1 of the U.N. Convention provides:

> "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Id.

believed that "the principle of the non-applicability of statutes of limitation to war crimes had already been recognized in international law."[78] This principle was based on the notion that "[w]ar crimes and crimes against humanity can in no way be equated with crimes under municipal law."[79] Even more compelling is the fact that Articles 1(a) and (b) of the U.N. Convention prohibits the imposition of a statute of limitations on war crimes, crimes against humanity, and genocide, as defined by the four Geneva Conventions[80] and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[81] The United States has signed and ratified all of these instruments,[82] which, in the style of the Nuremberg Charter,[83] do not contain a statute of limitations. Several commentators have argued that the U.N. Convention is to be read in conjunction with those treaties and as formally establishing the imprescriptibility of the crimes contained therein.[84] For instance, Chile, which has not ratified the U.N. Convention,[85] has concluded that the U.N. Convention has declaratory rather than constitutive effect.[86]

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78. Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 482 (1971). The Soviet Union representative also stated that "the Convention, when adopted, would not make new law, but merely reaffirm an existing principle of international law." *Id.* at 482 n.30.

79. *Id.* at 484.

80. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

81. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

82. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

83. Nuremberg Charter, *supra* note 54.

84. Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations*, *in* THE ROME STATUTE: A COMMENTARY 887 (Antonio Cassese ed., 2002) ("It is possible to view this Convention as declaratory of customary international law as it stood in 1968 with the result that core crimes committed thereafter were imprescriptible.").

85. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

86. Van den Wyngaert & Dugard, *supra* note 86.

86. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 diciembre 2006, "Casa Molco." Rol de la causa: 559-2004, Sala Penal (Chile) ("The Convention is not limited to stating this rule, but rather affirms it, since it already represented customary international law.") (author's translation) *available at* http://www.cecoch.cl/htm/revista/docs/estudiosconst/revistaano_5_1_htm/sentenci_molco5_1-2007.pdf.

The U.N. Convention, sparsely ratified due to its retroactive applicability and lack of clarity regarding definitions,[87] was followed by the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity[88] and the 1994 Inter-American Convention on Forced Disappearance of Persons.[89] The latter convention unequivocally adopted the principle of imprescriptibility, but applied the principal to offenses committed after its passage. The prohibition against torture, also widely acknowledged to have entered the realm of customary international law,[90] has been codified in the 1984 United Nations Convention Against Torture,[91] the 1985 Inter-American Convention to Prevent and Punish Torture,[92] and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Punishment.[93] These treaties do not contain statutes of limitation for the crime of torture.

The *Kiobel* court noted that it cannot be said that "treaties on specialized questions codify . . . customary international law" without an "existing or even nascent norm."[94] However, from Nuremberg onward, statutes of limitation have been inapplicable on atrocity crimes. The above treaties all affirm that norm. Any argument regarding the number of signatories to each treaty may be answered with an analysis of the practice of individual countries.

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87. Miller, *supra* note 79, at 488. *See also* JEAN-MARIE HENCKAERTS ET AL., INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 615 (2005); Van den Wyngaert & Dugard, *supra* note 86, at 887 ("The limited ratification of [the U.N. Convention] does not necessarily contradict [the imprescriptibility of genocide, war crimes, and crimes against humanity] as the principal objection to this Convention was its retrospectivity.").

88. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity, Jan. 25, 1974, C.E.T.S. No. 082 (demonstrating that efforts to establish a European Convention preceded negotiations on the U.N. Convention.).

89. Inter-American Convention on Forced Disappearance of Persons art. 7, Jun. 9, 1994, 33 I.L.M. 1529.

90. Winston Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 86 (2001); Erika de Wet, *The Prohibition on Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L. L. 1, 97–121 (2004); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 459 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T-10, Judgment, ¶¶ 160–61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* http://www.icty.org/x/cases/furundzija/tjug/en/furtj981210e.pdf.

91. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

92. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67

93. European Convention for the Prevention of Torture and Inhuman or Degrading Punishment, Nov. 26, 1987, E.T.S. No. 126.

94. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, 139 (2d Cir. 2010).

V. THE INDIVIDUAL PRACTICE OF VARIOUS COUNTRIES

"Widespread state practice" is one barometer for determining customary international law. (The other is *opinio juris*). The *Kiobel*[95] court had no state principle to analyze, since no other state has an identical statute to the ATS,[96] which can impose civil liability for atrocity crimes. However, there is plenty of state practice confirming that non-applicability of time limitations is customary for atrocity crimes.

For instance, France announced as early as 1964 that crimes against humanity were not subject to a statute of limitations.[97] Germany's *Völkerstrafgesetzbuch*, established in 2002, supplemented German law regulating crimes against international law and reflected the Rome Statute of the International Criminal Court.[98] The *Völkerstrafgesetzbuch* establishes in Article 1, Section 5, that there shall be no statute of limitations for genocide, crimes against humanity, and war crimes.[99] In commentary on the *Völkerstrafgesetzbuch*, Professor Russell Miller states that

> the explanatory materials also note that the absence of a statute of limitations is not exceptional in German criminal law as murder and genocide have long been free of a statute of limitations. The explanatory materials further suggest that the absence of a statute of limitations is not really more exceptional than the twenty or thirty year statutes of limitation applying to a number of other criminal provisions, which establish, *de facto*, a limitless opportunity to prosecute.[100]

In addition to France and Germany, the United Kingdom criminalized genocide in the Genocide Act of 1969,[101] which was replaced in 2001 by

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95. *Id.*

96. 28 U.S.C. § 1350 (2011).

97. Loi 64-1326 du 26 Décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité [Law 64-1326 of December 26, 1964 Tending to Establish the Limitations for Crimes Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 29, 1964, p. 11788.

98. Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90

99. VÖLKERSTRAFGESETZBUCH [VStGB] [Code of Crimes Against International Law], June 26, 2002, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 2254, art. 1(5) (Ger.).

100. Russell Miller, *Domesticating International Criminal Law: Germany's Proposed Völkerstrafgesetzbuch (International Law Criminal Code)*, 2 GER. L. J. 10-11 (2001), *available at* http://www.germanlawjournal.com/article.php?id=31.

101. Genocide Act, 1969, c. 12 (Eng.).

the International Criminal Court Act.[102] This Act implemented the provisions of the Rome Statute[103] and does not provide a statute of limitations on the crimes of genocide, war crimes, and crimes against humanity.[104] Additionally, Section 134 of the Criminal Justice Act establishes universal jurisdiction over acts of torture committed after 1988 without imposing a statute of limitation on such acts.[105] Similarly, Sweden enacted the Cooperation with the International Criminal Court Act in 2002,[106] and recently modified it to include a provision regarding the non-applicability of statutes of limitation for genocide, war crimes, and crimes against humanity.[107]

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102. International Criminal Court Act, 2001, c. 17, sched. 10 (U.K.).

103. *Id.* pt. 1, sec.1; Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

104. International Criminal Court Act, 2001, c. 17, sched. 8 (U.K.).

105. Criminal Justice Act, 1988, c. 33, § 134 (U.K.). It should be noted that there are inconsistencies between the UK laws that confer jurisdiction over UK residents (e.g., genocide and crimes against humanity) and laws that are applicable to any persons found in the UK (e.g., war crimes in international armed conflicts and torture). *See* JOINT COMMITTEE ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP: UK LAW ON GENOCIDE (AND RELATED CRIMES) AND REDRESS FOR TORTURE VICTIMS, 2008–09, H.C. 553, H.L. 153, ¶¶ 27–30 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/ 153/153.pdf.

106. LAG OM SAMARBETE MED INTERNATIONELLA BROTTMALSDOMSTOLLEN (Svensk Forfattningssamling [SFS] 2002:329) (Swed.).

107. Review Conference of the Rome Statute, May 31–June 11, 2010, *Compilation on Implementing Legislation 2010*, 45, RC/ST/CP/M.2 (Jun. 1, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/CP-M.2.Compilation-I.pdf. In addition to these examples, other European countries that currently have no statute of limitations for atrocity crimes include the Netherlands (Wet Internationale Misdrijven [International Crimes Act] §13, June 19, 2003Stb./S. 2003 at.270); Spain (The Organic Act art. 131 (B.O.E. 2003 283)); Belgium (Loi relative à la répression des violations graves de droit international humanitaire—Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht [Act Concerning the Punishment of Grave Breaches of International Humanitarian Law] of Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1993, 92860) (an English translation of the Act, as amended, is published in 38 I.L.M. 918 (1999)); Norway (Straffeloven [Criminal Code] Kap. 16); Finland (Laki rikoslain muuttamisesta [Law Amending the Penal Code], 212/2008, May 1, 2008); Armenia (K'reakan Orensgrk'I [Criminal Code] art. 75); Bosnia-Herzegovina (Kazneni zakon [Criminal Code] art. 19); Bulgaria (KONSTITUTSIYATA [CONSTITUTION] July 13, 1991, State Gazette No. 56/13.07.1991, art. 31(7)); Croatia (Kaznenog Zakona [Criminal Code] art. 18(2), Narodne novine [Official Gazette] No. 110 of Oct. 21, 1997, Jan. 1, 1998); Portugal (Lei 31/2004, de Julho 22, 2004, I-A Diário da República [Official Gazette] No. 171, art. 7)); Hungary (1978. évi. IV. törvény a Büntető Törvénykönyv (Act IV of 1978 on the Criminal Code) art. 33(2), *available at* http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/).

Italy's Corte Suprema di Cassazione in *Priebke*[108] found that a former Nazi war criminal, responsible for the massacres of Italian citizens during World War II, could be tried despite the passage of more than fifty years since the massacres. The man could be tried because statutory limitations were held inapplicable for war crimes and crimes against humanity, pursuant to the principle of *jus cogens*.[109] Commentary on *Priebke*[110] has noted that the court established a logical premise that "[a]ll norms of municipal law inconsistent with the above are thus non-applicable."[111] Italy is not a party to the U.N. Convention,[112] which further supports the argument that the "non-applicability of statutory limitations to war crimes [is] a peremptory norm of general international law."[113]

Much of Latin America has also embraced the imprescriptibility of atrocity crimes, whether through incorporation of the Rome Statute rules[114] or provisions in domestic penal codes. Argentina, for example, expressly stated in the 2001 Law to Implement the Rome Statute that crimes against humanity, war crimes, and genocide were not subject to a statute of limitations.[115] The principle was defended by Argentinean courts as early as 1989 when, in response to an extradition request from Germany, the La Plata Federal Court of Appeals found that in recognizing the primacy of international law, crimes against humanity were not subject to a statute of limitation.[116] Later, in the 2004 *Enrique Lautaro Arancibia Clavel* case,[117]

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108. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/95, "Priebke, Erich s/ solicitud de extradición," Colección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (1995-318-2148) (Arg.). Erich Priebke was extradited from Argentina to Italy. He was tried and convicted in Italy in 1998. Cass., *Priebke*, Judgment of 16 November 1998 (It.).

109. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 159 (3rd ed. 2009).

110. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/95, "Priebke, Erich s/ solicitud de extradición," Colección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (1995-318-2148) (Arg.).

111. Sergio Marchisio, *The Priebke Case Before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 1 Y.B. INT'L HUMAN. L. 344, 352 (1998).

112. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

113. *National Case Law: Haas and Priebke Cases, Military Court of Appeal of Rome*, INT'L COMM. OF THE RED CROSS, http://www.cicr.org/ihl-nat.nsf/a42a5edc55787e8f41256486 004ad09b/0370fc27370b3776c1256c8c0055e44d!OpenDocument.

114. Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

115. Law No. 25390, Jan. 16, 2001, [2001-A] A.L.J.A. 27 (Arg.) (adopting Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90).

116. Cámara Federal de Apelaciones de La Plata [Federal Court of La Plata], 30/8/1989, "J.F.S.L. s/ Extradición," El Derecho [E.D.] (1990-135-326) (Arg.).

the Supreme Court of Argentina affirmed this principle due to the status of crimes against humanity (including genocide, torture, and forced disappearances) as the most serious crimes under international law.[118]

In Chile, the Supreme Court recognized in 2006 that the non-applicability of statutory limitations to atrocity crimes was accepted as a norm of customary international law.[119] In 2007, the Supreme Court of Chile extradited Alberto Fujimori (former Peruvian president) to Peru after determining that atrocity crimes had no statute of limitation under international law.[120] Chile adopted the Rome Statute into domestic law in 2009, including imprescriptibility.[121]

Suriname, a nation under pressure during the *Moiwana Village*[122] case before the IACHR (a case that involved the massacre of village inhabitants—mostly women and children—during the Surinamese civil war in 1986), bowed to international custom and amended the Penal Code to include that the "right to prosecute does not expire if the matter in question concerns, *inter alia*, a 'crime against humanity' or a 'war crime.'"[123] Colombia,[124] Costa Rica,[125] Bolivia,[126] Panama,[127] Peru,[128] and many of

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117. Corte Supreme de Justicia [CSJ] [Supreme Court of Justice], 24/8/2004, "Arancibia Clavel, Enrique Lautaro y otros," Collección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (2004-327-3294) (Arg).

118. *Id.*

119. Sentencia de la Corte Suprema de Justicia de Chile [CSJN], Sala Penal, 13/12/2006, "*Caso Molco*," (559-2004).

120. Segunda Sala de la Corte Suprema de Justicia de la Republica [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, "Juzgamiento al Ex Presidente Alberto Fujimori/Resolucio´n de Extradicio´n," Rol N°
3744-07 (Chile).

121. Law No. 104, Agosto 1, 2009, DIARIO OFICIAL [D.O.] (Chile).

122. Moiwana Village v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (June 15, 2005).

123. *Id.* ¶ 86(41).

124. L. 975/2005, Julio 25, 2005, [45] DARIO OFICIAL [D.O.] 980 (Colom.).

125. Sentencia [S.] No. 00230, de las 9:39 a.m., 1 Dec. 1996, [Constitutional Chamber of the Supreme Court of Justice] (Costa Rica), *available at* http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=83830&strTipM=T&strDirSel=directo.

126. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/4/1993, "Sentencia pronunciada en los juicios de responsabilidad seguidos por el Ministerio Publico y coadyuvantes contra Luis Garcia Meza y sus colaboradores" (Bol.), *available at* www.derechos.org/nizkor/bolivia/doc/meza.html ("Bolivia, as a member of the United Nations, signed the Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, which declares the imprescriptibility of such crimes regardless of the date on which they were committed or whether they were committed in times of war or peace. This principle is in accordance with the Statute of the International Military Tribunal at Nuremberg and confirmed by General Assembly resolutions . . .") (author's translation).

127. Corte Suprema de Justicia [CSJ] [Supreme Court of Justice], 26/1/2007, "Aníbal Salas Céspedes," (Pan.).

128. Tribunal Constitucional [T.C.] [Constitutional Court] 18 Marzo 2004, "Genaro

their neighbors have also recently implemented measures or issued judgments affirming that no statute of limitations is applied to atrocity crimes. Elsewhere in the world, countries as diverse as Russia,[129] New Zealand,[130] the Republic of Korea,[131] Australia,[132] Canada,[133] Kenya,[134] and Rwanda,[135] among others, have already eliminated prescription on such crimes.

Beyond the adoption of this principle in international law, it has already been implemented in U.S. law. For instance, the War Crimes Act of 1996[136] provides that Americans can be prosecuted in federal criminal courts for violations of Common Article 3 of the Geneva Conventions.[137] This Act, which was passed by an overwhelming majority of the United States Congress,[138] contains no statute of limitations for crimes committed during war.[139] It was even cited as a means to try the second Bush

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Villegas Namuche," Rol de la causa: 2488-2002-HC/TC (Peru).

129. UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 78(5) (Russ.).

130. International Crimes and International Criminal Court Act 2000, sec. 12(1)(a)(vii) (N.Z.).

131. (Act on the Punishment, etc. of Crimes within the Jurisdiction of the International Criminal Court), Act No. 8719, Dec. 21, 2007, art. 6 (S. Kor.).

132. *International Criminal Court Act 2002* (Cth) sec. 2(1), sch. 1 (Austl.) (incorporating provisions of the Rome Statute).

133. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

134. The International Crimes Act, (2009) § 7(g) (Kenya).

135. Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since Oct. 1, 1990, No. 8, art. 37 (1996) (Rwanda).

136. 18 U.S.C. § 2441 (1996).

137. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.").

138. 142 Cong. Rec. H 8621 (1996); 142 Cong. Rec. S 6948 (1996).

139. 18 U.S.C. § 2441(a).

administration for their actions in Iraq.[140] More recently, the Genocide Accountability Act[141] and the proposed Crimes Against Humanity Act[142] explicitly deny a time limitation for prosecuting atrocity crimes. The Genocide Accountability Act amends 18 U.S.C. §1091, which has been part of the United States Code since 1987, and states in part (f) that "in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation."[143] The exact same language can be found in part (d) of the proposed Crimes Against Humanity Act.[144] Similarly, the Patriot Act states that there is no statute of limitations for certain acts of terror,[145] which, under international law, have been considered crimes against humanity.[146]

It should be pointed out that all of these examples involve criminal law, rather than the civil jurisdiction conferred by the ATS.[147] However, civil jurisdiction under the ATS has always been based on criminal acts,[148] an inherent duality of the ATS. Originally conceived to address the "three specific offenses against the law of nations addressed by the criminal law of England [and identified by Blackstone],"[149] the *Sosa*[150] court widened the jurisdiction, as previously discussed, to include acts of genocide, crimes against humanity, and war crimes.[151] No other country in the world has a statute conferring civil jurisdiction for criminal acts; however, that is precisely the reason the United States should look to comparable domestic criminal codes, which confer jurisdiction for the same acts, for guidance on the question of a statute of limitations. The *Kiobel* court, in its exhaustive reasoning, cited *only* international criminal tribunals in determining the scope of ATS civil jurisdiction.[152] If the *Kiobel*[153] reasoning is to stand,

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140. R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html.

141. 18 U.S.C. § 1091(f) (2007).

142. S. 1346, 111th Cong., 1st Sess. (2010).

143. 18 U.S.C. § 1091(f).

144. S. 1346, § 519(d), 111th Cong., 1st Sess. (2010). Most recent text *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s111-1346.

145. As provided by Title 8, § 809 of the Patriot Act provides no SOL for certain terrorism offenses, specifically those under 2332b(g)(5)(B). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. 107–56, § 809 (amending 18 U.S.C. § 3286 (year)).

146. Antonio Cassese, *Terrorism as an International Crime*, *in* ENFORCING INTERNATIONAL NORMS AGAINST TERRORISM 213, 222–23 (Andrea Bianchi & Yasmin Naqvi eds., 2004).

147. 28 U.S.C. § 1350 (2011).

148. *Id.*

149. Kiobel v. Royal Dutch Petrol Co. 621 F.3d 111, 125 (2d Cir. 2010).

150. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

151. *Id.* at 762.

152. *Kiobel*, 621 F.3d at 123–25.

courts must use the same international criminal law sources to determine the question of temporal jurisdiction.

Also, the gravity of the act should dictate the statute of limitations. Returning to the importance of *jus cogens* norms, when considering the most heinous violations, whether these violations are categorized as criminal or civil does not matter. What matters is whether the acts in question qualify as violations of *jus cogens*. If so, customary international law does not allow a statute of limitations. As stated by former Ambassador, David Scheffer, "[t]he United States must eliminate any possibility that it would remain a safe haven for war criminals and other perpetrators of atrocities who reach American shores and seek to avoid accountability for atrocity crimes."[154] The realization of this principle should not depend on whether a remedy is civil or criminal. Both civil and criminal remedies are punitive to current perpetrators and aim to deter future perpetrators. In particular, within the ATS,[155] the acts under discussion are of such severity that the fact that the United States offers both remedies should be a source of pride rather than unease.

Furthermore, some courts within the United States have ruled in favor of eliminating statutes of limitation for atrocity crimes. In *Agent Orange*,[156] a case involving claims under the Alien Tort Statute, the Eastern District of New York found:

> [a]lthough the United States is not a signatory to either the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity or the Rome Statute, these instruments suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity.[157]

To summarize this Article's analysis of international treaties and state practice, the "recent trend to pursue . . . national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes [and other atrocity crimes] into customary international law."[158]

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153. *Id.* at 111.

154. David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 30, (2009).

155. 28 U.S.C. § 1350 (2011).

156. *In re* Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

157. *Id.* at 63.

158. HENCKAERTS ET AL., *supra* note 89, at 615.

VI. WORKS OF PUBLICISTS

The *Kiobel* court noted that the works of publicists (well-known legal scholars) are relevant sources for determining customary international law when they are used as "trustworthy evidence of what the law really is."[159] Trusted international legal scholars have demonstrated that there is no statutory limitation for atrocity crimes under customary international law. "The non-applicability of statutory limitations to war crimes and crimes against humanity has been well recognized in international law since the 1960s," states Professor William Schabas in his commentary on Article 29 of the Rome Statute.[160] Indeed, Professor J.E.S. Fawcett wrote in 1965 that "[t]o bring certainty [to the prosecution of atrocity crimes], international rules were developed which bind all States as generally recognized principles of law."[161] Professor Fawcett then recommended that, pursuant to these obligations under international law, both of the then-existing governments of East Germany and West Germany should declare that no statute of limitations be imposed upon atrocity crimes committed during World War II.[162]

Many legal scholars have affirmed this principle, including Judge Antonio Cassese, former President of the ICTY.[163] Judge Cassese analyzes state practice, the decisions of regional courts, and the promulgation of the U.N. and other conventions, and concludes, "[S]pecific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture."[164] Judge Cassese maintains that aside from widespread state practice supporting the imprescriptibility of atrocity crimes:

> The application of statutes of limitation to the most serious international crimes proves contrary to the very nature of international rules prohibiting such crimes. These are so

159. *Kiobel*, 621 F.3d at 131, 142 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

160. Professor Schabas is the Director of the Irish Center for Human Rights at the National University of Ireland, the respected author of twenty-one books on international human rights law, and a delegate to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15–July 17, 1998.

161. J.E.S. Fawcett, *A Time Limit for Punishment of War Crimes*, 14 INT'L & COMP. L. Q. 627, 630 (1965). Professor Fawcett is Professor Emeritus of International Law at the University of London, and former President of the European Commission on Human Rights.

162. *Id.* at 632.

163. Judge Cassese is currently the President of the Special Tribunal for Lebanon, which was established by the United Nations Security Council in 2007. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

164. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (2003).

> abhorrent that their authors must be punished, even after the lapse of much time . . . [such crimes] affect the whole international community and not only the community of the state on whose territory they have been perpetrated[165]

Judge Cassese is joined in this view by U.N. human rights expert Louis Joinet, who stated in his 1997 report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible."[166] Further, Judge Bruno Simma of the International Court of Justice pointed out that the *Pinochet* case[167] established that the "[i]mprescriptibility of war crimes, crimes against humanity and genocide may be considered part of customary [international] law."[168]

Finally, David Scheffer, former United States Ambassador at Large for War Crimes Issues, writes that "statutes of limitations [for atrocity crimes] have been abandoned in international and much foreign practice in light of the magnitude and serious character of [these crimes]."[169] Scheffer recommended to a U.S. Senate subcommittee on human rights that they "[c]ontinue to eliminate from U.S. law all statutes of limitation for atrocity crimes."[170] Such a move would include removing the *de facto* ten-year statute of limitation on claims brought under the ATS.[171]

VII. COMPLICATIONS UNTANGLED

Despite the clarity of international law on the issue of statutory limits for atrocity crimes, there are a number of complications in eliminating the statute of limitations that are likely to be raised. The first, and perhaps most pervasive, "complication" is the "slippery slope" argument, that eliminating the statute of limitations will open the door to frivolous litigation based on acts that occurred decades prior.[172] This point is easy to counter. The *jus cogens* principle that claims arising out of atrocity crimes should be

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165. *Id.* at 318. *See also*, RUTH TEITEL, TRANSITIONAL JUSTICE 62–67 (2000).

166. U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) at 24, E/CN.4.Sub.2/1997/20 Rev. 1 (Oct. 20, 1997).

167. R. v. Bow St. Metro. Stipendiary Magis., *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. (H.L.) 147, 174 (appeal taken from Eng.).

168. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L. L 302, 315 (1999).

169. Scheffer, *supra* note 158.

170. *Id.*

171. 28 U.S.C. § 1350 (2011).

172. *See, e.g.*, Tim Kline, *Door Ajar, or a Floodgate?: Corporate Liability After Sosa v. Alvarez-Machain*, 94 KY. L.J. 691 (2005–2006).

litigated means that it should not matter whether the crimes are old or recent, as long as the litigation may provide a remedy for victims. As far as opening the door to frivolous claims, a ban on the statute of limitations does not serve to widen the substantive grounds of an allowable claim under the ATS. As established in *Sinaltrainal v. Coca-Cola Company*,[173] such claims must be pled with particularity.[174] Only if claims adhere to the rigorous *Twombly* pleading standard[175] set forth by the Supreme Court will plaintiffs be allowed to move forward.[176] This requirement ensures that frivolous or inadequately-supported claims (whether brought within five or fifty years of the associated acts) under the ATS[177] will be denied in U.S. courts. In the campaign for full enforcement of international human rights standards, it is detrimental to be an alarmist who views the judiciary as a collective pushover rather than as a group of thoughtful jurists who are fully aware of the dangers that they themselves would face if the pleading standards weren't fully applied.

The second complication is the prospect of negative relations with the home countries of defendants in ATS[178] suits. This complication is an issue that has the potential to emerge in any case involving foreign defendants, whether private individuals, corporations, or sovereigns. The United States has measures in place, including the Act of State doctrine,[179] the Foreign Sovereign Immunities Act,[180] and opinions of the State Department,[181] to ensure that when court action is a potential threat to foreign relations, the cases are carefully analyzed by the judiciary before being either dismissed

173. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

174. *Id.* at 1266.

175. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (establishing a two-pronged analysis to determine the adequacy of a complaint: (1) while the Court must accept well-pled facts as true, it is not required to adopt a plaintiff's legal conclusions; (2) the mere possibility that the defendant acted unlawfully is insufficient to survive a motion to dismiss; well-pled allegations must move a claim "across the line from conceivable to plausible.").

176. *Sinaltrainal*, 578 F.3d at 1266.

177. 28 U.S.C. § 1350 (2011).

178. *Id.*

179. *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250, 254 (1897) (explaining the prerogative of the Executive Branch in foreign affairs).

180. 28 U.S.C. § 1602–1611 (2011); *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008) (upholding immunities for foreign government officials acting in their official capacities); Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2189 (2009) (affirming the Executive's power to waive applicability of an FSIA exception allowing claims against foreign states (considered state sponsors of terrorism) for acts arising from terrorist acts).

181. *See, e.g.* Brief for Republic of South Africa as Amici Curiae Supporting Respondents, Khulumani v. Barclay Nat'l Bank, app. ¶ 4 (Statement of Brigitte Sylvia Mabandla, Minister of Justice & Constitutional Development), 504 F.3d 254 (2d Cir. 2005) (No. 05-2141).

or allowed to move forward. For example, during the *Khulumani*[182] case before the Second Circuit, the South African Minister of Justice and Constitutional Development sent a declaration to the Southern District stating that "[these issues] should be and are being resolved through South Africa's own democratic processes."[183] The U.S. State Department also weighed in, concluding that "the [apartheid litigation] risks potentially serious adverse consequences for significant interests of the United States."[184] The Second Circuit found, however, that "not every case 'touching foreign relations' is non-justiciable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis."[185] Such judicial discretion must be applicable to all ATS[186] cases in order to ensure that justice in the human rights context is served at all possible times, notwithstanding political threats.

A third, and legitimate, fear is that the right to be tried without undue delay, along with issues of practicality, is compromised by removing the statute of limitations from these core crimes. At least one commentator has noted "[t]hat the threat of civil litigation must come to an end at some stage is a long-established rule of public policy and a practical necessity."[187] However, there is no reason why the concepts of practicality and undue delay (a "reasonable time" requirement) should not be divorced from a statute of limitation. As explained by the commentators on the Rome Statute,

> [t]here is a fundamental difference between the two categories of time limits . . . . Limitation statutes usually do not allow a judicial assessment of the (seriousness of the) facts and the context of the case and the way it has been processed by the prosecution and the defence. On the

182. Khulumani v. Barclay Nat'l Bank, No. 03 Civ. 4524, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009).

183. Brief for Republic of South Africa as Amici Curiae Supporting Respondents, Khulumani v. Barclay Nat'l Bank, app. ¶ 4 (Statement of Brigitte Sylvia Mabandla, Minister of Justice & Constitutional Development), 504 F.3d 254 (2d Cir. 2005) (No. 05-2141) (quoting Decl. by Penuell Mpapa Maduna, prior Minister of Justice & Constitutional Development, filed in the district court).

184. Letter from William H. Taft IV, Legal Adviser, Dep't of State Washington, to Shannen W. Coffin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, at 2 (Oct. 27, 2003).

185. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 263 (2d Cir. 2007) (citing Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 69 (2d Cir. 2005)).

186. 28 U.S.C. § 1350 (2011).

187. Weeramantry, *supra* note 35, at 632.

> contrary, the 'reasonable time' requirement permits a judicial assessment of the case.[188]

For example, the 1984 Convention Against Torture, which imposes no statute of limitations, contains provisions disallowing claims that are considered to be "abuses of right."[189] Removing the statute of limitations from ATS[190] claims, therefore, does not prevent a United States judge from analyzing the case and using her/his discretion to dismiss cases not brought by plaintiffs within a reasonable period of time. A "reasonable period" will differ for every ATS[191] case, due to the nature of the claims. In some circumstances it could be possible for victims of international crimes to find their way to the United States and file suit within ten years, but in others it may not. It may also take ten or more years for perpetrators to set foot in the United States, where they may then be sued.[192] Such fact-specific decisions are better left to the discretion of federal judges when they arise, rather than to the mercy of a hard statute of limitations.

VIII. CONCLUSION

A brief disclaimer should be issued here that this analysis does not rely upon the final holding of the *Kiobel*[193] court. The questions asked were different, and the conclusion of that court—that corporations are not subject to liability under the ATS[194] —has been extremely controversial and is now on petition for certiorari before the U.S. Supreme Court. What this article posits is that the *Kiobel*[195] court was correct in its threshold assessment that the applicable law for ATS[196] questions is customary international law.[197] It is only logical, then, that customary international law, not U.S. federal law (i.e., the TVPA[198]), dictate the statute of limitations for the ATS.[199] And

188. Van den Wyngaert & Dugard, *supra* note 86, at 874.

189. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

190. 28 U.S.C. § 1350.

191. *Id.*

192. Judge Cassese expounds on this idea, stating that "if the victims of their relatives do not set in motion criminal proceedings, normally this failure is not due to negligence or lack of interest; initiating such proceedings may indeed prove 'psychologically painful, or politically dangerous, or legally impossible'; as for the national authorities failure to prosecute, it may be due to political motivations which the passage of time may sooner or later efface." CASSESE, *supra* note 168, at 318–19

193. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, (2d Cir. 2010).

194. 28 U.S.C. § 1350 (2011).

195. *Kiobel*, 621 F.3d 111.

196. 28 U.S.C. § 1350.

197. However, it may be found that the *Kiobel* court erred in their analysis of customary international law regarding the liability of corporations for atrocity crimes.

198. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

customary international law, whether in the form of tribunals, treaties, state practice, or the writings of scholars, does not allow a statute of limitations for acts of genocide, war crimes, and crimes against humanity.

The United States has embarked upon a renewed campaign to demonstrate and promote human rights standards in the past two years, including membership in the U.N. Human Rights Council and submission of its first Periodic Review on November 5 of 2010. The effort, however, will be incomplete if perpetrators of atrocity crimes are allowed to avoid liability in the United States because of a technicality that minimizes the ability to hold them liable for their actions. To that end, loopholes such as a statute of limitations must be eliminated for these acts—not only in order to comply with international legal standards, but to enable United States courts to lead state-level jurisprudence on genocide, crimes against humanity, and war crimes.

199. 28 U.S.C. § 1350.

IS A JURY COMPOSED OF PEOPLE HAVING ORDINARY SKILL IN THE ART? REASONS WHY THE UNITED STATES SHOULD CHANGE ITS APPROACH TO THE OBVIOUSNESS QUESTION IN PATENT LITIGATION.

Ian T. Keeler*

INTRODUCTION

An inventor in the United States may not obtain a patent if his or her invention is obvious according to 35 U.S.C. § 103(a), which states:

> A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.[1]

Questioning the obviousness of an invention is one way to challenge the validity of a patent in a patent infringement lawsuit.[2] Disproving the validity of a patent is an affirmative defense to the alleged infringement and can be a useful tool for the alleged infringer.[3]

This Note will attempt to answer the question of who, as between a judge and a jury, should make the final determination of the obviousness analysis. Additionally, this Note analyzes whether a judge or a jury in the current system is capable of properly conducting the obviousness analysis. In answering these questions, this Note proposes that the United States adopt a patent litigation system similar to its technological peers in Japan and Germany in order to create both greater uniformity and more cognizable rights for intellectual property owners. To effectuate these goals, the United States should create a system of centralized district courts

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1. 35 U.S.C. § 103(a) (2010).

2. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 124 (rev. 4th ed. 2007).

3. Sue Ann Mota, *eBay v. MercExchange: Traditional Four-Factor Test for Injunctive Relief Applies to Patent Cases, According to the Supreme Court*, 40 AKRON L. REV. 529, 532 (2007).

with exclusive jurisdiction over patent litigation, implement restrictions on the use of special interrogatories by district courts, utilize district court judges with technical backgrounds, and undertake *de novo* review by the Court of Appeals for the Federal Circuit on the obviousness issue.[4]

On June 30, 2005, Kinetic Concepts, Inc. (Plaintiffs) filed its Fourth Amended Complaint against Blue Sky Medical Corporation (Defendants) alleging, among other counts, federal patent infringement of its negative pressure wound therapy devices.[5] Pleading in the alternative, the Defendants asserted that the Plaintiffs' patents were invalid because they were obvious.[6] The suit went to trial and the District Court in *Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.* gave the jury thirty-seven special interrogatories regarding the obviousness question, which were all to be answered "yes" or "no."[7] The jury returned the interrogatories with thirty-seven "no" answers. The district court entered final judgment accordingly without any reasoning or separate analysis.[8] On appeal, the Federal Circuit "applied its highly deferential standard of review" and merely reviewed the jury's determination as opposed to articulating its own analysis.[9]

On August 13, 2009, the remaining defendants from *Kinetic Concepts* submitted a petition for certiorari to the United States Supreme Court with the following question: "Whether a person accused of patent infringement has a right to independent judicial, as distinct from lay jury, determination of whether an asserted patent claim satisfies the non-obvious subject matter condition for patentability."[10] The more direct question is whether "the district court was required to conduct its own independent obviousness analysis and erred by simply reviewing the jury's verdict for substantial evidence."[11] The petition for certiorari pointed out how the Federal Circuit's treatment of the obviousness question conflicts with Supreme Court precedent.[12] The petition also outlined two *en banc* decisions on this issue, decided by the Seventh and the Ninth Circuit Courts of Appeals, that conflict with the current procedures of the Federal Circuit.[13] Ultimately, the

4. *See infra* Part IV.

5. Plaintiffs' Fourth Amended Complaint at para. 46; Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., No. SA-03-CV-832-WRF (W.D. Tex. Apr. 4, 2007), 2005 WL 5062888.

6. Petition for a Writ of Certiorari at 4, Medela AG v. Kinetic Concepts, Inc., 130 S.Ct. 624 (2009) (No. 09-198), 2009 WL 2509227.

7. *Id.* at 6.

8. *Id.* at 6–7.

9. *Id.* at 8.

10. *Id.* at i.

11. Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1017 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

12. Petition for a Writ of Certiorari, *supra* note 6, at 11–19.

13. *Id.*

Supreme Court denied the petition for certiorari.[14] However, the significance of the question posed is demonstrated by the fact that the petition drew briefs as *amici curiae* supporting the petitioner from some of the world's leading corporations, including Intel Corporation, Apple, Inc., Google, Inc., and Microsoft Corporation.[15]

Paralleling the significance of the question posed by the certiorari petition, the United States is faced with no longer being the singular authority in patent law.[16] The growth of patents granted to foreign inventors is outpacing growth of patents granted to United States inventors.[17] According to a United States Patent and Trademark Office (USPTO) report summarizing utility patent applications and grants from 1963 through 2010, 2008 marked the first year in which more utility patents were granted to foreign inventors than were granted to United States inventors.[18] The two foreign countries with the most utility patents granted to their inventors by the USPTO were Japan and Germany.[19]

Although it is apparent that Japan and Germany are our peers in terms of inventiveness, had the issue in *Kinetic Concepts* been brought to a court in Japan or Germany, it would have been decided, not through special interrogatories to a jury, but by a technologically informed judge.[20] The question that presents itself is whether the United States should continue allowing a jury to answer the obviousness question, or whether the United States should adopt a different method that utilizes a technologically

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14. Medela AG, Inc. v. Kinetic Concepts, Inc., 130 S.Ct. 624 (2009).

15. Brief for Intel Corporation, SAP America, Inc., and Shoretel, Inc. as Amici Curiae Supporting Petitioners, *Medela AG*, (No. 09-198), 2009 WL 2979048; Brief for Apple, Inc., Cisco Systems, Inc., Google, Inc., Microsoft Corp., Symantec Corp., and Yahoo!, Inc. as Amici Curiae Supporting Petitioners, *Medela AG*, (No. 09-198), 2009 WL 2979049.

16. Kerry J. Begley, Note, *Multinational Patent Enforcement: What the "Parochial" United States Can Learn from Past and Present European Initiatives*, 40 CORNELL INT'L L.J. 521, 522 (2007). "Patent law, like all intellectual property law, has historically been based on national laws and the principle of territoriality. Individual national governments grant patents to inventors, and the territorial limits of sovereignty preclude a nation from giving extraterritorial effect to its patent laws." *Id.*

17. UNITED STATES PATENT AND TRADEMARK OFFICE, U.S. PATENT STATISTICS CHART [hereinafter USPTO STATISTICS REPORT], *available at* http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (last modified Jan. 25, 2011).

18. *Id.* In 2008, 77,501 utility patents were granted to U.S. inventors and 80,271, or 50.9% of all utility patents, were granted to foreign inventors. *Id.*

19. Patent Technology Monitoring Team (PTMT), *Patents by Country, State, and Year - All Patent Types*, UNITED STATES PATENT AND TRADEMARK OFFICE (Dec. 2009), *available at* http://patents.uspto.gov/web/offices/ac/ido/oeip/taf/cst_all.htm.

20. Toshiko Takenaka, *Comparison of U.S. and Japanese Court Systems for Patent Litigation: A Special Court or Special Divisions in a General Court?*, 5 CASRIP PUBLICATION SERIES 47, 48 (1999), *available at* http://www.law.washington.edu/casrip/symposium/Number5/ pub5atcl6.pdf; IP CAMPENHAUSEN, PATENT NULLITY PROCEEDINGS AND COSTS FOR PATENT LITIGATION IN GERMANY 4 (2004), *available at* http://ip-campenhausen.de/Nullity.pdf.

informed judge?

Part I of this Note begins with a brief history on the background of the obviousness question in United States case law. Two seminal United States Supreme Court cases on this issue are briefly introduced, followed by an analysis of how the U.S. circuit courts have reviewed district courts' determinations on the issue. Part II contains a brief introduction to the significance of global intellectual property. Part II also discusses the procedural aspects of patent infringement suits and the structure of the courts that address those suits in Japan and Germany. Part III compares the procedural and structural elements of patent infringement suits in Japan and Germany with the procedural and structural elements of patent infringement suits in the United States. Part IV contains recommendations for changes to the United States' patent litigation system, which draws from desirable aspects of all three countries' systems. Part V offers concluding remarks.

I. BACKGROUND INFORMATION ON THE OBVIOUSNESS QUESTION

A. Jurisdiction

The obviousness question stems from 35 U.S.C. § 103(a).[21] Congress first codified the common law requirement of non-obviousness in the Patent Act of 1952.[22] Obviousness is the most litigated of the three fundamental grounds for validity of a patent, which are utility, novelty, and non-obviousness.[23]

According to 28 U.S.C. § 1338(a), federal district courts have exclusive original jurisdiction for all patent cases. It states that the "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."[24] The Federal Courts Improvement Act of 1982 gave the Court of Appeals for the Federal Circuit exclusive appellate jurisdiction over all United States District Courts who derived their jurisdiction, "in whole or in part," from 35 U.S.C. § 1338.[25] The Federal Courts Improvement Act of 1982 took

21. 35 U.S.C. § 103(a) (2010).

22. Bradley G. Lane, Note, *A Proposal to View Patent Claim Nonobviousness from the Policy Perspective of* Federal Rule of Civil Procedure *52(A)*, 20 U. MICH. J.L. REFORM 1157, 1160–61 (1987).

23. *Id.* at 1158–59.

24. 28 U.S.C. § 1338 (2010).

25. Federal Courts Improvement Act of 1982, Pub. L. No. 97-167, 96 Stat. 25 (1982).

effect on October 1, 1982, and is codified in 28 U.S.C. § 1295.[26] "A major purpose of the statute creating the Federal Circuit was to assure greater uniformity in patent law."[27] Prior to October 1, 1982, the regional Circuit Courts of Appeal held appellate jurisdiction on patent cases brought in the district courts.[28]

B. Current Supreme Court Case Law

The United States Supreme Court interpreted the new "obviousness" condition of the Patent Act of 1952 in *Graham v. John Deere Co. of Kansas City* in 1966.[29] In *Graham*, Justice Clark laid down what was to become the foundation of the obviousness inquiry:

> While the ultimate question of patent validity is one of law, the [35 U.S.C.] § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under [35 U.S.C.] § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or non-obviousness, these inquiries may have relevancy.[30]

Unfortunately, the foundation for the analysis was impractical, and the debate began on how to apply a question ultimately of law but composed of three factual conditions and several secondary conditions.[31]

The United States Supreme Court further defined the inquiry into the obviousness question in *KSR International Co. v. Teleflex Inc.*[32] This case revolved around a patented adjustable pedal assembly with an electronic

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26. 2-5 DONALD S. CHISUM, CHISUM ON PATENTS § 5.04(3)(d) (2010); 28 U.S.C. § 1295 (2010).

27. CHISUM, *supra* note 26, § 5.04(3)(d).

28. *Id.* § 5.04(3)(d)(i)–(xiii).

29. Graham v. John Deere Co. of Kan. City, 383 U.S. 1 (1966).

30. *Id.* at 17–18 (citations omitted).

31. *Id.*

32. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007).

sensor.[33] Teleflex held the patent and brought suit for infringement against KSR after KSR added an electronic sensor to a different adjustable pedal assembly.[34] KSR argued that the patent was invalid because the addition of an electronic sensor to a patented adjustable pedal assembly would have been obvious to a person having ordinary skill in the art.[35] Applying the Teaching, Suggestion, or Motivation (TSM) Test, the Court of Appeals for the Federal Circuit held, in the context of KSR's motion for summary judgment, Teleflex's patent was not obvious to a person having ordinary skill in the art.[36] According to the Court of Appeals for the Federal Circuit, it would not have been obvious from the prior teachings, suggestions, or motivations for a person ordinarily skilled in the art to add an electronic sensor to an already patented adjustable pedal assembly.[37]

Writing for the majority, Justice Kennedy took exception to the Federal Circuit's rigid TSM Test and held that "[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents."[38] Emphasizing the inquiry regarding the obviousness question, Justice Kennedy stated:

> In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under [35 U.S.C.] § 103. One of the ways in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims.[39]

The most revealing part of the *KSR International Co. v. Teleflex Inc.* decision was expressed when Justice Kennedy stated that a court's obviousness analysis should be made explicit.[40] The court quoted the Court

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33. *Id.* at 405–06.

34. *Id.* at 405–06, 410.

35. *Id.* at 412. *See id.* at 414. "That it might have been obvious to try the combination of Asano and a sensor was likewise irrelevant, in the [Federal Circuit's] view, because [o]bvious to try has long been held not to constitute obviousness." *Id.* (internal citations and quotation marks omitted; second set of brackets in original).

36. *Id.* at 413–414.

37. *Id.* at 414.

38. *Id.* at 419.

39. *Id.* at 419–420.

40. *Id.* at 418.

of Appeals for the Federal Circuit and stated that "[r]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness."[41]

C. Circuit Split

Regional circuit courts[42] heard appeals of patent infringement suits prior to the creation of the Court of Appeals for the Federal Circuit.[43] Although these decisions are no longer legally binding when jurisdiction is based on 28 U.S.C. § 1338, they provide historical significance and guidance for the obviousness debate.[44] Professor Donald Chisum, in his treatise, *Chisum on Patents*, explains that when a court undertakes the obviousness analysis, the "function of adjudication is always a three-fold process: (1) 'law declaration'; (2) 'fact identification', 'the determination and statement of the relevant characteristics of the particular matter' before the court; and (3) 'law application', 'linking up the particular with the general.'"[45] Professor Chisum explains that "[t]he major controversy over law-versus-fact with the nonobviousness question is whether the appellate court should freely review the third task--i.e., whether the trial court correctly applied the legal standard to the facts."[46] Professor Chisum further explains that actions of the Supreme Court in *Graham* reflect the view that the third task, applying the law, should be conducted by the judge.[47] However, subsequent Federal Circuit decisions have not found *Graham* as readily decipherable.[48]

Using logic comparable to Professor Chisum's analysis of the holding in *Graham*, the Seventh Circuit Court of Appeals in *Roberts v. Sears, Roebuck & Co.* held that the "responsibility for the ultimate determination of obviousness lies with the trial judge, who must determine whether the facts as found by the jury fall within the legislative standard."[49] Similarly, the Ninth Circuit Court of Appeals in *Sarkisian v. Winn-Proof Corp.* held that "[t]he court must, in all cases, determine obviousness as a question of law independent of the jury's conclusion."[50]

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41. *Id.* at 418 (quoting *In re* Kahn, 441 F.3d 977, 988 (Fed. Cir. 2006)).
42. CHISUM, *supra* note 26, § 5.04(3)(d).
43. *Id.* § 5.04 (3)(d)(i)–(xiii).
44. *Id.* § 5.04 (3)(d).
45. *Id.* § 5.04 (3)(c).
46. *Id.*
47. *Id.*
48. *See* Roberts v. Sears, Roebuck & Co., 723 F.2d 1324 (7th Cir. 1983) (en banc); Sarkisian v. Winn-Proof Corp., 688 F.2d 647 (9th Cir. 1982) (en banc) (per curiam).
49. *Roberts*, 723 F.2d at 1335.
50. *Sarkisian*, 688 F.2d at 651.

Addressing whose role it is to make the law application step of an adjudication on the obviousness question, the Federal Circuit in *Richardson v. Suzuki Motor Co.* held that "the jury may decide the questions of anticipation and obviousness, either as separate special verdicts or en route to a verdict on the question of validity, which may also be decided by the jury."[51] The Federal Circuit explained the reasoning behind this statement in *Richardson* in *Connell v. Sears, Roebuck & Co.* when it stated that:

> No warrant appears for distinguishing the submission of legal questions to a jury in patent cases from such submissions routinely made in other types of cases. So long as the Seventh Amendment stands, the right to a jury trial should not be rationed, nor should particular issues in particular types of cases be treated differently from similar issues in other types of cases. Scholarly disputes over use of jury trials in technically complex cases relate to the right to trial by jury itself, and center on whether lay juries are capable of making correct fact determinations, not over the propriety of submitting legal questions to juries. The obviousness issue may be in some cases complex and complicated, on both fact and law, but no more so than equally complicated, even technological, issues in product liability, medical injury, antitrust, and similar cases. Indeed, though the analogy like most is not perfect, the role of the jury in determining obviousness is not unlike its role in reaching a legal conclusion respecting negligence, putting itself in the shoes of one "skilled in the art" at the time the invention was made in the former and in the shoes of a "reasonable person" at the time of the events giving rise to the suit in the latter.[52]

Therefore, the question that presents itself is whether a judge or a jury should undertake the law application step of an obviousness analysis. If the various governmental bodies of the United States choose to address this question explicitly in the future, they can find guidance in the court systems of our technological peers in Japan and Germany.

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51. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1234 (Fed. Cir. 1989) (citing Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983)).

52. *Connell*, 722 F.2d at 1547.

II. COMPARABLE FOREIGN STANDARDS

A. Foreign Intellectual Property

According to a United States Patent and Trademark Office report summarizing utility patent applications and grants from 1963 through 2010, 2008 marked the first year in which the office granted more utility patents to foreign inventors.[53] Of the 80,271 utility patents granted to foreign inventors, inventors from Japan and Germany received the most with 36,679 and 10,086 grants, respectively.[54]

Additionally, according to the World Intellectual Property Organization, Japan granted 32.6% of the world's patents in 2000, more than any other country.[55] The United States was second with 25.9% and Germany was third with 7.9%.[56] By 2006, Japan still led the world in granting patents, with a total of 29.9% of the world's patents.[57] The United States remained in second, granting 21.3%.[58] Germany fell to fourth, granting 7.7% of the world's patents, but remained the leading European grantor of patents.[59] Combined, Japan and Germany grant over one-third of the world's patents.[60] Based on the volume of patents granted, the Japanese and German patent systems are substantial and well developed.[61] Therefore, if the United States should choose to address its system for patent litigation, it should look to the systems of Japan and Germany for guidance.

B. Japan

Like the United States' patent law, Japan's patent law is statutorily created and requires that a patent be non-obvious to a person skilled in the art.[62] A translation of the Japanese Patent Act states:

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53. USPTO STATISTICS REPORT, *supra* note 17.

54. Patent Technology Monitoring Team, *supra* note 19.

55. WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORLD PATENT REPORT - A STATISTICAL REVIEW 22 (2008), *available at* http://www.wipo.int/export/sites/www/ipstats/en/ statistics/patents/pdf/wipo_pub_931.pdf.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Tokkyohō [Patent Act], Law No. 121 of 1959, art. 29, para. 2 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=42&vm=04&re=02&new=1. Japan operates under a civil law system, as opposed to the U.S. common law system. Thus, Japan does not primarily rely on its case law as the United States does. For that reason, this Note will not address Japanese case law. *See generally* Carl E. Schneider, *Reform in Japanese*

> Where an invention could easily have been made, prior to the filing of the patent application, by a person with ordinary skill in the art to which the invention pertains, on the basis of an invention or inventions referred to in any of the paragraphs of subsection (1), a patent shall not be granted for such an invention notwithstanding subsection (1).[63]

Patent protection in Japan is granted by the Japan Patent Office, which employs procedures similar to the United States' procedures.[64] The validity of a patent may initially be challenged in the Japan Patent Office through an opposition proceeding, but the opposition must be filed "within six months from the publication of the Gazette containing the patent."[65] Standing for these proceedings is addressed in Article 113 of the Japanese Patent Act, which states that any person may file an opposition proceeding with the Commissioner of the Patent Office.[66] The opposition proceeding is conducted "by a collegial body of three or five appeal examiners."[67] Appeals of opposition proceedings are heard before Japan's Intellectual Property High Court in Tokyo.[68]

In Japan, patent infringement suits are brought in a Japanese District Court.[69] Japan is divided into fifty districts. Proper jurisdiction for the suit is the district where the defendant is domiciled.[70] However, Article 6 of

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Legal Education: On American Legal Education, 2 ASIAN-PAC. L. & POL'Y J. 76 (2001) (explaining that Socratic teaching in Japan would look different because "[c]ivil law systems, of course, rely less centrally than ours on cases").

63. Tokkyohō art. 29, para 2. *See id.* para. 1 (discussing Japan's novelty requirement, stating, "An inventor of an invention that is industrially applicable may be entitled to obtain a patent for the said invention, except for the following: (i) inventions that were publicly known in Japan or a foreign country, prior to the filing of the patent application; (ii) inventions that were publicly worked in Japan or a foreign country, prior to the filing of the patent application; or (iii) inventions that were described in a distributed publication, or inventions that were made publicly available through an electric telecommunication line in Japan or a foreign country, prior to the filing of the patent application.").

64. *Procedures for Obtaining a Patent Right*, JAPAN PATENT OFFICE, http://www.jpo.go.jp/ cgi/linke.cgi?url=/tetuzuki_e/t_gaiyo_e/pa_right.htm (last visited Mar. 27, 2011).

65. Tokkyohō art. 29, para. 2.

66. *Id.* art. 113.

67. *Procedures for Obtaining a Patent Right*, *supra* note 64; Tokkyohō art. 114, para. 1.

68. *Procedures for Obtaining a Patent Right*, *supra* note 64; Tokkyohō art. 178, para. 1. Further, a discussion of proceedings before Japan's Intellectual Property High Court in Tokyo can be found later in this section of this Note.

69. Ryu Takabayashi, *Practices of Patent Litigation in Japanese Courts*, 5.2 CASRIP NEWSL. (Toshiko Takenaka trans., 1998), *available at* http://www.law.washington.edu/ Casrip/Newsletter/default.aspx?year=1998&article=newsv5i2jp2.

70. *Id.*; MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 4, para. 1 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1.

Japan's Code of Civil Procedure grants concurrent jurisdiction to the Tokyo or Osaka District Courts for lawsuits involving patents.[71] Japan created this exception "because patent cases involve complex technology issues and these courts have a special section dedicated to intellectual property cases due to the complexity of technologies involved in patent cases."[72]

An infringement lawsuit in Japan begins with the filing of a complaint.[73] The complaint is served upon the defendant and the defendant is required to provide an answer.[74] After the issues and allegations have been established before the court, the court enters into proceedings for arranging the issues and evidence.[75] There are three different types of preliminary proceedings permitted by Japan's Code of Civil Procedure: preliminary oral arguments, preparatory proceedings, and preparatory proceedings by means of documents.[76] The court uses preliminary oral arguments for the "arrangement of issues and evidence."[77] Preparatory proceedings are similar to preliminary oral arguments in that the court uses both types of proceedings to confirm facts with the parties.[78] However, unlike preliminary oral arguments, preparatory proceedings are not required to be open to the public, and are therefore most often conducted in an office with the presiding judge and the parties.[79]

Preparatory proceedings by means of documents require the parties to submit briefs relevant to the material issues to the presiding judge.[80] In Japan, parties are not limited in their filings to a specific number of briefs, which are also not limited in size.[81] "The exchange of briefs ceases when a judge decides that the case has been fully tried, with both parties having exhausted their arguments, and the parties so agree."[82] The battle in Japanese intellectual property cases is mostly fought on paper. "In Japan, intellectual property-related cases are essentially argued and tried in briefs, and oral arguments are made only as a matter of formality in most cases."[83]

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71. *Id.* art. 6.

72. Takabayashi, *supra* note 69.

73. *Outline of Civil Litigation in Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/proceedings/civil_suit.html#iii_a (last visited Mar. 27, 2011); MINSOHŌ art. 133, para. 1.

74. *Outline of Civil Litigation in Japan*, *supra* note 73; MINSOHŌ art. 138.

75. *Outline of Civil Litigation in Japan*, *supra* note 73.

76. *Id.*; MINSOHŌ arts. 164, 168, 175.

77. *Outline of Civil Litigation in Japan*, *supra* note 73.

78. *Outline of Civil Litigation in Japan*, *supra* note 73; MINSOHŌ art. 175.

79. *Id.*

80. *Outline of Civil Litigation in Japan*, *supra* note 73.

81. Setsuko Asami, *Japan-U.S. Patent Infringement Litigation Practice: A Visit to the United States Court of Appeals for the Federal Circuit*, 5.3 CASRIP NEWSL. (Shoko Leek trans., 1998), *available at* http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year= 1998&article=newsv5i3asami.

82. *Id.*

83. *Id.*

There are no juries in Japanese civil courts, and judges resolve both factual and legal issues.[84]

After the presiding judge concludes proceedings for arranging the issues and evidence, the trial then proceeds to oral argument for the examination of witnesses.[85] Parties are responsible for choosing which witnesses testify.[86] Lay witnesses and expert witnesses are examined by the party that called them, the opposing party, and the presiding judge.[87] In addition, the court is permitted to examine one or both of the parties.[88] The Code of Civil Procedure allows Technical Advisers and Judicial Research Officials to question the parties, witnesses, and expert witnesses during oral argument in intellectual property cases.[89]

Following the conclusion of the examination of the witnesses, the court renders its judgment on the case.[90] The Code of Civil Procedure requires that the court's judgment be in writing and contain, among other items, the facts the judge relied on and the reasoning the judge used in making his or her decision.[91]

Japan amended its Code of Civil Procedure in 2003 to introduce a Technical Advisor system to better facilitate its courts' understanding of complex technological issues inherent in intellectual property suits.[92] Article 92-2 of the Code of Civil Procedure provides that courts may have Technical Advisers participate in various capacities throughout proceedings.[93] More directly, "[t]echnical advisors are appointed by the Supreme Court as part-time officials, from among experts such as university professors and researchers of public research institutes who have expertise in various scientific fields."[94] The Technical Adviser may participate by giving an explanation of the evidence based on their expert knowledge and by asking questions directly of the witnesses, parties, or expert witnesses.[95] One of the goals of the Technical Adviser system, aside from providing technical expertise from a fair and neutral viewpoint to the

84. *Id.*

85. *Outline of Civil Litigation in Japan*, *supra* note 73.

86. *Id.*

87. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 202 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1; *id.* art. 215, para. 2.

88. *Id.* art. 207.

89. *Id.* art. 92, paras. 2, 8.

90. *Outline of Civil Litigation in Japan*, *supra* note 73.

91. MINSOHŌ art. 252, para. 53.

92. *Id.* art. 92, para. 8.

93. *Id.* para. 2.

94. *Organization*, INTELLECTUAL PROPERTY HIGH COURT, http://www.ip.courts.go.jp/eng/aboutus/organization.html (last visited Mar. 27, 2011).

95. MINSOHŌ art. 92, para. 2.

judge (still the ultimate decision maker) is "to enhance public confidence in judicial determination[s] on intellectual property issues."[96] Technical Advisors "cover a wide range of scientific fields, including electronics, machinery, chemicals, information communication, and biotechnology. Courts select the most suitable technical advisors from a wide range of candidates, on a case-by-case basis, considering the nature and content of the dispute."[97]

Another recent addition to intellectual property cases in Japan is the use of Judicial Research Officials.[98] Article 92-8 of the Code of Civil Procedure provides that courts, in cases involving intellectual property, may use Judicial Research Officials to ask questions of the parties in order to clarify issues of the suit.[99] In addition, Judicial Research Officials may examine the parties, lay witnesses, or expert witnesses, and may give explanations based on their expert knowledge.[100] The "officials have expertise in various technical fields such as machinery, chemicals and electronics, and as ordered by judges, carry out necessary research on technical matters involved in patent . . . cases."[101] In a technically complex case, Judicial Research Officials, who are well versed in patent prosecution procedure, work with Technical Advisers, who are experts in the technical field at issue in the case, in order to assist the judge.[102] As of July 2009, the Intellectual Property High Court, the Tokyo District Court, and the Osaka District Court have been permanently assigned twenty-one Judicial Research Officials.[103]

All appeals of patent infringement claims are heard before Japan's Intellectual Property High Court.[104] Central to the debate undertaken in this Note, the Intellectual Property High Court reviews both legal and factual issues *de novo*.[105] Generally, cases appealed to the Intellectual Property High Court are heard before a three-judge panel, but in special instances Japan's Code of Civil Procedure permits that a five-judge panel may

96. *Technical Advisors in Intellectual Property Lawsuits*, INTELLECTUAL PROPERTY HIGH COURT, http://www.ip.courts.go.jp/eng/documents/expert.html (last visited Mar. 27, 2011).

97. *Id.*

98. *Id.*

99. *Id.*

100. MINSOHŌ art. 92, para. 8.

101. *Technical Advisors in Intellectual Property Lawsuits*, *supra* note 96.

102. *Id.*

103. *Id.*

104. MINSOHŌ art. 6, para. 3; *Jurisdiction*, INTELLECTUAL PROPERTY HIGH COURT, http://www.ip.courts.go.jp/eng/aboutus/jurisdiction.html (last visited Mar. 27, 2011).

105. Takenaka, *supra* note 20, at 48.

conduct the trial.[106] Trials before the five-judge panel are known as Grand Panel cases, and although the trials are conducted by only a five-judge panel, "in practice, [its decisions are] based on discussions by the whole court."[107] The Grand Panel system was introduced because of a desire by the industrial circle for "the formation of satisfactorily reliable rules and consistency of judicial decisions prior to the final judgment made by the Supreme Court."[108]

The trial before the appellate court is conducted procedurally in a similar fashion to the trial before the Japanese district court.[109] However, the appellate trial is considered to be a continuation of the trial at first instance, and therefore the appellate court focuses its attention on the decision of whether to overturn the district court.[110] After the Intellectual Property High Court conducts its trial, it renders a written opinion.[111] Similar to the district court, the High Court is required to state its factual determinations and legal reasoning in its opinion following the appeal.[112]

Final appeals in Japan are heard before Japan's Supreme Court.[113] However, in general, appeals before the Supreme Court are limited to constitutional issues and are therefore not relevant to this Note.[114] As stated previously, the Grand Panel system was created in an attempt to facilitate uniformity by the Intellectual Property High Court without the need for review by the Supreme Court.[115]

Japanese judges have noticed increasing complexity in patent infringement cases directly related to the issues of *Kinetic Concepts*.[116] For example, Judge Ichiro Otaka of the Intellectual Property High Court remarked in an article that:

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106. MINSOHŌ art. 310, para. 2; *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/system/system.html (last visited Mar. 27, 2011).

107. *Current Status of the IP High Court*, INTELLECTUAL PROPERTY HIGH COURT (Mar. 2010), http://www.ip.courts.go.jp/eng/aboutus/current.html.

108. ICHIRO OTAKA, RECENT DEVS. IN INTELLECTUAL PROP. LAW & POLICY IN ASIA, RECENT DEVELOPMENTS REGARDING THE INTELLECTUAL PROPERTY HIGH COURT OF JAPAN 8 (2006), *available at* http://www.ip.courts.go.jp/eng/documents/pdf/conference/060420.pdf.

109. *Outline of Civil Litigation in Japan*, *supra* note 73.

110. *Id.*

111. *Id.*

112. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, arts. 53, 252 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1 (stating that a "final appeal" can only be filed on a judgment that contains some sort of constitutional issue).

113. *Id.* art. 311.

114. *See generally id.* art. 312.

115. OTAKA, *supra* note 108, at 8.

116. *Id.* at 7–8.

> [A]fter the so-called *Kilby* decision (*Texas Instruments v. Fujitsu*, Supreme Court Third Petty Bench Decision of April 11, 2000, Minshu 54-4, 1368), patent infringement cases have been arguing the existence of the reason for invalidating a patent, and with the increase of the district court making decisions on the "defense of abuse due to obvious invalidity", the appeal trials on infringement have become more and more complicated and difficult to render a decision.[117]

Fortunately, the Japanese have developed a system designed to address technically complex issues. With the involvement of Technical Advisors and Judicial Research Officials at both the District Court and High Court levels, judges are in a position to apply legal conclusions to a technology they fully understand.

C. Germany

Like the United States and Japan, Germany's patent law requires that a patent be non-obvious to a person skilled in the art.[118] This requirement is a combination of § 1 of the German Patent Act, which requires an "inventive step," and § 4 of the German Patent Act, which defines an "inventive step."[119] A translation of these sections reads as follows:

> § 1.-(1) Patents shall be granted for inventions that are new, involve an inventive step and are susceptible of industrial application. . . . § 4.-An invention shall be considered to involve an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.[120]

German patent protection is provided by either the German Patent and Trademark office or the European Patent Office.[121] Germany breaks down the patent litigation system into three different types of proceedings. [122]

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117. *Id.*

118. PATENTGESETZ [PATG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 4 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126259 (last visited Mar. 27, 2011).

119. PATG §§ 1, 4.

120. *Id.*

121. *Id.* § 2.

122. CAMPENHAUSEN, *supra* note 20, at 1.

These proceedings are referred to as opposition, nullity, and infringement proceedings.[123]

i. Opposition Proceedings

Opposition proceedings for German patents granted by the German Patent and Trademark Office and the European Patent Office are proceedings that challenge the validity of a newly issued patent and must be brought within a specified time period after publication of that patent.[124] "In [the] case of a German national patent, the opposition [proceeding] must be filed within three months from the publication of the grant of the patent."[125] After the expiration of the three month period to bring an opposition proceeding, the obviousness of an invention may then only be challenged in a nullity proceeding.[126]

The European Patent Office conducts opposition proceedings for German patents granted by the European Patent Office while the German Patent Office conducts opposition proceedings for German patents granted by the German Patent Office.[127] During times of increased workload for the German Patent Office, opposition proceedings of German patents granted by the German Patent Office may take place before the German Federal Patent Court.[128] Opposition proceedings and appeals of decisions by the German Patent Office are heard before the German Federal Patent Court Technical Boards of Appeal.[129] The Technical Boards of Appeal are composed of three judges who are technically qualified, and one judge who is legally qualified.[130] The presiding judge of a Technical Board of Appeal is technically qualified and, in the event of a split decision, is given the deciding vote.[131]

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123. *Id.* Unlike the United States, Germany is a civil law country where judicial opinions do not carry the same precedential authority and are therefore not addressed in this Note. N. Thane Bauz, *Reanimating U.S. Patent Reexamination: Recommendations for Change Based Upon a Comparative Study of German Law*, 27 CREIGHTON L. REV. 945, 963 (1994).

124. *Id.*

125. *Id.*

126. PATG §§ 59, 81, para. 2.

127. CAMPENHAUSEN, *supra* note 20, at 1. Because this Note focuses on German and not European patent law, opposition proceedings for German patents granted by the European Patent Office will not be addressed.

128. *Id.* at 2; FED. PATENT COURT OF THE FED. REPUBLIC OF GER., 2007 INFORMATION BROCHURE 25 (Dep't for Int'l Affairs and Pub. Relations: Fed. Patent Court, 2007) [hereinafter 2007 INFORMATION BROCHURE].

129. 2007 INFORMATION BROCHURE, *supra* note 128, at 13, 24–25.

130. *Id.* at 13; PATG § 67, para. 1. *See infra* Part II.C.iii. (further developing the requirements for being considered technically qualified to sit as a judge on the Federal Patent Court).

131. 2007 INFORMATION BROCHURE, *supra* note 128, at 13; PATG § 70, para. 2.

The German Patent Act requires that an opposition proceeding only be based on the requirements of § 21 of the Act.[132] Section 21 of the Act states that a patent may be revoked if it is shown that the patent fails to meet the requirements of §§ 1–5 of the Act.[133] As discussed above, the obviousness step is required by § 1 of the Act; therefore, it may be challenged in an opposition proceeding under § 59.[134]

The German Patent Act gives very broad standing to potential plaintiffs who seek to bring opposition proceedings.[135] Section 59 states that "any person, but only the injured party in the case of usurpation, may give notice of opposition to the patent."[136] Hence, opposition proceedings in Germany are available to all litigants except in a case where the complaining party is attempting to allege the infringement of rights.[137] In that case, only the party whose rights have allegedly been infringed may bring the opposition proceeding.[138]

The general procedure of an action or an appeal before a Technical Board of Appeal begins when a party submits the action or appeal to the Federal Patent Court's central filing office.[139] The parties to the proceedings submit briefs, which are then reviewed and decided by one of the board's judges.[140] This judge then circulates his or her opinion for further comment from the other judges of the Board.[141] Section 76 of the German Patent Act provides that the President of the Patent Office may submit a brief in appeal proceedings before the Board of Appeals in order to safeguard the public's interest.[142] After the judges have had a chance to review the submissions and the initial opinion, the presiding judge schedules a date for *in camera* debate, or an oral hearing.[143] Again, the President of the Patent Office may take part if there is an oral hearing on appeal.[144] In general, the Boards of Appeal make their decisions on appeal without an oral hearing.[145] Throughout the process, the Boards of Appeal are not bound by the offerings of facts by the parties and are free to conduct their own investigation into the facts of the case.[146] After the judges

132. PATG § 59.
133. *Id.* § 21.
134. *Id.* §§ 1, 21, 59.
135. *Id.* § 59.
136. *Id.*
137. CAMPENHAUSEN, *supra* note 20, at 2.
138. PATG § 59.
139. 2007 INFORMATION BROCHURE, *supra* note 128, at 20.
140. *Id.*
141. *Id.*
142. PATG §§ 76–77.
143. 2007 INFORMATION BROCHURE, *supra* note 128, at 20.
144. PATG §§ 76–77.
145. 2007 INFORMATION BROCHURE, *supra* note 128, at 19.
146. PATG § 87, para. 1.

conduct their final deliberation, the Board issues a written decision that is delivered to the parties.[147]

In 2008, the Technical Boards of Appeal of the Federal Patent Court processed 610 appeals proceedings and 452 opposition proceedings.[148] At the conclusion of 2008, the Boards had 2118 appeals proceedings pending and 1289 opposition proceedings pending.[149]

Appeals of opposition proceeding decisions of the German Federal Patent Court Technical Boards of Appeal are heard before the German Federal Court of Justice, the court of last resort for issues regarding patents in Germany.[150] The Federal Court of Justice is bound by the finding of facts of the Technical Boards of Appeal, but reviews the points of law *de novo*.[151] The assessment of the issue of inventive step or obviousness of a patent is considered a question of law and is reviewed *de novo* by the Federal Court of Justice.[152]

ii. Infringement Proceedings

In Germany, unlike the United States, a defendant cannot raise the invalidity of the patent as an affirmative defense in an infringement proceeding.[153] An infringement proceeding in Germany would be an improper stage to raise invalidity as a defense.[154] Infringement proceedings are heard before civil courts of general jurisdiction; thus, if a defendant wishes to raise a nullity defense during the infringement proceeding, a special request to the Federal Patent Court may be made for a declaration on the nullity of the patent.[155] "[I]f the civil court estimates the prospects of success of [the nullity] proceedings as good the civil court may suspend temporarily the infringement proceedings until the final decision is rendered in the nullity proceedings."[156] Otherwise, a judge in a German infringement

147. 2007 INFORMATION BROCHURE, *supra* note 128, at 20.

148. THE FEDERAL PATENT COURT 17 (Regina Hock ed., 2009) [hereinafter 2009 INFORMATION BROCHURE], *available at* http://www.bpatg.de/cms/media/Oeffentlichkeitsarbeit/Veroeffentlichungen/Informationsbroschueren/englische_Broschuere_2009.pdf.

149. *Id.*

150. 2007 INFORMATION BROCHURE, *supra* note 128, at 21. *See* PATG § 100; FEDERAL COURT OF JUSTICE, THE FEDERAL COURT OF JUSTICE 4 (2010), *available at* http://www.bundesgerichtshof.de/cae/servlet/contentblob/758306/publicationFile/51136/brochure.pdf.

151. 2007 INFORMATION BROCHURE, *supra* note 128, at 21. *See generally* PATG §§ 100–109 (providing statutory language of the same).

152. CAMPENHAUSEN, *supra* note 20, at 17.

153. THOMAS BOPP & MICHAEL TRIMBORN, GLEISS LUTZ, PATENT LITIGATION IN GERMANY 4 (2004), *available at* http://www.bundesgerichtshof.de/cae/servlet/contentblob/758306/ publicationFile/51136/brochure.pdf.

154. *Id.* at 4.

155. 2007 INFORMATION BROCHURE, *supra* note 128, at 6–7.

156. *Id.* at 7.

proceeding must "proceed on the basis of the patent as granted, [and] counterclaims of invalidity are not admitted in infringement proceedings."[157] Because Germany separates infringement and nullity proceedings, and because the defense of obviousness would be addressed in a nullity proceeding, infringement proceedings will not be further addressed in this Note.[158]

iii. Nullity Proceeding

Nullity proceedings are different from opposition proceedings and are heard only before a Nullity Board of the German Federal Patent Court, regardless of whether it was the German Patent Office or the European Patent Office that originally granted the patent.[159] As opposed to other proceedings before the Federal Patent Court, nullity proceedings are heard in first instance rather than on appeal before the court.[160] Nullity proceedings may begin "[o]nce opposition proceedings have been terminated or after the opposition period has expired, [and] may only be challenged in a [German] nullity proceedings [sic] before the [German] Federal Patent Court."[161]

One of the most intriguing aspects of the German Federal Patent Court is the composition of the panel of judges that presides over a nullity proceeding. The panel is composed of three judges with technical backgrounds and two judges who have legal backgrounds.[162] The panel is better equipped to assess the validity of a particular patent at issue because there are judges on the panel with technical backgrounds.[163] The judges with technical backgrounds are "technical experts with full-fledged academic formation in science or engineering."[164] Upon completion of their studies, technical judges must have passed a final state or academic examination, have five years of practical experience, and "have acquired the necessary legal knowledge."[165] Technical judges gain their practical experience and legal knowledge from the German Patent and Trademark

157. BOPP & TRIMBORN, *supra* note 153, at 4.

158. 2007 INFORMATION BROCHURE, *supra* note 128, at 6–7.

159. CAMPENHAUSEN, *supra* note 20, at 2, 7.

160. 2007 INFORMATION BROCHURE, *supra* note 128, at 21.

161. CAMPENHAUSEN, *supra* note 20, at 2; PATENTGESETZ [PATG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 81, para. 2 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id= 126259 (last visited Mar. 27, 2011).

162. CAMPENHAUSEN, *supra* note 20, at 4. *See* PATG § 67, para. 2; 2007 INFORMATION BROCHURE, *supra* note 128, at 15.

163. CAMPENHAUSEN, *supra* note 20, at 4.

164. 2007 INFORMATION BROCHURE, *supra* note 128, at 8.

165. *Id.* at 9.

Office and are recruited exclusively from this office.[166] "The technical members of the Federal Patent Court have a particular expertise in one specialist technical field and are used in cases where a decision needs to be taken regarding a property right in their technical specialism."[167]

The judges with legal backgrounds must meet the same studies and training requirements as other federal judges, which includes years of professional experience gleaned from administrative agencies or various courts.[168] The Federal Patent Court seeks to achieve judicial independence for both technically qualified and legally qualified judges by the privilege of lifetime appointments.[169] Unlike the opposition proceedings heard before the Technical Boards of Appeal, the presiding judge in cases before the Nullity Boards is legally qualified.[170] There are no juries in a nullity proceeding; therefore, judges determine both questions of fact and law in such proceedings.[171]

The ability to file suit in a German nullity proceeding is not limited to the patent holder and mirrors the standing requirements of an opposition proceeding.[172] "[A] party which considers a patent an obstacle to his business activities in Germany does not have to wait until he is sued for infringement in order to challenge the validity of that patent. Instead, this party may take the initiative and file a nullity action."[173]

Procedurally, nullity proceedings work differently than opposition proceedings.[174] Both opposition proceedings and nullity proceedings begin with the filing of an action and other written statements.[175] Generally, "the action for a declaration of nullity of a patent is . . . the consequence of patent infringement proceedings."[176] The court informs the defendant of the action, and the defendant is then invited by the court to reply or face default.[177] Upon the reply of the defendant, the court informs the plaintiff of the reply and schedules and conducts a hearing unless the parties consent

166. *Id.*

167. 2009 INFORMATION BROCHURE, *supra* note 148, at 11.

168. 2007 INFORMATION BROCHURE, *supra* note 128, at 9.

169. *Id.* at 8.

170. *Id.* at 13, 15.

171. CAMPENHAUSEN, *supra* note 20, at 6.

172. *Id.* at 4, 7; PATENTGESETZ [PATG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 81, para. 3 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126259 (last visited Mar. 27, 2011). *See supra* Part II.C.i.

173. CAMPENHAUSEN, *supra* note 20, at 4.

174. *See generally* 2007 INFORMATION BROCHURE, *supra* note 128, at 20–21 (explaining the procedure before a nullity board).

175. PATG § 81, para. 4.

176. 2007 INFORMATION BROCHURE, *supra* note 128, at 20.

177. PATG § 82.

to a ruling without a hearing.[178] The presiding judge conducts the hearing and receives any evidence.[179] During the hearing, the judges are in charge of questioning and may examine witnesses, experts, and both parties to the proceeding.[180] The Nullity Board is entitled to make inspections of the evidence, and the presiding judge discusses with the parties both questions of law and questions of fact.[181] The parties to the proceedings are also given a chance to speak to the court in the hopes of substantiating their motions.[182]

Like opposition proceedings, the Nullity Board is not bound by the offerings of facts of the parties and the court is free to conduct its own investigation into the facts of the case.[183] However, the decision of the court "may be based only on facts and the results of evidence on which the parties have had an opportunity to state their views."[184] Final decisions of the court are either pronounced in court or by a written decision which is served upon the parties.[185] Section 93(1) of the German Patent Act specifically requires that the judges' "decision[s] shall state the grounds which led the judges to form their conclusions."[186] In 2008, the Nullity Boards of the Federal Patent Court processed 237 cases, while 388 cases remained pending at the conclusion of 2008.[187]

Similar to appeals of opposition proceedings, appeals of nullity proceedings are heard before the German Federal Court of Justice.[188] However, in nullity proceedings the Federal Court of Justice is not bound by the findings of fact of the Nullity Boards and reviews both points of law and points of fact *de novo*.[189] Unlike the nullity boards, the Federal Court of Justice is not staffed with technically qualified judges and therefore relies on technical experts for evidentiary purposes to fulfill its functions.[190]

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178. *Id.* § 83.

179. *Id.* §§ 88, 90.

180. *Id.* § 88, para. 1.

181. *Id.* §§ 88, para. 1; 91, para. 1.

182. *Id.* § 90, para. 3.

183. *Id.* § 87, para. 1.

184. *Id.* § 93, para. 2.

185. *Id.* § 94, para. 1.

186. *Id.* § 93, para. 1. "The Patent Court shall take its decisions on the basis of its own conclusions freely reached in the light of the results of the proceedings as a whole. The decision shall state the grounds which led the judges to form their conclusions." *Id.*

187. 2009 INFORMATION BROCHURE, *supra* note 148, at 17.

188. 2007 INFORMATION BROCHURE, *supra* note 128, at 29; PATG §110, para. 1. *See generally* FEDERAL COURT OF JUSTICE, *supra* note 150, at 7 (explaining that the Federal Court of Justice hears appeals of patent cases regarding revocation and performs the duties of a trial judge).

189. PATG § 115, para. 1.

190. 2007 INFORMATION BROCHURE, *supra* note 128, at 29. *See generally* PATG § 115, para. 2 (explaining that the Federal Court of Justice may take evidence through an intermediary of the German Federal Patent Court).

As of January 1, 2008, the Federal Court of Justice staffed 127 judges comprising 17 total panels, but uniformity among decisions was guaranteed by the fact that only one of those panels, the Tenth Civil Panel, was responsible for patent law cases.[191] The structure of Germany's system permitted its court of last resort to process sixty-one nullity proceeding appeals in 2008.[192]

III. COMPARISON OF THE U.S. SYSTEM WITH THOSE OF ITS TECHNOLOGICAL PEERS

A. Japan

Although the complexities of both the U.S. and Japanese systems would allow for comparisons at any number of levels, this Note will focus primarily on (*i*) the types of courts that are granted jurisdiction in a patent litigation lawsuit, (*ii*) who has the responsibility of performing the law application step, and (*iii*) the differing aspects of appellate review and procedure of the initial judicial decision.

i. Jurisdiction

An important element in the adjudication of patent litigation is the expertise and subject matter knowledge of the court.[193] Although Japan, like the United States, has a large number of district courts,[194] Japan has created a system more likely to provide uniformity simply by its lack of diversity.[195] By contrast, the United States has ninety-four federal districts, and 28 U.S.C. § 1338(a) grants jurisdiction for patent infringement suits to all of these courts without a preference for one over another.[196] Although a major purpose of the Federal Courts Improvement Act of 1982 and the creation of the Court of Appeals for the Federal Circuit was to create greater uniformity in patent law,[197] the United States could have accomplished that goal more easily by implementing a system like Japan's where the uniformity comes at both the district court and appellate court

191. FEDERAL COURT OF JUSTICE, *supra* note 150, at 7, 11.

192. 2009 INFORMATION BROCHURE, *supra* note 148, at 19.

193. The procedural mandates of Japan's Grand Panel system require that the judges "be aware of the cases presided over by other judges at all times." OTAKA, *supra* note 108, at 9.

194. Japan is divided into fifty districts. Takabayashi, *supra* note 69.

195. Bauz, *supra* note 123, at 963 ("U.S. [federal district] courts . . . typically have a lottery system for assigning a judge to a particular case."); MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 6 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1.

196. 28 U.S.C. § 1338(a) (2010).

197. CHISUM, *supra* note 26, § 5.04(3)(d).

level.[198]

ii. Law Application

Application of the law in an obviousness determination is done differently in the United States than in Japan. "In Japanese courts, judges, not juries, resolves [sic] both factual and legal issues," and therefore would be charged with the responsibility of the law application step in a patent litigation suit.[199] Japan's Code of Civil Procedure permits Technical Advisers and Judicial Research Officials to aid judges in this process.[200] In a particular case, a Judicial Research Official, who is an official of the court, would conduct research, question witnesses and parties, provide explanations based on his or her expert analysis, and inform the judge(s) about his or her opinion on a given case.[201] Similarly, a Technical Advisor, knowledgeable in the specialized field of the particular suit, would provide the court with expert explanations and might also question lay witnesses, expert witnesses, and the parties.[202] Japan has implemented such a system in order to mitigate discrepancies between decisions in order "to enhance public confidence in judicial determination on intellectual property issues."[203]

In contrast, the Court of Appeals for the Federal Circuit affirmed in *Kinetic Concepts* that a jury of twelve individuals, meeting the minimum requirements for jury service, are sufficiently capable of determining obviousness of a particular patent through thirty-seven "yes" or "no" interrogatories.[204] Some of the seven general requirements for jury service in the federal district courts of the United States include that an individual must be a United States citizen, eighteen years of age, proficient in English, and have not been convicted of or subjected to felony charges.[205] There are no minimum education requirements for jury service in the United States.[206] Had *Kinetic Concepts* been brought in Japan before either the Tokyo or

198. A 2006 United States House of Representatives Bill proposed "a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges . . . which [was] intended to improve the adjudication of patent disputes." H.R. REP. NO. 109-673 (2006) (internal quotation marks omitted), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&.

199. Takenaka, *supra* note 20, at 48.

200. MINSOHŌ art. 92, paras. 2, 8.

201. *Id.* para. 8.

202. *Id.* para. 2.

203. *Technical Advisors in Intellectual Property Lawsuits*, *supra* note 96.

204. *See* Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

205. *Juror Qualifications, Exemptions and Excuses*, U.S. COURTS, http://www.uscourts.gov/jury/qualifications.html (last visited Mar. 27, 2011).

206. *Id.*

Osaka District, the technical expertise of the persons charged with the responsibility of the law application step would have been drastically different.

In addition, the judge's analysis would have been made explicit because he or she would have been required to record the basis for the decision in the judgment document.[207] Article 253, paragraph 1 of Japan's Code of Civil Procedure states that the judgment document shall include both the facts of the case and the judge's reasons for his or her decision.[208] Analysis of this comparison cuts to the core of the issue both in this Note and in the petition for certiorari and *amici* briefs in *Kinetic Concepts*.[209] The comparison also determines whether the district court's submission of special interrogatories to the jury is sufficient to make the court's obviousness analysis *explicit*,[210] as required by the Supreme Court's recent precedent on the issue.[211] Justice Kennedy's opinion in *Teleflex Inc.* supports the requirement that the court's obviousness analysis be *explicit*. He states:

> Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be *made explicit*.[212]

At first blush, the Supreme Court's requirement that a court's obviousness analysis be made explicit infers that a judge must personally conduct the analysis leading to a legal determination. Additionally, it appears as though the standard announced in *KSR International Co. v. Teleflex Inc.* has come in line with both the Seventh and Ninth Circuit en banc holdings of *Roberts v. Sears, Roebuck & Co.* and *Sarkisian v. Winn-Proof Corp.*, [213] and parallels the written judgment document requirements of the Japanese Code

207. MINSOHŌ art. 253, para. 1.
208. *Id.*
209. *See supra* Part I.
210. *Id.*
211. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007).
212. *Id.* at 418 (emphasis added).
213. Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1335 (7th Cir. 1983) (en banc).

of Civil Procedure.[214] However, the District Court's reliance on Federal Circuit precedent in *Kinetic Concepts*,[215] as well as the Supreme Court's denial of certiorari after the Federal Circuit upheld the District Court's procedure,[216] suggests that acceptable *explicit analysis*[217] and *articulated reasoning*[218] may merely consist of "yes" or "no" answers to the special interrogatories submitted to a jury.[219]

One reason that District Courts punt the obviousness analysis to the jury by way of special interrogatories and a general verdict may be that the District Courts typically have fewer clerks as compared to the Federal Circuit and that the law clerks are no more likely than the District Court judges to possess a technical degree.[220] This is bolstered by the fact that of the 256,354 civil cases commenced in United States District Courts between June 30, 2007, and June 30, 2008, only 2951, or approximately 1.15% of the suits, involved patent law issues.[221] Unfortunately, this places District Court judges in the position of making judicial determinations on increasingly complex subject matters without any assurances that they possess any basic understanding of the subject matter at issue.

iii. Appellate Review

Like jurisdiction, appellate review of a judicial decision largely relies on the expertise of the appellate court. However, an additional aspect is the breadth of the appellate court's review. When it comes to appellate review of judicial decisions in Japan, the Intellectual Property High Court reviews

214. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 253, para. 1 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1.

215. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1234 (Fed. Cir. 1989) (citing Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983) ("It is established that the jury may decide the questions of anticipation and obviousness, either as separate special verdicts or en route to a verdict on the question of validity, which may also be decided by the jury."); *Connell*, 722 F.2d at 1547 (holding "that it is not error to submit the question of obviousness to the jury. No warrant appears for distinguishing the submission of legal questions to a jury in patent cases from such submissions routinely made in other types of cases.").

216. Petition for a Writ of Certiorari, *supra* note 6, at i.

217. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007).

218. *Id.* (quoting *In re* Kahn, 441 F.3d at 988).

219. *See Kinetic Concepts*, 554 F.3d 1010 (Fed. Cir. 2009).

220. Wendy K. Tam Cho & Albert H. Yoon, *Strange Bedfellows: Politics, Courts, and Statistics: Statistical Expert Testimony in Voting Rights Cases*, 10 CORNELL J. L. & PUB. POL'Y 237, 249 (2001).

221. U.S. COURTS, TABLE C-2 28, *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2008/jun08/C02jun08.pdf (last visited Mar. 27, 2011).

both legal and factual conclusions *de novo*,[222] whereas the Court of Appeals for the Federal Circuit only reviews questions of law *de novo*.[223] In terms of the law application task, Japan's High Court reviews this analysis under the *de novo* standard, like all other decisions made by its district courts.[224] In contrast, the United States' Court of Appeals for the Federal Circuit's separate standards of review for questions of facts and questions of law muddy the waters.[225]

In regard to special interrogatories, as were given to the jury in *Kinetic Concepts*, it is difficult to distinguish the fully reviewable questions of law from the questions of fact,[226] with the questions of fact being "reviewed only for reasonableness under the substantial evidence test."[227] As a result, when a jury is permitted to render a general verdict on obviousness, the Federal Circuit's review "entails '*re-creating* the facts as they *may have been found* by the jury,' and determining whether such hypothetical facts would be sufficient to support a legal conclusion of validity on *any* theory."[228] Such a review hardly seems to be an *explicit* analysis, and yet this was the extent of the analysis by the Federal Circuit in *Kinetic Concepts*.[229]

The United States and Japan ensure a relative expertise on intellectual property issues by granting a singular court jurisdiction for all appeals of

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222. *Takenaka*, *supra* note 20, at 48.

223. Jurgens v. McKasy, 927 F.2d 1552, 1557 (Fed. Cir. 1991).

224. *Takenaka*, *supra* note 20, at 48.

225. *Jurgens*, 927 F.2d at 1557 ("In general, the judge decides issues of law and issues committed to his discretion, and the jury decides issues of fact that are material to the case and in genuine dispute. . . . Between these simple extremes of issues decided by the judge and issues decided by the jury are issues of law submitted to the jury upon disputed facts. When an issue of law has been submitted to the jury upon disputed facts–for example, a jury special verdict on patent claim obviousness where the underlying facts have been disputed–the standard of review has two parts. We first presume that the jury resolved the underlying factual disputes in favor of the verdict winner and leave those presumed findings undisturbed if they are supported by substantial evidence. Then we examine the legal conclusion *de novo* to see whether it is correct in light of the presumed jury fact findings.") (internal citations omitted).

226. CHISUM, *supra* note 26, § 5.04(3)(d)(xiv)(B) ("Federal Circuit decisions have oscillated on how issues concerning obviousness should be presented to a jury and on the standard of review of jury verdicts on obviousness.").

227. Structural Rubber Products Co. v. Park Rubber Co., 749 F.2d 707, 719 (Fed. Cir. 1984).

228. Petition for a Writ of Certiorari, *supra* note 6, at 4 (quoting McGinley v. Franklin Sports, Inc., 262 F.3d 1339, 1351 (Fed. Cir. 2001) (emphasis in original)). *See* Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1021 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009) ("[W]e must assume that the jury found that the prior art does not disclose 'treating a wound with negative pressure' within the meaning of the patents.").

229. *Kinetic Concepts*, 554 F.3d at 1020–21 (Fed. Cir. 2009).

patent infringement lawsuits.[230] In Japan, Technical Advisors and Judicial Research Officials play a vital role in helping the High Court understand the complexities of the technology at issue.[231] The Court of Appeals for the Federal Circuit addresses this issue by providing its judges with four law clerks and a judicial assistant.[232] The judges on the Federal Circuit generally require that their clerks possess a technical background.[233] In addition, the court provides a senior technical assistant and three technical assistants with technical degrees for the judges' use.[234] Finally, some of the judges themselves have earned advanced technological degrees.[235]

The Federal Circuit's level of expertise is necessitated by the fact that forty-one percent of the appeals heard before the court in fiscal year 2010 dealt with intellectual property issues.[236] However, in a case like *Kinetic Concepts*, where the District Court charged the jury with a general verdict, the Federal Circuit's review is limited to "'*re-creating* the facts as they *may have been found* by the jury,' and determining whether such hypothetical facts would be sufficient to support a legal conclusion of validity on *any* theory."[237] It seems unlikely that a strong technical background is needed in attempting to recreate the facts found by the jury. However, a strong technical background would likely be useful in determining whether the *hypothetical facts* support a legal conclusion.

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230. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 6, para. 3 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1; 28 U.S.C. § 1295 (2010).

231. *Technical Advisors in Intellectual Property Lawsuits*, *supra* note 96.

232. *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited Mar. 27, 2011).

233. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 18 (2001).

234. Brooke Terpening, Comment, *Practice Makes Perfect? An Empirical Analysis of H.R. 5418*, 4 FIU L. REV. 287, 294 (2008) ("The technical assistants assist the judges in reviewing cases before oral argument, by doing legal research, drafting memoranda, and participating in the court's process for avoiding conflicts in published opinions.").

235. *Id.* "As of 2001, four of the twelve Federal Circuit judges had technical backgrounds." *Id.*

236. *Appeals Filed, by Category FY 2010*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2010.pdf (last visited Mar. 27, 2011).

237. Petition for a Writ of Certiorari, *supra* note 6, at 4 (quoting McGinley v. Franklin Sports, Inc., 262 F.3d 1339, 1351 (Fed. Cir. 2001) (emphasis in original)). *See* Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1021 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009) ("[W]e must assume that the jury found that the prior art does not disclose 'treating a wound with negative pressure' within the meaning of the patents.").

B. Germany

This section compares (*i*) German opposition proceedings and their U.S. equivalent, (*ii*) the jurisdiction elements of infringement and nullity proceedings, and (*iii*) the expertise of the jurists for patent infringement lawsuits in both countries.

i. Opposition Proceedings

German opposition proceedings are somewhat equivalent to reexamination proceedings before the United States Patent and Trademark Office (USPTO).[238] Like German opposition proceedings, reexamination proceedings are commenced by the submission of a request for reexamination to the USPTO.[239] Similar to opposition proceedings, any person may file a request for reexamination because there is no standing requirement for a reexamination.[240] However, the United States does not limit the filing of a request for reexamination to a three-month time frame after publication. (A request for reexamination may be filed at any time.)[241]

Similar to appeals of opposition proceedings heard before the German Federal Patent Court,[242] appeals of reexaminations are heard before the Court of Appeals for the Federal Circuit.[243] However, the Court of Appeals for the Federal Circuit reviews the factual determinations of the Board of Patent Appeals and Interferences under the substantial evidence standard,[244] which is the same standard that it uses for review of District Court factual determinations.[245] Additionally, the Court of Appeals for the Federal

238. *See generally* Edited & Excerpted Transcript, Symposium, *Ideas into Action: Implementing Reform of the Patent System*, 19 BERKELEY TECH. L.J. 1053 (2004) (generally speaking about the U.S. reexamination procedure and potential reforms that can be undertaken by learning from both European and Japanese Opposition Proceedings).

239. 35 U.S.C. § 302 (2010) (requests for *ex parte* reexamination proceedings); 35 U.S.C. §311 (2010) (requests for *inter partes* reexamination proceedings).

240. 35 U.S.C. § 302; 35 U.S.C. § 311 (subject to the limitation that the party requesting the reexamination may not have previously filed a request which rendered a decision favorable to patentability, or that the requestor has a final decision entered against them in a civil action brought under 28 U.S.C § 1338 for failure to meet their burden on invalidity).

241. 35 U.S.C. § 302; 35 U.S.C § 311.

242. 2007 INFORMATION BROCHURE, *supra* note 128, at 13, 24–25.

243. 35 U.S.C. § 314 (2010) (permits that *inter partes* reexamination appeals may first be heard before the Board of Patent Appeals and Interferences under 35 U.S.C. § 134 (2010), and an appeal of that decision may be heard before the Court of Appeals for the Federal Circuit under 35 U.S.C. § 141 (2010)).

244. *In re* Gartside, 203 F.3d 1305, 1316 (Fed. Cir. 2000) ("Although we have previously reviewed the Board's factual determinations in an obviousness analysis for clear error, we now review them for substantial evidence.") (internal citation omitted).

245. Structural Rubber Products Co. v. Park Rubber Co., 749 F.2d 707, 719 (Fed. Cir. 1984).

Circuit reviews the USPTO's decisions on questions of law *de novo*.[246] In contrast, the German Federal Patent Court reviews both questions of law and questions of fact *de novo* and is not susceptible to the problems that arise in the United States' dual-standard system.[247]

ii. Jurisdiction in Infringement and Nullity Proceedings

Germany exclusively grants jurisdiction for claims of invalidity due to non-obviousness to its Federal Patent Court in nullity proceedings, after the opposition period expires.[248] By contrast, the United States grants jurisdiction to ninety-four separate district courts,[249] and Japan merely grants concurrent jurisdiction to its specialized district courts.[250] Germany's exclusive standard promotes efficiency and consistency because of the judges' familiarity with the proceedings.[251] The current system in the United States does not ensure that judges are equally familiar with patent cases.[252] A House of Representatives report by the 109th Congress discussing a Pilot Program for Patent Judges reported:

> Given this background--the relative infrequency of patent litigation, early settlement of most suits, and random assignment of cases--district court judges generally receive little exposure to actual patent claim trials. One judge from the U.S. District Court in Chicago, historically one of the top five busiest district courts in terms of patent case

246. *Gartside*, 203 F.3d at 1316 ("Whether a claimed invention is unpatentable as obvious under § 103 is a question of law based on underlying findings of fact. . . . The Board's legal conclusion of obviousness is reviewed de novo.") (internal citations omitted).

247. *See supra* Part III.A.ii.

248. CAMPENHAUSEN, *supra* note 20, at 2; PATENTGESETZ [PATG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 81, para. 2 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126259 (last visited Mar. 27, 2011).

249. 28 U.S.C. § 1338(a) (2010) (granting jurisdiction to all U.S. District Courts for patent infringement suits).

250. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 6 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1.

251. *See* H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109& (purposing that restricting the judges who hear patent cases promotes the expertise of the judges and the improvement of the adjudication).

252. *See supra* Part III.A.ii.

> filings, reported his personal patent case workload never exceeded five percent of his calendar.[253]

The disparity in expertise between a judge with a small percentage of his overall caseload in the area of patent litigation, and a five-judge board that exclusively hears cases regarding the validity of patents is clear.[254]

However, the current U.S. system not only calls upon its district court judges to conduct an inquiry into the validity of the patent at issue, but also requires the district court to conduct an infringement trial concurrently.[255] Germany addresses this requirement of separate skill sets by giving jurisdiction for infringement trials to its civil courts of general jurisdiction and not the Federal Patent Court.[256] Infringement proceedings before the civil courts of general jurisdiction are conducted under the assumption of validity of the patent.[257] If the validity is challenged, that challenge is heard before a Nullity Board of the Federal Patent Court; as a result the proceeding before the civil court for general jurisdiction may be suspended.[258] The separation of infringement from nullity proceedings in the German system creates a venue for nullity proceedings where not all of the judges need be judicially qualified and technical experts of the German judicial system are also allowed to have a vote in the proceedings.[259]

iii. Jurists

One significant difference between United States' patent litigation suits and German nullity proceedings is the expertise of the jurists trying the suit. A German Nullity Board is composed of three judges with technical backgrounds and two judges with law-based backgrounds.[260] The three technically qualified judges of the Board have technical expertise in the subject matter at hand and are able to objectively weigh the substance of the propositions offered by the parties.[261] Like the fact finder in Japan, the German judges are not forced to base their decision on the subjective

253. H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&.

254. *Id.*

255. *See* Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1013–14 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009) (Medela, Inc. and Blue Sky Medical Group, Inc. appealed the district court's ruling on both obviousness and infringement.).

256. 2007 INFORMATION BROCHURE, *supra* note 128, at 6–7.

257. BOPP & TRIMBORN, *supra* note 153, at 4.

258. 2007 INFORMATION BROCHURE, *supra* note 128, at 7.

259. CAMPENHAUSEN, *supra* note 20, at 4.

260. *Id.*

261. 2007 INFORMATION BROCHURE, *supra* note 128, at 8.

trustworthiness of a particular witness.[262] Instead, the judges are permitted to question the witnesses while conducting their own investigation into the relevant facts,[263] which allows the judges the opportunity to fully examine the witnesses' propositions on their technical merits.[264] These procedures allow the Board to fulfill the German Patent Law requirement that judges document the reasoning for their decisions.[265]

In contrast, when a jury in the United States is asked to determine the obviousness of a claimed invention, the jury's understanding is likely restricted by the proficiency of the parties' expert witnesses' presentations.[266] Again, this was the case in *Kinetic Concepts*.[267] There, the Court of Appeals for the Federal Circuit quoted Fifth Circuit precedent in stating that "in case[s] of conflicting expert testimony, the jury is entitled to make credibility determinations and believe the witness it considers more trustworthy."[268] The current system relies on the subjective trustworthiness of the expert witnesses whereas the German system relies on the objective understanding of the technology at issue by the court's own technical experts.[269] The German system better promotes uniformity as compared to that of the United States.

In the current U.S. system, preventing the jury from answering the obviousness question through special interrogatories is unlikely to help. The minimal requirements for jury service in the United States' federal courts[270] are no more technically demanding than the requirements to be a federal judge.[271] The criteria does not include a full-fledged academic formation in science or engineering,[272] passage of an academic examination and five years practical experience,[273] and recruitment exclusively from the United States Patent and Trademark Office.[274] As such, it is unlikely that a district court judge in the United States' current system would be in as

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262. PATENTGESETZ [PatG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 87, para. 1 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126259 (last visited Mar. 27, 2011).

263. *Id.*

264. *Id.*

265. *Id.* § 93, para. 1.

266. Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1018–20 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

267. *Id.*

268. *Id.* at 1020 (*quoting* Streber v. Hunter, 221 F.3d 701, 726 (5th Cir. 2000)).

269. 2007 INFORMATION BROCHURE, *supra* note 128, at 8.

270. *See supra* Part III.A.ii.

271. *Frequently Asked Questions*, U.S. COURTS, http://www.uscourts.gov/faq.html (last visited Mar. 27, 2011).

272. 2007 INFORMATION BROCHURE, *supra* note 128, at 8.

273. *Id.* at 9.

274. *Id.*

strong a position as a similarly situated judge in Germany to make an objective determination on the technology at issue in a patent suit.[275]

IV. POSSIBLE SOLUTIONS IN ADDRESSING THE OBVIOUSNESS QUESTION IN PATENT LITIGATION

The pleas of some of the largest patent holders in the United States, in the form of *amici curiae* briefs supporting the petition for certiorari in *Kinetic Concepts*, signify that the United States is in need of a new patent litigation system that is capable of better promoting uniformity at the district court level and broader review at the appellate court level.[276] An underlying theme of uniformity has been the driving force behind the evolution of the patent litigation systems in Germany, Japan, and the United States. In Germany, this is evident through the creation of the Federal Patent Court and the court's jurisdiction over issues involving patent validity.[277] It is also seen through the fact that there is only one civil panel on the Federal Court of Justice that hears appeals of patent cases.[278] In Japan, the Code of Civil Procedure's grant of concurrent jurisdiction for the Tokyo and Osaka District courts in patent proceedings[279] and creation of the Intellectual Property High Court increases uniformity.[280] Finally, in the United States, a driving force behind the creation of the Court of Appeals for the Federal Circuit was the assurance of greater uniformity in patent law.[281] The most notable difference between the U.S. solution and the solutions in Japan and Germany is that in the United States nothing has been done at the district court level to assure uniformity of the law as applied.[282]

Generally, there are four key elements of the current U.S. system that are most in need of change. Drawing from the comparisons against Japan and Germany, three of the elements can be addressed by changes in the U.S. patent litigation system at the district court level. These changes include centralized district courts that possess sole jurisdiction on issues of patent law, restrictions on the use of special interrogatories in patent law cases,

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275. *See generally* H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&.

276. Brief for Intel Corporation, *supra* note 15; Brief for Apple, Inc., *supra* note 15.

277. 2009 INFORMATION BROCHURE, *supra* note 148, at 2.

278. *Id.* at 22.

279. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 6 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1.

280. *Id.* para. 3; *Jurisdiction*, *supra* note 104.

281. CHISUM, *supra* note 26, § 5.04(3)(d).

282. *See generally* H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109& (proposing a means for creating greater uniformity at the U.S. district court level).

and jurists at the district courts with scientific expertise. The final element is *de novo* review of the law application step by the Court of Appeals for the Federal Circuit.

A. Centralized District Courts

The sheer size of the United States makes it impractical to propose a solution similar to Germany or Japan where the district court proceedings would be centralized in one or two districts.[283] In contrast, there are too few patent lawsuits commenced in a given year to justify having a judgeship solely devoted to patent law in all ninety-four districts.[284] In addressing a similar problem, the United States' federal judicial system operates through thirteen federal circuit courts at the appellate level,[285] located in twelve different regions throughout the country.[286] A similar method of regional location could be adopted for a district court with exclusive jurisdiction over patent rights because "[p]atents are exclusively governed by federal law",[287] and there is no need for the court's jurisdiction to be constrained by state boundaries.

Placement of a district court with exclusive jurisdiction over adjudication of patent rights in each of the twelve different regions for the federal circuit courts would be a viable option for the given problem.[288] Of course, there may be some regions where patent lawsuits may be more frequent, which could be addressed with the creation of a second or third

283. The total area of the United States is 9,826,675 square kilometers. *The World Factbook: United States*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last updated Mar. 23, 2011) (click on "Geography" tab). Japan has a total area of 377,915 square kilometers. *The World Factbook: Japan*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html (last updated Mar. 23, 2011) (click on "Geography" tab). Germany has a total area of 357,022 square kilometers. *The World Factbook: Germany*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ gm.html (last updated Mar. 23, 2011) (click on "Geography" tab). The United States is over twenty-six times larger geographically than Japan and over twenty-seven times larger geographically than Germany.

284. There were 2,937 lawsuits commenced in United States district courts in 2007 where the nature of the suit dealt with patent rights and there were 2,951 lawsuits commenced for the same reason in 2008. U.S. COURTS, *supra* note 221, at 30.

285. 28 U.S.C. § 41 (2010).

286. *Court Locator*, U.S. COURTS, http://www.uscourts.gov/court_locator.aspx (last visited Mar. 27, 2011).

287. *Patent Overview*, LEGAL INFO. INST., CORNELL UNIV. LAW SCH. (Aug. 19, 2010, 5:21 PM), http://topics.law.cornell.edu/wex/Patent.

288. Both the District of Columbia Circuit Court of Appeals and the Circuit Court of Appeals for the Federal Circuit are located in Washington D.C. Therefore, a district court with exclusive jurisdiction over patent law need only be located at one of the two circuit courts in Washington, D.C. *Court Locator*, *supra* note 286.

judgeship. The U.S. Congress creates new judgeships through legislation; therefore, the creation of this proposed system would be done through an act of the legislative branch of the U.S. government.[289]

Both the district court judges and party participants in a given lawsuit would reap the benefits of the change. The district court judges would gain expertise through experience, which is critical in any form of adjudication.[290] Additionally, the judges' gained expertise would provide greater certainty to the parties, and in turn, reduce litigation costs via lower reversal rates.[291] Overall, such a system would increase a patent's value through decreased expected litigation costs and would increase judicial efficiency through familiarity.

B. Restriction on the Use of Special Interrogatories

Japan's and Germany's requirement that their district courts and nullity boards specifically state the reasoning used when making determinations on obviousness significantly aids the appellate court's review by increasing the decision's clarity.[292] In comparison, although the United States Supreme Court held in *KSR International Co. v. Teleflex Inc.* that a court's obviousness analysis must be made explicit,[293] *Kinetic Concepts*, which followed Federal Circuit precedent,[294] determined that special interrogatories coupled with a jury's subjective determinations of expert witnesses was sufficient to satisfy the Supreme Court's explicit

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289. *Frequently Asked Questions*, *supra* note 271.

290. Moore, *supra* note 233, at 30 ("While it may be true that district court judges see more patent cases than the average juror, generally they do not adjudicate enough patent cases to develop expertise with the law and certainly not with the technology which changes from case to case.").

291. A study by current Court of Appeals for the Federal Circuit Judge Moore showed that from 1983–1999, 22% of patent validity issues appealed to the court were reversed. *Id.* at 17. In comparison, a House of Representatives report on a pilot program for patent judges states that the national reversal rate for civil and criminal appeals to the federal circuit courts is less than ten percent. H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&.

292. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.], 1996, art. 253, para. 1 (Japan), *translated in Japanese Law Translation*, MINISTRY OF JUSTICE, JAPAN (Apr. 1, 2009), http://www.japaneselawtranslation.go.jp/law/detail/?id=1940&vm=04&re=02&new=1; PATENTGESETZ [PATG] [PATENTS LAW], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL. I], as amended, § 93, para. 1 (Ger.), *translated in* WORLD INTELLECTUAL PROP. ORG., WIPO DATABASE OF INTELLECTUAL PROPERTY LEGISLATIVE TEXTS, GERMANY: PATENT LAW, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126259 (last visited Feb. 18, 2011).

293. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007).

294. *See* Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1234 (Fed. Cir. 1989); Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983).

analysis requirement.[295] A requirement that United States district court judges perform the law application step outside of special interrogatories would provide clarity for the Federal Circuit's review and eliminate the need for the Federal Circuit to speculate on a jury's subjective determination.[296]

Although the United States Supreme Court's call for explicit analysis of an obviousness determination has already solidified the requirement that a district court judge perform the law application step,[297] as stated in *Kinetic Concepts*,[298] further action by the Supreme Court is necessary to enforce the requirement. The Court, through its denial of certiorari, passed on a prime opportunity to do so in *Kinetic Concepts*. However, should the Court choose to hear a similar case in the future, a holding disallowing the use of special interrogatories as they apply to the law application step of the obviousness analysis would create such a precedent.

The benefits of such a precedent would be recognized foremost by the Federal Circuit and the parties to patent litigation. The Federal Circuit's review of the district court's reasoning would be facilitated by explicit analysis found in the form of a written opinion. The guesswork of determining subjective inferences would be eliminated. Parties would see benefits in the form of greater certainty, eventually translating into reduced expected litigation costs, which correlate to an overall increase in the value of society's intellectual property.

C. Jurists with Scientific Expertise

One of the most significant aspects of both the Japanese and German patent litigation systems is the expertise of the individuals involved in the adjudication process.[299] Although the systems differ in that German judges possess technical expertise[300] whereas Japanese judges rely on judicial research officials and technical advisors with technical expertise,[301] both systems center around a philosophy of increased understanding of complex technical issues.[302] In order for United States district courts to better adjudicate patent rights, the United States must adopt a similar philosophy of understanding complex technical issues. An ideal system would adopt elements of both the Japanese and German systems and would require

295. *See* Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

296. *Id.* at 1018–20.

297. *KSR Int'l Co.*, 550 U.S. at 418.

298. *See Kinetic Concepts*, 554 F.3d at 1010.

299. *See supra* Parts II.B–C.

300. *See supra* Part II.C.iii.

301. *See supra* Part II.B.

302. *See supra* Parts II.B–C.

greater technological expertise from both district court judges and their clerks.

The United States presently has a vast system of technical expertise in place through the United States Patent and Trademark Office. Like Germany, the United States can recruit judges with technical expertise exclusively from the USPTO.[303] At the end of the fiscal year 2009, the USPTO employed 6,243 patent examiners.[304] The USPTO currently provides its patent examiners with technology-specific legal and technical training.[305] Were the United States to adopt a system like Germany's, further practices and training could be implemented within the USPTO to create an environment where patent examiners could be prepared for service on the federal judiciary.

Appointments to the federal judiciary come from the President of the United States with confirmation by the Senate.[306] Although the United States Constitution requires appointment in this fashion, there are no constitutional criteria for appointments to the federal judiciary.[307] A requirement that a federal patent judge must have technical expertise would merely be an additional criterion in the vetting process of the Department of Justice and Congress. If such a criterion were implemented into the vetting process, it would pay substantial dividends in terms of the technical expertise of U.S. district courts for patent cases.

Qualifications for law clerks are decided by the hiring judge within the bounds of the mandated parameters of the Judicial Conference of the United States.[308] However, requiring jurists to have scientific expertise would only make sense in a system of centralized district courts that possess exclusive jurisdiction over patent rights.[309] As such, it would seem implicit that those judges would require some form of technical expertise from their clerks.

The benefits of requiring judges with technical expertise at the district court level would fall upon all of those involved in the litigation and even those outside of it. The district judges would have confidence in their own understanding of the issue at hand,[310] the parties would not be prisoners to

303. *See supra* Part II.C.iii.

304. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2009 11 (2009), *available at* http://www.uspto.gov/about/ stratplan/ar/2009/2009annualreport.pdf.

305. *Id.* at 107.

306. U.S. CONST. art. II, § 2.

307. *Frequently Asked Questions*, *supra* note 271.

308. *Qualifications, Salary, and Benefits*, OSCAR, U.S. COURTS, https://oscar.uscourts.gov/drupal/content/qualifications-salary-and-benefits (last visited Mar. 27, 2011).

309. *See supra* Part IV.A. There could be an argument that having jurists with scientific expertise would be useful in a system that only centralized exclusive jurisdiction over patent rights implicitly.

310. *See supra* Part II.C.iii.

the jury's subjective determinations on the credibility of expert witnesses,[311] and the Federal Circuit would likely receive more well-reasoned and objective opinions.[312] However, the largest beneficiary would be society as a whole. Patent rights would be better defined because the percentage of reversals at the Federal Circuit would likely decrease.[313] This phenomenon would lead to reduced expected litigation costs, correlating to an overall increase in the value of society's intellectual property.

D. De Novo Review of the Law Application Step

Current Federal Circuit Judge Kimberly Ann Moore[314] stated it best when she posited that, in addressing a better patent litigation system, "[i]deally, the solution lies in increasing the accuracy at the trial level."[315] In addition to increasing accuracy at the trial level, the systems of Japan and Germany also give their appellate courts *de novo* review of the lower court's determination.[316] *De novo* review by the Federal Circuit of the law application step in patent litigation would provide both clarity and certainty to the U.S. district courts and to patent rights holders. As such, it is an essential element for the advancement of the United States' patent litigation system.

De novo review of the law application step directly correlates to any restriction on the use of special interrogatories that the Supreme Court might create through its decisions.[317] Current Supreme Court precedent dictates that the ultimate question of a patent's validity is one of law.[318] Therefore, technically, the Federal Circuit's current review of the law application step is a *de novo* review.[319] However, in combination with a restriction on the use of special interrogatories, the true benefit of the Federal Circuit's review will be in the form of its explicit analysis of the law application step as required by *KSR International Co. v. Teleflex Inc.*[320]

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311. *See supra* Part III.A.ii.

312. *See* H.R. REP. NO. 109-673 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109& (seeking to promote the expertise of district court judges and the improvement of their adjudication).

313. The district court reversal rate on patent claim terms is 33% as compared to just 10% for all other types of cases. *Id.*

314. *Kimberly A. Moore, Circuit Judge*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/judges/kimberly-a-moore-circuit-judge.html (last visited Mar. 27, 2011).

315. Moore, *supra* note 233, at 38.

316. *See supra* Parts II.B.; II.C.iii.

317. *See supra* Part IV.B.

318. Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 17–18 (1966).

319. *Id.*

320. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007).

Many different groups will recognize the benefits of such a requirement. The district courts will receive guidance in conducting the law application step through Federal Circuit precedent. The Federal Circuit's review will be aided by the added consistency in application at the district court level. Ultimately, society will benefit by the increased value afforded to intellectual property through the certainty created within the patent litigation system.

CONCLUSION

The patent litigation systems of Japan and Germany are designed to promote confidence and efficiency in the adjudication of patent rights. If the United States adopted procedures and systems similar to those of Japan and Germany, it would provide better protection for the intellectual property of some of the most complex U.S. industries. Also, it would foster an environment where patent rights are well defined and would inspire increased creativity in the United States. An environment that inspires increased creativity is necessary for growth in today's global economy. Therefore, it would be detrimental for the United States to fall behind its peers in terms of intellectual property if it seeks to maintain its significant place in the world's economy. Accordingly, decisions addressing the U.S. patent litigation system in the near term will have a significant effect on the technological importance of the United States for decades to come.

LANDLORD MORTGAGE DEFAULTS AND STATUTORY TENANT PROTECTIONS IN U.S. FORECLOSURE AND U.K. REPOSSESSION ACTIONS: A COMPARATIVE ANALYSIS

Ryan K. Lighty*

The ache for home lives in all of us,
the safe place where we can go as we are and not be questioned.

–Maya Angelou

INTRODUCTION

During the 2007–2009 global financial crisis,[1] mortgage foreclosure rates in the United States rose to levels not seen since the Great Depression.[2] Repossession rates in the United Kingdom also spiked, demonstrating that this phenomenon was not limited to the American side of "the pond."[3] While many media reports acknowledge the ills of owner-occupants mired in the modern foreclosure crisis, renters are often the forgotten victims.[4]

The foreclosure/repossession problem has affected not-quite-innocent parties such as banks that gave bad loans and homeowners who took loans they could not afford.[5] However, the effects also reach a large percentage of people who are losing their principal place of residence through no fault

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† *The views and opinions expressed herein are solely those of the author and do not necessarily represent the views and opinions of the U.S. Nuclear Regulatory Commission or the United States Government.*

1. *See generally* William Poole, *Causes and Consequences of the Financial Crisis of 2007–2009*, 33 HARV. J.L. & PUB. POL'Y 421, 422–26 (2010) (discussing the causes of and conditions leading to the financial crisis).

2. Lawrence H. White, *How Did We Get into This Financial Mess?*, CATO INST. (Nov. 18, 2008), http://www.cato.org/pub_display.php?pub_id=9788.

3. Mark Smith, *In Brief: Home Repossessions 'Set for New Record'*, SCOTSMAN (Edinburgh, Scotland), Nov. 12, 2009, http://thescotsman.scotsman.com/politics/Home-repossessions--39set-for.5816967.jp.

4. Tim Logan, *Renters Often Become the Forgotten Victims*, ST. LOUIS POST-DISPATCH, June 28, 2008, at B1, *available at* 2008 WLNR 11664140.

5. *Id.*

of their own: renters.[6] Many of these renters are innocent victims of the battered global economy.[7]

If a borrower defaults on a promissory note and mortgage, the bank may reclaim its possessory interest and sell the property to fulfill the outstanding debt.[8] This may force an owner, or tenant, to vacate the property.[9] At common law, renters have few rights, if any, when the property's owner defaults on the promissory note of a mortgaged rental property; renters can be forced to suddenly leave their home.[10] This is an especially harsh scenario if the tenant has "clean hands" and has made timely rent or lease payments.

The number of people affected by this phenomenon is significant.[11] Recent estimates suggest that a substantial number of foreclosures involve a landlord–tenant relationship.[12] In fact, in New York City, nearly 60% of the 15,000 notices of foreclosure filed in 2007 were on multi-family buildings.[13] Ejectments—orders directing homeowners to vacate properties sold at an auction or sheriff's sale—have more than doubled in some places.[14]

The harms that flow to renters from landlord defaults are significant. Unscrupulous landlords facing a foreclosure or repossession are not likely to maintain the property and often raid the tenant's security deposit for use on the mortgage payment.[15] In addition, since a foreclosure or repossession action essentially erases any existing lease agreement, tenants can be evicted from the premises.[16] This involuntary displacement causes irreparable detriment to both occupants and society in general.[17]

As one scholar notes, "[m]ost . . . renters are not wealthy enough to obtain security of tenure by agreement with the landowner, and therefore

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6. *See* Arminé Bazikyan, Comment, *Renters: The Innocent Victims of the Foreclosure Mortgage Crisis*, 39 SW. L. REV. 339 (2009).

7. *See* Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 975 (2010).

8. CARYL A. YZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS §4:37 (Thomson/West 2005).

9. *Id.*

10. *See* Aleatra P. Williams, Symposium, *Real Estate Market Meltdown, Foreclosures and Tenants' Rights*, 43 IND. L. REV. 1185, 1196–97 (2010).

11. Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 4–5 (2009).

12. Bazikyan, *supra* note 6, at 348–49.

13. Been & Glashausser, *supra* note 11.

14. Alan J. Heavens, *As Moratoriums Expire, Home Ejections Climb*, PHILADELPHIA INQUIRER, June 16, 2009, at C02, *available at* 2009 WLNR 11487756.

15. Bazikyan, *supra* note 6, at 350–51.

16. Johnson, *supra* note 7.

17. *See* Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

rely upon the government to assure them some protection against . . . terminations of occupancy."[18] In response to this reality, there have been many approaches to altering the strict common law outcome. From procedural rules in the United Kingdom that extend the notice period for ejecting tenants,[19] to local law enforcement directives that obligate purchasers of foreclosed homes to provide relocation costs to ousted tenants,[20] to United States laws that require institutional purchasers to honor existing lease agreements regardless of priority,[21] government solutions have been diverse.

Statutory protections for tenants facing foreclosure or repossession are relatively new.[22] Part I of this Note examines the need for statutory tenant protections and discusses the research and lobbying work of tenant advocacy groups. Specifically, Part I focuses on independent research studies that show substantial numbers of renting individuals and families are affected by landlord foreclosure. Furthermore, these studies highlight the significant individual and societal harms that flow from involuntary displacement of innocent tenants.

Parts II and III examine statutory tenant protections in the United States and the United Kingdom, respectively. The bulk of these discussions focus on two major legislative undertakings: the Protecting Tenants at Foreclosure Act of 2009 (U.S.) and the Mortgage Repossessions (Protection of Tenants etc) Act 2010 (U.K.). This Note scrutinizes the textual meaning and underlying legislative intent of these Acts. Criticisms of these legislative works are also explored, along with the possibilities for future statutory tenant protections. Part IV considers recommendations for improving the Acts and highlights lessons the Americans can learn from the British, and vice-versa. Finally, the Note concludes that statutory tenant protections must become permanent fixtures of United States and United Kingdom law.

PART I: THE NEED FOR STATUTORY TENANT PROTECTIONS

In order to comprehensively evaluate tenant protection legislation, it is important to first consider the underlying issues giving rise to public demand for such laws. Awareness of the structural deficiencies of the

18. *Id.* at 817–18.

19. Chiara Cavaglieri, *Tenants Left Homeless by Defaulting Landlords*, INDEPENDENT ON SUNDAY (UK), July 5, 2009, http://www.independent.co.uk/money/spend-save/tenants-left-homeless-by-defaulting-landlords-1731820.html.

20. Tom Clark, *Sheriff's Office Details How Eviction Process is Supposed to Work*, PHILADELPHIA DAILY NEWS, June 16, 2009, at 6, *available at* 2009 WLNR 11487794.

21. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701–704, 123 Stat. 1632 (2009).

22. *See, e.g., id.*

common law will help inform a pertinent analysis regarding the necessity or adequacy of current legislation. This section discusses the importance of *security of tenure* and examines multiple policy-relevant findings that point to the need for statutory tenant protections.

A. Security of Tenure and Involuntary Displacement

Throughout history, the concept of "home" has carried special meaning.[23] It can impart a sense of belonging, comfort, and security.[24] Research indicates that "homes are sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks."[25] A home can also provide individuals with a sense of citizenship, personhood, and identity.[26] Indeed, people's homes are their castles; "[b]y their physical nature, homes provide their inhabitants with a measure of security against attack or invasion by other individuals" or by the government.[27] United States Supreme Court Justice Oliver Wendell Holmes even noted, "[h]ousing is a necessary of life."[28]

Security of tenure is the right of a tenant to continue to occupy a dwelling or site absent good cause.[29] It is arguably "one of the most important elements of the human right to housing" because it is "the basis upon which residents build their lives."[30] This continuity provides a foundation for school attendance, religious exercise, social participation, and employment activities of children and adults.[31] With so much at stake, it is easy to see why security of tenure provides much more than mere socioeconomic status.

"Involuntary displacement from a home is an obvious, immediate, and tangible injury."[32] When tenants are involuntarily displaced, their ability to make financial, psychological, and emotional investments in their

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23. Kristen David Adams, *Do We Need A Right To Housing?*, 9 NEV. L.J. 275, 305 (2009).

24. *Id.* at 305–07.

25. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 277 (2006).

26. Adams, *supra* note 23, at 307–09. *See generally* Michael Sorkin, *More or Less*, in THE HOME HOUSE PROJECT: THE FUTURE OF AFFORDABLE HOUSING 10 (David J. Brown ed., 2004) (arguing that a home is a means of asserting personal identity); Padraic Kenna, *Housing Rights - The New Benchmarks for Housing Policy in Europe?*, 37 URB. LAW. 87 (2005) (asserting that housing is an important component of fully realized personhood).

27. Barros, *supra* note 25, at 260.

28. Block v. Hirsh, 256 U.S. 135, 156 (1921).

29. Roisman, *supra* note 17, at 819.

30. *Id.* at 820.

31. *Id.*

32. Ann B. Lever & Todd Espinosa, *A Tale of Two Fair Housing Disparate-Impact Cases*, 15-SPG J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 257, 261 (2006).

homes and neighborhoods is disrupted.[33] For the elderly, it can cause even greater harms including illness and death.[34]

Residential instability is a major cause of school-related problems for children.[35] These problems can cause serious educational and social disruptions for both transient students as well as the non-transient students in a classroom.[36] Involuntary displacement can even lead to literal homelessness for poor individuals who may be unable to make timely alternative living arrangements.[37] Homelessness has its own set of distinct detrimental effects including "division of families, with children wrested from their parents' custody to be institutionalized or placed into foster care."[38] When involuntarily displaced tenants suffer physical or mental injury, family disruption, homelessness, or foster care placement because of forced displacement, *society* bears heavy financial and other costs.[39] Reduction or elimination of these societal harms should be a key goal of tenant protection legislation.

B. Policy Arguments for Statutory Tenant Protections in the United States

According to a 2008 report by the National Low Income Housing Coalition (NLIHC),[40] six distinct and policy-relevant findings point to the need for statutory tenant protections.[41] These findings highlight the significant number of individuals affected by landlord default scenarios, the harms incurred by these individuals, and the ease with which mitigation can be achieved via simple statutory safeguards.

The first finding notes that, "[m]ore than 20% of the properties facing foreclosure nationwide are rentals."[42] The NLIHC points out that the Mortgage Bankers Association (MBA)[43] estimates that one in five

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33. Roisman, *supra* note 17, at 820.

34. *Id.* at 822.

35. *Id.* at 821–22.

36. *Id.* at 822.

37. *Id.* at 823.

38. *Id.*

39. *Id.* at 828.

40. The NLIHC is an advocacy group "dedicated solely to achieving socially just public policy that assures people with the lowest incomes in the United States have affordable and decent homes." NATIONAL LOW INCOME HOUSING COALITION, http://www.nlihc.org (last visited May 22, 2011).

41. DANILO PELLETIERE, NATIONAL LOW INCOME HOUSING COALITION, RENTERS IN FORECLOSURE: DEFINING THE PROBLEM, IDENTIFYING SOLUTIONS 4 (2008), *available at* http://www.nlihc.org/doc/renters-in-foreclosure.pdf.

42. *Id.* at 6.

43. The MBA "is the national association representing the real estate finance industry . . . ." *About MBA*, MORTGAGE BANKERS ASS'N, http://www.mbaa.org/AboutMBA (last visited May 22, 2011).

properties with a delinquent mortgage is not owner-occupied. RealtyTrac[44] speculates that the number is closer to one in three, but climbs to roughly half of all foreclosures in Nevada, Illinois, and New York; and Hennepin County, Minnesota, conducted its own investigation revealing that forty-three percent of the county's foreclosed properties were tenant-occupied.[45] These findings illustrate the *significant* number of homes potentially affected by a landlord default situation.

Second, "[b]ecause rental properties often are home to *multiple* families, renters make up roughly 40% of the families facing eviction."[46] Studies conducted by the NLIHC, the Furman Center for Real Estate and Urban Policy,[47] and the Woodstock Institute[48] suggest that between thirty-two percent and sixty percent of properties in foreclosure contain more than one dwelling unit.[49] The report notes that studies have reinforced the conclusion that the proportion of rentals in foreclosure exceeds twenty percent, particularly in areas with high proportions of renters.[50]

Third, low income and minority communities tend to account for a disproportionate percentage of rental foreclosures.[51] Even though the foreclosure crisis is a national phenomenon, it is especially damaging to low income neighborhoods.[52] "Rental units generally serve lower income households and are concentrated in lower income communities."[53]

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44. RealtyTrac is an "online marketplace of foreclosure properties" that "collects and aggregates foreclosure data from more than 2,200 counties, covering more than 90 percent of U.S. households . . . ." *RealtyTrac Backgrounder*, REALTYTRAC, http://www.realtytrac.com/company/backgrounder.html (last visited May 22, 2011).

45. PELLETIERE, *supra* note 41, at 7.

46. *Id.* (emphasis added).

47. The Furman Center is an "academic research center devoted to the public policy aspects of land use, real estate development and housing." *About the Furman Center*, FURMAN CENTER FOR REAL ESTATE AND PUB. POL'Y, http://furmancenter.org/about (last visited May 22, 2011).

48. Woodstock Institute is a "nonprofit research and policy organization in the areas of fair lending, wealth creation, and financial systems reform." *About Woodstock Institute*, WOODSTOCK INST., http://www.woodstockinst.org/about-woodstock-institute (last visited May 22, 2011).

49. PELLETIERE, *supra* note 41, at 7.

50. *Id.* Additionally,

> NLIHC has estimated that 32% of the properties auctioned or bank-owned in four New England states were multifamily properties. In this study, the number in Rhode Island was 41%. A similar study in New York found that 60% of the filings there contained at least two units. In Chicago, 35% of the one-to-six unit property foreclosures had at least two units, suggesting that the proportion of multi-unit properties would be even higher if buildings with six or more units were included.

Id.

51. *Id.* at 8.

52. *Id.*

53. *Id.*

According to data from four New England states, "the foreclosure rate on a per unit basis is more than five times higher in largely non-white, poor neighborhoods than in largely white, low poverty neighborhoods."[54] Roughly sixty percent of foreclosed properties in high-poverty minority neighborhoods are multi-unit buildings, compared to just seven percent in low poverty, white neighborhoods.[55] There is a clear indication that landlord defaults can have far-reaching impacts on disadvantaged communities.

Fourth, "[t]he foreclosure crisis is exacerbating pre-existing rental market imbalances."[56] The report notes that the current state of the national economy is driving incomes down and forcing more individuals and families into rental housing.[57] However, the declines in real estate values are providing little, if any, relief to low income renters.[58] As the number of persons in rental housing increases, so does the pool of potential innocent victims of landlord default situations.

Fifth, "[p]olicies at all levels of government could greatly mitigate the difficulties renters face in foreclosure situations."[59] Since renters are rarely a direct party to a foreclosure action, they are significantly more likely to become homeless, as compared to actual homeowners.[60] A gaping deficiency in the common law is exposed when the persons most directly affected by a foreclosure—the actual occupants—are completely at the mercy of forces beyond their control because their participation in the foreclosure proceedings is neither requested nor desired. This lack of involvement impairs the ability of the renters to make alternative housing arrangements, and can precipitate literal homelessness and its associated parade of horribles. Many of these difficulties can be remedied through government involvement.

The NLIHC report's sixth and final finding suggested that, "[t]he federal government has a crucial role to play."[61] Although real estate law, including foreclosures and evictions, has traditionally been within the purview of state law, the foreclosure crisis is national in scope.[62] The nation's economy is, for better or worse, intimately intertwined with the nation's housing market; the argument that foreclosures are not the proper subject matter of federal legislation is simply uninformed.

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54. *Id.*
55. *Id.*
56. *Id.* at 9.
57. *Id.*
58. *Id.*
59. *Id.* at 10.
60. *Id.*
61. *Id.* at 12.
62. *Id.*

These findings distinctly support the conclusion that statutory tenant protections are necessary and justified, especially in the current economic climate. Further, the findings point to the need for action at the federal level, given the national scope of the problem. The harms have devastating potential, the economic ripple effect has far-reaching implications, and the need for reform is obvious. The policy arguments for statutory tenant protections in the United States are clear and powerful.

C. Policy Arguments for Statutory Tenant Protections in the United Kingdom

In November 2009, the Council of Mortgage Lenders (CML)[63] predicted a large rise in British repossessions compared to previous years.[64] While Parliament had "introduced several measures aimed at reducing the number of repossessions and assisting households in difficulty to remain in their homes," the measures were not directed toward renters.[65] It is challenging to account for a precise number of individuals affected by landlord defaults due to the difficulty of collecting statistics on *unauthorized tenancies*, "those where the landlord has not sought the permission of the lender."[66] Though some tenancies may be binding on the lender,[67] unauthorized tenancies,[68] the focus of this Note, generally are not.[69]

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63. The CML "is a not-for-profit organisation and the trade association for the mortgage lending industry" in the United Kingdom. *About us*, COUNCIL OF MORTGAGE LENDERS, http://www.cml.org.uk/cml/about (last visited May 22, 2011).

64. HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 10/05: MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC.) BILL 2 (2010) [hereinafter HC RESEARCH], *available at* http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-005.pdf.

65. *Id.*

66. *Id.*

67. *Id.* at 4–6.

68. The British government has described "unauthorised tenancies" as follows:

> It is a standard term in most owner-occupier mortgages that the borrower is prohibited from renting out the property or that the lender's consent must be sought before any such tenancy is entered into. Where a borrower lets his property in breach of this requirement or related conditions (eg failing to provide required information to the lender) the "tenancy agreement" will be void as against the lender. We refer to these as "unauthorised tenancies." The effect of this is that the "tenant" has no right against the lender to enforce the terms of that agreement. After repossession therefore they will have no right to remain in occupation and no right to notice of termination of the agreement. Even if the "tenants" are aware of possession proceedings and attend the court hearing, the court has very limited powers to take their situation into account.

DEP'T FOR COMMUNITIES AND LOCAL GOV'T, LENDER REPOSSESSION OF RESIDENTIAL PROPERTY: PROTECTION OF TENANTS 11 (2009) [hereinafter ENGLISH CONSULTATION], *available at* http://www.communities.gov.uk/documents/housing/pdf/1304815.

69. HC RESEARCH, *supra* note 64, at 6.

Under pre-2010 English law-in-force, landlords could evict month-to-month tenants without reason and were only required to (1) give a two month notice to vacate and (2) obtain a judicial possession order.[70] The notice period was designed to provide a necessary "breathing space for tenants to start looking for an alternative home."[71] However, in the case of a defaulting borrower/landlord, the tenant could lose even those basic rights.[72]

Studies suggest that approximately fourteen percent of households in England live in the private rental sector.[73] These tenants are often oblivious to landlord default situations and have no idea they are at risk of losing their homes.[74] English privacy laws prohibit lenders and solicitors from communicating the details of a default directly to the tenants, and landlords are reluctant to notify tenants for fear of rent payments being withheld.[75] Often, the only warning the tenant may receive is a hearing notice or notice of eviction addressed to "The Occupier."[76] However, notices to "The Occupier" are often treated as junk mail, discarded, or remain unopened for extended periods.[77] Frequently, despite being current on rent payments, the first indication renters have of a landlord default is the sudden physical presence of bailiffs who have come to take possession of their home.[78]

Even when tenants received adequate notice and attended the possession hearing, the court had no authority to delay the repossession.[79] "Under these circumstances, tenants are *denied* the rights they would normally be afforded when a landlord chooses to end a tenancy."[80] Tenants can also lose out financially when their landlord is repossessed.[81] Many will never see their deposit returned, and others will likely never recover prepaid rent.[82] This financial setback can make it even more difficult for the tenant to locate alternative housing.[83]

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70. SHELTER, CITIZENS ADVICE, CRISIS & THE CHARTERED INSTITUTE OF HOUSING, A PRIVATE MATTER? - PRIVATE TENANTS: THE FORGOTTEN VICTIMS OF THE REPOSSESSIONS CRISIS 3 (2009) [hereinafter PRIVATE TENANTS], *available at* http://england.shelter.org.uk/__data/assets/ pdf_file/0003/182532/A_private_matter.pdf.

71. *Id.*

72. *Id.*

73. *Id.* at 1.

74. *Id.* at 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. HC RESEARCH, *supra* note 64, at 6.

79. PRIVATE TENANTS, *supra* note 70, at 3.

80. *Id.*

81. *Id.* at 4.

82. *Id.*

83. *Id.*

In 2008, the British Government ordered[84] an independent study of private rental housing,[85] referred to as the Rugg Review. The study was completed in October of 2008.[86] In its formal response to the Rugg Review, the Government included a note on the notice period issue, which stated that the new, longer notice period was a significant improvement from previous practice, but also acknowledged that further action was vital.[87] In point of fact, "the two months' notice referred to is not a statutory requirement but reflects the time period that *may* elapse between issue of a claim for possession and the hearing, which [the relevant Civil Procedure Rule (CPR)] sets at four to eight weeks."[88]

Some groups, including the Association of Residential Letting Agents (ARLA),[89] are troubled by the very real possibility that tenants will misinterpret these notices and prematurely break legally binding tenancy agreements.[90] Other English tenant advocacy groups welcome the CPR changes, but feel they do not go far enough in light of the dismissive treatment given to mail addressed to "The Occupier."[91] Even if tenants open these notices, they are still only provided with short notice of the possession hearing, and do not give the tenants any status in the proceedings or the right to be admitted to the hearing.[92] Some tenants could even panic and abandon the property immediately, exacerbating the landlord's situation by stopping the rental income.[93] Finally, the new rules fell short of addressing situations where the formal proceedings are bypassed (for example, where the landlord surrenders the keys to the lender and the tenant is left with no protections whatsoever).[94]

These findings provide solid arguments for statutory tenant protections beyond mere procedural adjustments. These protections are essential to combating the harms of involuntary displacement in the United Kingdom.

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84. HC RESEARCH, *supra* note 64, at 2.

85. JULIE RUGG & DAVID RHODES, THE U. OF YORK, THE PRIVATE RENTED SECTOR: ITS CONTRIBUTION AND POTENTIAL (2008), *available at* http://www.york.ac.uk/inst/chp/publications/PDF/prsreviewweb.pdf.

86. HC RESEARCH, *supra* note 64, at 2.

87. DEP'T FOR COMMUNITIES AND LOCAL GOV'T, THE PRIVATE RENTED SECTOR: PROFESSIONALISM AND QUALITY: THE GOVERNMENT RESPONSE TO THE RUGG REVIEW 26 (2009), *available at* http://www.communities.gov.uk/documents/housing/pdf/1229922.pdf.

88. HC RESEARCH, *supra* note 64, at 3 (emphasis added).

89. The ARLA is "the professional and regulatory body for letting agents in the UK." *Company Profile – About Us*, ASS'N OF RESIDENTIAL LETTING AGENTS, http://www.arla.co.uk/ about (last visited May 22, 2011).

90. Thomas George, *Tenants Could Fall Foul of Law Meant to Protect Them*, SOUTH WALES ECHO (UK), Aug. 20, 2009, at 3, *available at* 2009 WLNR 16231935.

91. PRIVATE TENANTS, *supra* note 70, at 5.

92. *Id.*

93. *Id.*

94. *Id.*

PART II: STATUTORY TENANT PROTECTIONS IN THE UNITED STATES

On May 20, 2009, President Barack Obama signed the "Protecting Tenants at Foreclosure Act of 2009" (PTFA) into law.[95] Senator Christopher Dodd, sponsor of the Senate bill, and Senator John Kerry, the bill's original author, spoke optimistically on the floor of the United States Senate regarding the intent of the legislation.[96] Senator Dodd noted that the PTFA "protects tenants facing evictions due to foreclosure by ensuring they can remain in their homes for the length of the lease or, at the least, receive sufficient notice and time to relocate their families and lives to a new home."[97] Senator Kerry stressed the importance of the Federal Reserve and the Department of Housing and Urban Development issuing notifications to their regulated entities because "[f]amilies in these precarious circumstances should not be forced individually to assert their rights under the law."[98]

A. The Protecting Tenants at Foreclosure Act of 2009[99]

When the parties and property involved in a foreclosure meet criteria specified in the PTFA, the Act mandates steps that a successor in interest must undertake in order to evict a preexisting tenant (assuming the tenant does not already possess a priority lease).[100] The Act provides that, in many cases, a tenant may continue to occupy the property until the expiration of the lease.[101] The Act specifically provides that the *successor in interest* must provide a "notice to vacate" to any bona fide tenant at least ninety days before the effective date of such notice.[102] It also states that only a purchaser who will occupy the unit as a *primary residence* may terminate a lease executed prior to the date of foreclosure filing.[103] The

95. *Protecting Tenants in Foreclosure*, U.S. FED. NEWS, June 5, 2009, *available at* 2009 WLNR 10781368.

96. 155 CONG. REC. S8978 (2009).

97. *Id.*

98. *Id.*

99. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701–704, 123 Stat. 1632 (2009).

100. Allyson Gold, Note, *Interpreting the Protecting Tenants at Foreclosure Act of 2009*, 19-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 205, 208 (2010).

101. *HR1247: Protecting Tenants at Foreclosure Act of 2009*, CRS BILL DIG., May 11, 2009, *available at* 2009 WLNR 9019121. *See also Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property*, HOUSING & URB. DEV. DEP'T DOCUMENTS, June 24, 2009, *available at* 2009 WLNR 12066597.

102. Protecting Tenants at Foreclosure Act §§ 701–704.

103. *Id.*

lease continuation provision only applies if: (a) the tenant is not the mortgagor (or the child, spouse, or parent of the mortgagor); (b) the lease or tenancy was the result of an arms-length transaction; and (c) the rent is not substantially less than fair market value (excluding instances of government subsidy).[104]

B. Adequacy of the PTFA

Supporters claim the law has placed "more power in the hands of renters."[105] However, PTFA opponents argue that the poorly drafted statutory language has introduced confusion and uncertainty that is fueling compliance litigation against lenders.[106] There are many legitimate criticisms of the PTFA that illuminate the need for amendments to the Act.

Statutory ambiguity is a common theme among critics. Complicating the matter, "no federal agency has authority to issue regulations implementing the law or to interpret the law."[107] The Affordable Housing Task Force aptly notes that, "[a]s with all new laws, [the PTFA] is open to interpretation. Until a court decides exactly what this law means, we can only do our best to interpret it."[108]

Even state legislatures found themselves struggling to interpret the new statute. A Florida legislative report posited the following questions:

- Is the landlord required to pursue an eviction action after the 90 days?
- What information should be included in the 90-day notice?
- Is the tenant still required to pay rent and to whom?
- Does the tenant have an obligation to stay?
- Does the property manager have any ongoing obligation to the property?
- What happens with the security deposit?[109]

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104. *Id.*

105. Nirvi Shah, *New Law Gives Tenants More Clout in Cases of Foreclosure*, MIAMI HERALD, August 23, 2009, at E1, *available at* 2009 WLNR 16426073.

106. Elizabeth Stull, *Credit Crisis Driving Securities, Mortgage-Related Litigation*, DAILY REC. (Rochester, NY), Aug. 28, 2009, *available at* 2009 WLNR 17035582.

107. Letter from Sandra F. Braunstein, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, to The Officers and Managers in Charge of the Consumer Affairs Divisions (July 30, 2009), *available at* http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm.

108. AFFORDABLE HOUSING TASK FORCE, KNOW YOUR RIGHTS! RENTERS IN FORECLOSURE 4 (2009), *available at* http://www.miamidade.gov/foreclosure/library/Know_Your_Rights_ Handbook.pdf.

109. THE FLORIDA SENATE, COMMITTEE ON JUDICIARY, TENANTS' RIGHTS IN FORECLOSURE ACTIONS, INTERIM REP. 2010-124, 7 (2009), *available at* http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-124ju.pdf (bullets in original).

The PTFA is vague or silent on numerous other matters, including whether the protections continue if a tenant is late on payments.[110] Lenders who acquire properties via foreclosure sale are struggling to comply with the PTFA "because it doesn't specify between tenants who have been paying rent and those who have not."[111] The injustice of involuntary displacement, a primary policy argument in favor of statutory tenant protections, is certainly diminished if the tenant is no longer an innocent party; however, courts are likely to see litigation on this very point.

The PTFA also does not address the status of existing lease agreements when property acquired by institutional purchasers at the foreclosure sale is immediately re-sold in a *flip* transaction to a new owner-occupier.[112] The Act is silent on whether this subsequent owner-occupier (who will inhabit the unit as a primary residence) may terminate an existing lease prior to its natural expiration as if the new owner-occupier had purchased the property directly at the foreclosure sale. The fact that the PTFA carves out an exception to allow primary residence purchasers to terminate existing leases suggests that Congress finds tenant rights subordinate to owner-occupier-purchaser rights, generally. If correct, this position implies that *any* successor in interest who will occupy the unit as a primary residence can terminate the lease. This is yet another ambiguity that invites stakeholders to flood courts with litigation in order to obtain an interpretation of the statute.

Additionally, the statute does not address whether the ninety-day notice can be given prior to the foreclosure sale.[113] The language requires the "immediate successor in interest" to provide the notice.[114] What happens if the foreclosure Plaintiff purchases the property—would a *pre-sale* notice from the Plaintiff satisfy the statute? At least one public interest group suggests that any ninety-day notice sent prior to the legal transfer of title is ineffective.[115] Indeed, a pre-sale notice would seem to circumvent the entire protective mechanism intended by the notice provision.

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110. Tom Bayles, *New Law Protects Renters*, SARASOTA HERALD TRIBUNE (FL) (June 22, 2009, 1:00 AM), http://www.heraldtribune.com/article/20090622/COLUMNIST/906221013.

111. Jerry DeMuth, *Creating Chaos*, MORTGAGE BANKING, Oct. 1, 2009, at 64, *available at* 2009 WLNR 22520863.

112. Bayles, *supra* note 110. The term "flip" means "[t]o buy and then immediately resell . . . real estate in an attempt to turn a profit." BLACK'S LAW DICTIONARY (9th ed. 2009) (West).

113. FRANK S. ALEXANDER, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW §8.8 (2011).

114. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701–704, 123 Stat. 1632 (2009).

115. PUB. JUSTICE CTR., TENANTS AND FORECLOSURE PROCEDURE IN MARYLAND 6–7 (2009), *available at* http://publicjustice.org/publicjustice/uploads/File/Renters_and_Foreclosure_In_MD_09Dec21--_PUBLIC.pdf.

However, the answer may vary between jurisdictions depending on whether the state subscribes to a title, lien, or intermediate theory of property.[116]

The lease continuation provision is also unclear; is this an option the tenant can *elect*, or does the lease continue in force *as a matter of law* post-foreclosure?[117] If the lease continues as a matter of law, it would potentially give rise to a cause of action by the immediate successor in interest against the tenant if the tenant vacates the property without paying the full ninety-day rent.[118] Given the possibility that renters will voluntarily vacate the premises after receiving a notice of foreclosure, this outcome seems severe. Once again, this is a matter likely to drive parties into courts across the nation, and to result in a patchwork of widely varied interpretations.

The PTFA left many unanswered questions, and courts, with minimal substantive guidance, will likely be asked to resolve these issues. As discussed below in Part IV, lawmakers can take steps to minimize the significant strain on judicial resources, and reduce the considerable stakeholder confusion and instability, created by these ambiguities.

C. Post-PTFA State Responses

States are also closely watching the PTFA with regard to their own policy initiatives.[119] One of the most obvious concerns of state lawmakers is preemption—whether the PTFA *trumps* state law in any given jurisdiction.[120] The Supremacy Clause of the United States Constitution states that federal laws "shall be the supreme law of the land."[121] Generally speaking, if the PTFA provides greater protection, it *preempts* state law; however, if state law provides greater protection, state law prevails.[122] Legislators are struggling to understand the contours of the PTFA in order to define what could constitute greater or lesser protection.

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116. Gold, *supra* note 100, at 213–14.

117. ALEXANDER, *supra* note 113.

118. *See* Gold, *supra* note 100, at 213–14.

119. *See, e.g.*, THE FLORIDA SENATE, *supra* note 109.

120. *See* Gold, *supra* note 100, at 216–17.

121. U.S. CONST. art. VI., cl. 2.

122. GMAC Mortgage, LLC v. Taylor, 899 N.Y.S.2d 802, 805 (D.Ct. Suffolk Co., Dist. 3, Mar. 1, 2010) (noting that while the Supremacy Clause of the U. S. Constitution mandates the preemption of state laws in conflict with federal law, "the provisions of 12 USC Sec. 5220 Note (a)(2)(A) are self exempting and inapplicable as the statute expressly limits its reach in subdivision (a) when it provides: 'Except that nothing under this section shall affect the requirements for termination of any Federal or State subsidized tenancy or of any State or local law that *provides longer time periods or other additional protections for tenants.*' Emphasis added.").

The Florida legislature is pursuing a wait-and-see strategy regarding statutory tenant protections.[123] Lawmakers want to determine whether Congress will re-enact or otherwise extend the PTFA beyond its December 31, 2012 expiration date.[124] Meanwhile, other states are taking more proactive measures in combating the ills of involuntary displacement of tenants.[125] There is concern among some Florida legislators that premature state action risks irritating an already critical housing situation in the sunshine state.

On December 15, 2009, New York's Governor, David Paterson, "signed into law comprehensive foreclosure legislation which provides additional critical protections for New York State homeowners, tenants and neighborhoods in the wake of the ongoing foreclosure crisis."[126] The bill adds to a 2008 subprime lending reform law by "assisting homeowners currently at risk of foreclosure and minimizing the negative impacts that foreclosures have on communities."[127] The law became effective January 14, 2010, and contains lease extension and ninety-day notice provisions similar to the PTFA.[128] New York took a proactive approach and enacted a PTFA-like statutory tenant protection scheme of its own in order to provide protections that are independent of the whims of Congress.

In California, over a dozen cities have ratified a patchwork of various eviction control laws.[129] A proposal, known as the "California Tenant Stability Act," purports to standardize and strengthen eviction control measures by promoting a statewide law limiting evictions, governing security deposits, regulating notice, increasing private representation of tenants, and funding education and outreach programs.[130] The California plan takes a more comprehensive view of the problems associated with involuntary displacement.

Arguably, however, the most tenant-friendly protections in the United States are of the variety available in Massachusetts. There, the legislature enacted a law in 2010 that prevents a foreclosing owner from evicting a tenant "except for just cause."[131] This approach benefits tenants by allowing them to retain pre-foreclosure lease terms without interruption. However, the marginal additional benefit to tenants is offset by significant

123. THE FLORIDA SENATE, *supra* note 109, at 8.

124. *Id.*

125. *See, e.g., Gov. Paterson Signs Comprehensive Foreclosure Legislation into Law*, U.S. FED. NEWS, Dec. 16, 2009, *available at* 2009 WLNR 25272024.

126. *Id.*

127. *Id.*

128. N.Y. REAL PROP. ACTS. LAW § 1305 (McKinney 2010).

129. Nicole Gon Ochi, Note, *The California Tenant Stability Act: A Solution for Renters Affected by the Foreclosure Crisis*, 17 GEO. J. ON POVERTY L. & POL'Y 51, 65 (2010).

130. *Id.* at 65–76.

131. MASS. GEN. LAWS ANN. ch. 186A, §2 (West 2010).

additional detriments to the other stakeholders, including: (1) purchasers intent on becoming owner-occupiers are forced into becoming long-term landlords, which (2) discourages potential buyers from even attending foreclosure sales, which (3) drives down the sale proceeds collected from the auction, and (4) saddles the mortgagor with a higher deficiency debt. For any statutory tenant protection arrangement, the goal should be to mitigate the harms of involuntary displacement. However, given its significant disadvantages, the Massachusetts policy likely goes too far.

This potpourri of state and local statutory tenant protection schemes only serves to intensify the stakeholder uncertainty surrounding the PTFA. There is no better time for Congress to implement uniform statutory tenant protections. Legislators should be inspired by the significant public support for such measures, as evidenced by the sheer number of state and local responses, and work to enact permanent and comprehensive legislation to protect tenants from unscrupulous landlords.

D. The Future of Statutory Tenant Protections at the Federal Level

Calls have been made for a more expansive version of the PTFA that would require the immediate successor in interest to give former borrowers the right to enter into long-term leases on properties they have lost to foreclosure.[132] Supporters contend that this rental option is a solution that provides no windfalls to borrowers (since they lose ownership of their homes), minimizes disruptions to neighborhoods, and requires no taxpayer money.[133]

Critics of this proposal argue that the hassle of property management inappropriately jumps the wall between finance and commerce.[134] As one finance executive notes, "[n]o bank wants to be a landlord."[135] A forced landlordship confers responsibility for property upkeep (maintenance, taxes, HOA fees, lawn care, etc.) on the former lender.[136] The significant expense required for such an enterprise foretells a momentous lobbying pushback from the banking industry, and renders this type of expansion of the PTFA highly unlikely.

A 2009 report by seven of the leading homelessness and housing advocacy groups in the United States (the National Coalition for the Homeless, the National Alliance to End Homelessness, the National Association for the Education of Homeless Children and Youth, the National Health Care for the Homeless Council, the National Law Center

132. Harry Terris, *GSEs Find Seized Homes Easier to Empty than Rent*, AM. BANKER, October 14, 2009, at 1, *available at* 2009 WLNR 20212557.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

on Homelessness & Poverty, the National Low Income Housing Coalition, and the National Policy and Advocacy Council on Homelessness) recognized that the PTFA does "not completely—or permanently—resolve the underlying lack of tenant rights."[137] The report makes several recommendations regarding the protection of renters, including that PTFA "provisions become permanent protections that extend beyond 2012."[138] Further, the groups ask that:

> B. Renters in foreclosed units utilizing other federal, state or local subsidies should receive the same protection that Section 8 voucher holders have been granted under the new law. C. Local policies should ensure that foreclosed properties are maintained by the owner, lender and/or jurisdiction in such a condition that they are suitable for habitation by tenants who are legal occupants.[139]

Some members of Congress agree that PTFA protections should become permanent fixtures in federal law.[140] On March 4, 2010, Representative Keith Ellison, a Democrat from Minnesota, introduced H.R. 4766, the "Permanently Protecting Tenants at Foreclosure Act of 2010." This bill would have repealed the sunset provision of PTFA and made the law permanent.[141] However, Representative Ellison was not successful in this endeavor and the sunset provision remains.

The PTFA makes significant strides in providing security of tenure for renters, and state activity in this arena indicates considerable popular support for permanent tenant protections. However, making the PTFA permanent would merely be a good start. Without significant amendments and clarifications, the PTFA will never fully realize its potential to comprehensively protect innocent tenants from the harms of involuntary displacement.

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137. NATIONAL COALITION FOR THE HOMELESS, ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 8 (2009) [hereinafter VICTIMS], *available at* http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf.

138. *Id.* at 16.

139. *Id.*

140. Permanently Protecting Tenants at Foreclosure Act of 2010, H.R. 4766, 111th Cong. (2010) (noting multiple co-sponsors), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4766ih/pdf/BILLS-111hr4766ih.pdf.

141. *Id.*

PART III: STATUTORY TENANT PROTECTIONS IN THE UNITED KINGDOM

Recognizing the need for legislative action, the English Government called for an official Consultation to identify the specific problems of tenants in repossession actions and to identify workable solutions. In calling for the Consultation, Housing Minister John Healey noted, "[i]t is wrong that through no fault of their own these families can find themselves out on the street."[142] Minister Healey sought to examine possible "safeguards for tenants of dodgy landlords who leave them vulnerable to eviction with little notice."[143]

The Consultation was completed in August 2009 and considered five courses of action.[144] The first option considered retention of the status quo.[145] The second examined the possibility of giving "unauthorised tenants the right to be heard at the possession hearing," and empowering courts to postpone repossession in order to allow tenants a reasonable period of time to move.[146] The third option dealt with amending "the notification of the possession hearing, so that more unauthorised tenants attend and make representations at the hearing."[147] The fourth option would require "lenders to notify their intention to enforce possession, and provide a mechanism for unauthorised tenants to request a two-month *delay*."[148] The final alternative explored provision of "a mechanism for unauthorised tenants to request a two-month *stay* in the warrant of possession."[149]

Ultimately, the Consultation urged the government to adopt a hybrid solution allowing tenants to be heard at repossession hearings, giving courts the power to delay proceedings, and requiring a new notice of intent to enforce possession along with a mechanism for tenants to apply for a two-month reprieve.[150] Although the cost of implementing such changes is estimated at £19.2M over the next ten years, the monetary benefit outweighs the cost and justifies the expenditure.[151] In addition, there would be considerable non-monetary benefits to the public at large as a result of

142. Joe Murphy, *New Rights Over Eviction for Tenants of Bad Landlords*, EVENING STANDARD (London, UK), Aug. 6, 2009, http://www.thisislondon.co.uk/standard/article-23728954-new-rights-over-eviction-for-tenants-of-bad-landlords.do.

143. *Id.*

144. ENGLISH CONSULTATION, *supra* note 68, at 5, 7.

145. *Id.* at 7.

146. *Id.*

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.* (emphasis added).

150. *Id.*

151. *Id.* at 31, 35.

reduced stress and disruption caused by short-notice evictions.[152]

After the Consultation was completed, 126 members of Parliament signed "EDM 1154" regarding "Tenants in the Private Rented Sector and Repossessions," which stated:

> That this House recognises that tenants in the private rented sector risk losing their homes through repossession when landlords default on mortgages; notes that many tenants are evicted with little or no notice, sometimes only finding out when the bailiff arrives on their doorstep; further notes that many of these tenants could be at risk of homelessness through no fault of their own; and calls on the Government to take urgent action to avert a potential crisis by giving courts the discretion to defer possession and allow tenants sufficient time to find another home.[153]

Then, on December 16, 2009, before the Consultation's stakeholder comment period closed, Dr. Brian Iddon, MP, introduced "a Bill to protect private tenants from losing their homes in the event of their landlord defaulting on the mortgage payments."[154] The Bill was titled the Mortgage Repossessions (Protection of Tenants Etc) Bill.[155]

A. The Mortgage Repossessions (Protection of Tenants etc) Act 2010[156]

Dr. Iddon's Bill was approved by both houses of Parliament, received Royal Assent on April 8, 2010,[157] and took effect on October 1, 2010.[158]

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152. *Id.* at 7.

153. *Id.* at 9. *See* HOUSE OF COMMONS INFO. OFFICE, FACTSHEET P3: EARLY DAY MOTIONS 1 (2008), *available at* http://www.parliament.uk/documents/commons-information-office/p03.pdf ("Early day motion (EDM) is a colloquial term for a notice of motion given by a Member for which no date has been fixed for debate. EDMs exist to allow Members to put on record their opinion on a subject and canvass support for it from fellow Members. In effect, the primary function of an EDM is to form a kind of petition that MPs can sign and there is very little prospect of these motions being debated on the floor of the House.").

154. HC RESEARCH, *supra* note 64, at 12.

155. Mortgage Repossessions (Protection of Tenants Etc.) Bill, 2009-10, H.C. Bill [15] (Eng. & Wales), *available at* http://www.publications.parliament.uk/pa/cm200910/cmbills/015/2010015.pdf.

156. Mortgage Repossessions (Protection of Tenants etc) Act, 2010, c. 19 (Eng. & Wales), *available at* http://www.legislation.gov.uk/ukpga/2010/19/enacted/data.pdf.

157. *Bill Progress: Mortgage Repossessions (Protection of Tenants Etc.) Bill 2009-10*, U.K. PARLIAMENT, http://services.parliament.uk/bills/2009-10/mortgagerepossessionsprotectionoftenantsetc.html (last visited May 22, 2011). *See generally* HOUSE OF COMMONS INFORMATION OFFICE, PARLIAMENTARY STAGES OF A GOVERNMENT BILL (2010), *available at* http://www.parliament.uk/documents/commons-information-office/l01.pdf (a primer on

The Mortgage Repossessions (Protection of Tenants etc) Act 2010 (MRPTA) has two substantive clauses.[159] The first addresses the power of the court to postpone repossession, and the second deals with notice of the intended repossession.[160]

The MRPTA applies to dwelling units as well as mixed-use residential/commercial property.[161] The Act generally covers unauthorized tenancies with annual rents of up to £100,000.[162] High-value residential tenancies, those in excess of the £100,000 per year mark, are excluded from protection under the Act, and tenants in these situations are not included in the statutory protection scheme.[163]

The first substantive section of the MRPTA, in essence, provides the court with wide discretion to give tenants a two-month period to locate alternative housing.[164] A tenant may make application for this accommodation either before the possession order is granted, in which case the court could *delay* the date of the possession order, or after the possession order is granted, in which case the court may *stay* or suspend the execution of the order.[165]

Clause 1(5) of the MRPTA requires courts to contemplate certain enumerated criteria when examining tenant requests for reprieve from possession orders.[166] The court must duly consider the unique circumstances of the tenant.[167] If the tenant is currently in breach of the lease agreement, the court must weigh the nature of the breach and the ease with which it could have been avoided.[168] The delay or stay "may be made conditional upon the tenant making payments to the mortgagee in respect of their occupation during that period."[169] However, as Clause 1(7) makes

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U.K. legislative process). The author recognizes the publication addresses *government* bills, and the MRPTA was technically a *private* bill; however, the general overview may be helpful to those unfamiliar with how bills become laws in the United Kingdom.

158. Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order, 2010, S.I. 2010/1705 (Eng. & Wales), *available at* http://www.legislation.gov.uk/uksi/2010/1705/made/data.pdf.

159. Mortgage Repossessions (Protection of Tenants etc) Act, 2010, c. 19 (Eng. & Wales).

160. Teresa Sutton, *Legislative Comment: The Mortgage Repossessions Bill*, 14(2) LANDLORD & TENANT REV. 48, 49–50 (2010).

161. Sophie Schultz, *Residential Repossession and Unauthorised Tenants*, ALLEN & OVERY (Sept. 1, 2010), http://www.allenovery.com (web page no longer available; archived copy on file with author).

162. Andy Creer, *Mortgage Repossessions and Tenants*, HARDWICKE (Sept. 27, 2010), http://www.hardwicke.co.uk/articles/mortgage-repossessions-and-tenants.

163. Schultz, *supra* note 161.

164. *Id.*

165. Creer, *supra* note 162.

166. Sutton, *supra* note 160, at 49.

167. *Id.*

168. *Id.*

169. *Id.*

clear, such payments would not serve as evidence of a newly created tenancy.[170]

The second substantive section of the MRPTA provides that possession orders can only be executed after the mortgagee has given notice, at the property, of the intention to repossess.[171] The regulations provide that fourteen days must elapse between service of the notice and execution of the warrant.[172] The hope is that the new requirements will increase the chances that a tenant will apply for a stay or delay of the possession order.[173]

B. Adequacy of the MRPTA

Several key stakeholders in the housing industry strongly supported allowing tenants the opportunity to be heard at a possession hearing.[174] There was near unanimous agreement that this type of legislative action was prudent; however, there was much less agreement, particularly from the mortgage industry, on allowing tenant applications for postponement of possession orders.[175] The Council of Mortgage Lenders (CML) vehemently disagreed with the postponement provision, claiming that it unfairly prejudiced lenders.[176] The Council noted that the postponement provision places a new, and significant, burden upon lenders, and that the burden is inequitable given that the need for repossession only arises through *borrower* breach.[177] Similarly, the Building Societies Association (BSA) opposed the postponement provision claiming that it unjustly punishes lenders, who, like tenants, may be innocent.[178] The BSA was troubled by the notion of lenders acting as landlords and the significant transaction costs involved with the involuntary creation of this new relationship.[179]

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170. *Id.*

171. *Id.* at 50.

172. The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations, 2010, S.I. 2010/1809 (Eng. & Wales), *available at* http://www.legislation.gov.uk/uksi/2010/1809/pdfs/uksi_20101809_en.pdf.

173. Sutton, *supra* note 160, at 50.

174. HC RESEARCH, *supra* note 64, at 10.

175. *Id.*

176. COUNCIL OF MORTGAGE LENDERS, LENDER REPOSSESSION OF RESIDENTIAL PROPERTY: PROTECTION OF TENANTS, RESPONSE BY THE COUNCIL OF MORTGAGE LENDERS TO THE COMMUNITIES AND LOCAL GOVERNMENT CONSULTATION PAPER 1 (2009), *available at* http://www.cml.org.uk/cml/filegrab/Lenderrepossessionofresidentialpropertyprotectionoftenants.pdf?ref=6895.

177. *Id.*

178. Press Release, Building Societies Association, CLG Consultation on Lender Repossession of Residential Property: Protection of Tenants, Response by the BSA (Oct. 13, 2009), http://www.bsa.org.uk/members/policybrief/CLG_consultation_unauthorised_tenants.htm.

179. *Id.*

The MRPTA language has created some confusion regarding the postponement provision: stakeholders are uncertain of whether a tenant may request both a pre-order *delay* and a post-order *stay*. If so, this would permit the tenant to "double dip" and obtain postponement for up to four months, as opposed to two months as originally contemplated in the Consultation.[180] "Dr. Iddon was confident that the Bill would be interpreted by the courts to mean that only one suspension of a possession order would be possible."[181] However, the official Guidance casts doubt over the accuracy of Dr. Iddon's statement.[182] When a landlord fully complies with the terms of a *delayed* possession order, but arrears subsequently accrue, the plain reading of the statute and Guidance suggests that the tenant could, in fact, apply for a *stay* of possession regardless of whether the original order has "fallen away."[183] These conflicting interpretations are likely to give rise to litigation.

C. The Future of Statutory Tenant Protections in the United Kingdom

Unlike the PTFA in the United States, the MRPTA does not contain an expiration date or "sunset provision."[184] This signals the Government's commitment to providing permanent protection for tenants. Additionally, the MRPTA has generally received a warm welcome among stakeholders in the United Kingdom, and its passage was referred to as a "no brainer."[185] However, a number of advocacy groups, including Crisis, Shelter, and the Residential Landlord's Association, have called for more comprehensive statutory tenant protections.

Crisis, the England-based national charity for single homeless people,[186] generally supports the changes included in the MRPTA.[187]

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180. Sally Blackmore, *"Very Much for the Public Good": A Consideration of the Mortgage Repossessions (Protection of Tenants etc) Act 2010*, 14(1) J. HOUSING L. 12, 13 (2011).

181. HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 10/15: MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC.) BILL: COMMITTEE STAGE REPORT 3 (2010) [hereinafter HC COMMITTEE], *available at* http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-015.pdf.

182. Blackmore, *supra* note 180, at 13–15. *See* DEP'T FOR COMMUNITIES AND LOCAL GOV'T, GUIDANCE TO THE MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC) ACT 2010 19 (2010) [hereinafter GUIDANCE], *available at* http://www.communities.gov.uk/documents/ housing/pdf/1729687.pdf.

183. Blackmore, *supra* note 180, at 13–15.

184. *See* Mortgage Repossessions (Protection of Tenants etc) Act, 2010, c. 19 (Eng. & Wales), *available at* http://www.legislation.gov.uk/ukpga/2010/19/enacted/data.pdf.

185. Blackmore, *supra* note 180, at 12.

186. *Crisis (charity)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Crisis_(charity) (last visited May 22, 2011).

187. CRISIS, LENDER REPOSSESSION OF RESIDENTIAL PROPERTY: PROTECTION OF TENANTS, CRISIS'S RESPONSE TO THE CLG CONSULTATION 1 (2009) [hereinafter CRISIS RESPONSE],

However, the group would like to see a provision for positive referral to the court on any dispute between lenders and tenants regarding their applications for continued tenancy.[188] Crisis notes that such protection would encourage lenders to carefully consider applications and discourage tenants from making fraudulent claims.[189]

Shelter, a British charity that campaigns to end homelessness and bad housing,[190] has also called for additional statutory tenant protections.[191] The group recommends taking the onus away from the tenant to make an appeal, and instead placing an obligation on the lender to notify the court when it denies an application for the two-month delay.[192] Shelter further calls for an affirmative right to request an extension of the fourteen-day delay period in extraordinary situations where the tenant may have been out of the country or in the hospital.[193] Finally, the group recommends allowing all tenants, regardless of whether they are behind on rent payments, to apply for the two-month delay, suggesting that this would achieve parity with tenants who are evicted by a landlord.[194]

The Residential Landlord's Association (RLA) also generally supports the MRPTA, but recommends adding a number of provisions.[195] The RLA believes that "[w]here a suspended possession order is made in the case of a tenanted property then there should be an obligation imposed on the lender to return to Court to seek the Court's permission to enforce the order."[196] The RLA also believes that "all existing tenancies," regardless of whether they are authorized or not, should "bind the mortgage lender . . . according to the terms agreed with the landlord up to a maximum of 12 months."[197]

The MRPTA is a significant improvement over the common law in terms of providing security of tenure to renters and has significant support from stakeholders on all flanks of the issue. However, without more, the

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available at http://www.crisis.org.uk/data/files/publications/0910Landlord%20repossessions%20consultationFINAL.pdf.

188. *Id.* at 4.

189. *Id.*

190. *Shelter (charity)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Shelter_(charity) (last visited May 22, 2011).

191. SHELTER, SHELTER'S RESPONSE TO THE COMMUNITIES AND LOCAL GOVERNMENT CONSULTATION - LENDER REPOSSESSION OF RESIDENTIAL PROPERTY: PROTECTION OF TENANTS 3 (2009) [hereinafter SHELTER RESPONSE], *available at* http://england.shelter.org.uk/__data/assets/pdf_file/0003/219882/10-09_Lender_repossession_-_Protection_of_tenants.pdf.

192. *Id.* at 8.

193. *Id.* at 8–9.

194. *Id.* at 9.

195. Press Release, Residential Landlords Association, Response to CLG's Consultation Paper – Lender Repossession of Residential Property: Protection of Tenants (Jan. 19, 2010), http://news.rla.org.uk/index.php/archives/date/2010/01/page/13.

196. *Id.*

197. *Id.*

MRPTA is not sufficient to universally protect innocent tenants, and society at large, from the harms of involuntary displacement.

PART IV: RECOMMENDATIONS

"'Home' is a powerful and rich word in the English language. As our cultural cliché 'a house is not a home' suggests, 'home' means far more than a physical structure. 'Home' evokes thoughts of, among many other things, family, safety, privacy, and community."[198] However, as the common law fails to fully safeguard the sanctity of homestead for renters, statutory enactments are necessary to protect society and individuals alike from the innumerable harms of involuntary displacement.

A. Recommendations for the United States Congress

First and foremost, Congress should make the protections of the PTFA permanent. The substantial harms of involuntary displacement, especially among the most vulnerable renters, will not suddenly evaporate when the Act expires. There is significant support from multiple advocacy groups for repeal of the sunset provision.[199] As noted earlier, Representative Ellison has already sparked discussion of making the PTFA permanent.[200] Members of Congress should harness the momentum of public opinion and act quickly to ensure statutory tenant protections do not expire, especially in the midst of a global economic downturn.

Another major flaw of the PTFA is the absence of administrative oversight in the law's execution. Although Congress had the power to do so,[201] it did not delegate rulemaking authority over the PTFA to any administrative agency.[202] Given the numerous ambiguities that have been exposed since the Act's passage,[203] Congress must amend the PTFA to authorize an administrative agency, specifically the Department of Housing and Urban Development (HUD), to resolve ambiguities in the PTFA. HUD is uniquely qualified to address matters of housing policy,[204] and its

198. Barros, *supra* note 25, at 255.

199. *E.g.*, VICTIMS, *supra* note 137.

200. Permanently Protecting Tenants at Foreclosure Act of 2010, H.R. 4766, 111th Cong. (2010), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4766ih/pdf/BILLS-111hr4766ih.pdf.

201. "The Constitution authorizes the delegation of rulemaking to agencies because Congress is given the power '[t]o make all laws which shall be necessary and proper' to carry out its functions under Article I. U.S. Const. art. I, § 8." WILLIAM F. FUNK ET. AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 520 (4th ed. 2010).

202. *See* Protecting Tenants at Foreclosure Act § 702(a)(1).

203. *See supra* Part II.B.

204. *See Mission*, U.S. DEP'T OF HOUSING AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited May 22, 2011) ("HUD's mission is to create

resources should be utilized to strengthen the PTFA, protect tenants, and improve judicial economy.

Whether by direct legislation or administrative delegation, Congress must act to eliminate ambiguities in the PTFA. Specifically, the text of the ninety-day notice provision[205] should be clarified to prohibit notices sent *prior* to the foreclosure sale in attempts to thwart the ninety-day period. The use of this loophole subverts the purpose of the law, and an authoritative interpretation would prevent abuse. This single ambiguity has caused much needless confusion among stakeholders,[206] and clarification would reduce unnecessary litigation.

Additionally, the lease extension provision[207] must address tenant discontinuation of rent payments. The Act should be amended (or interpreted by an agency) to allow foreclosure sale purchasers to initiate normal eviction proceedings upon tenant default. Uncertainty on this point has generated confusion for potential foreclosure sale purchasers.[208] A definitive assertion in this regard would add stability to the housing and lending markets. Additionally, the role of the lease extension provision[209] in flip transactions must be defined. Institutional purchasers should be required to sell flipped properties "subject to priority lease," which would place *post-foreclosure* flip transactions on a level playing field with *all other* flip transactions.

Congress should also take notes from the British playbook[210] regarding the notice provisions of the PTFA.[211] More precisely, the PTFA needs statutory clarification or administrative guidance to regulate the content of these notices. The imprecise requirements of the current PTFA have given rise to divergent interpretations and practices, but standardized content would impose fairness and congruity in the foreclosure process.[212] To be more exact, the notice would be significantly more helpful to tenants if it included information "about [the tenant's] rights and where they can go to get further advice."[213]

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strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination; and transform the way HUD does business.").

205. Protecting Tenants at Foreclosure Act of 2009 § 702(a)(1), Pub. L. 111-22, Div. A., May 20, 2009, 123 Stat. 1632.

206. *See* ALEXANDER, *supra* note 113.

207. Protecting Tenants at Foreclosure Act § 702(a)(2).

208. *See* Bayles, *supra* note 110; DeMuth, *supra* note 111.

209. Protecting Tenants at Foreclosure Act § 702(a)(2).

210. *See* ENGLISH CONSULTATION, *supra* note 68.

211. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 702(a)(1), 123 Stat. 1632 (2009).

212. *See* THE FLORIDA SENATE, *supra* note 109, at 3.

213. PRIVATE TENANTS, *supra* note 70, at 6.

Overall, the PTFA grants renters significantly more protections than its British counterpart. However, the lack of administrative delegation and temporary nature of the Act are glaring deficiencies in the PTFA that prevent it from fully recognizing its potential to eliminate or mitigate the harms of involuntary displacement of otherwise innocent renters.

B. Recommendations for the United Kingdom Parliament

Parliament should take steps to refine the MRPTA and implement suggestions[214] from key stakeholders. The Bill was prematurely introduced before Parliament received the summary report of stakeholders' input.[215] Now, Parliament has the opportunity to construct a more comprehensive, highly effective piece of tenant protection legislation by examining stakeholder proposals and implementing a number of suggestions contained therein.

Explicitly, Parliament should amend the MRPTA to require lender denials of postponement requests to be immediately submitted to the court for judicial determination.[216] This would encourage careful lender consideration of tenant applications and remove the burden of filing an appeal from the tenant.[217] As Senator Kerry noted, fairness demands that families not be burdened with an affirmative duty to assert their rights;[218] Parliament should heed this assertion and provide British families with commensurate procedural protections.

Additionally, regulations should be promulgated to allow the inclusion of delinquent renters in the delay request program, except under the most extreme circumstances of fraud or wrongdoing.[219] This would place all renters on a level playing field since non-repossessed renters, delinquent or not, can avail themselves of the benefit of a delay.[220] It hardly seems just to punish tenants who simply have "dodgy" landlords, and the matter is easily remedied.

Alternatively, and preferably, Parliament should enact a provision similar to the PTFA's lease extension provision.[221] If the MRPTA were to include a similar provision, scrapping the postponement application process, tenants could potentially have an additional ten months of security

214. *See supra* Part III.B.

215. HC RESEARCH, *supra* note 88, at 12–13.

216. *See* CRISIS RESPONSE, *supra* note 187, at 4; SHELTER RESPONSE, *supra* note 191, at 8.

217. *Id.*

218. 155 CONG. REC. S8978 (2009).

219. *See* SHELTER RESPONSE, *supra* note 191, at 9.

220. *Id.*

221. Protecting Tenants at Foreclosure Act of 2009 § 702(a)(2), Pub. L. 111-22, Div. A., May 20, 2009, 123 Stat. 1632.

of tenure.[222] Statistics clearly show that society's most vulnerable populations (the poor, the elderly, etc.) are more likely to end up homeless in short-notice eviction situations.[223] This additional security of tenure would make significant progress toward the goal of reducing the harms of involuntary displacement. As an added bonus, British courts would not be entangled in the postponement application process and judicial costs and caseloads would be reduced.

The MRPTA is a step in the direction of justice, and represents progress toward mitigation of the individual and societal harms that flow from involuntary displacement. But a token reprieve period (as opposed to a full-scale lease continuation provision), and the improvident placement of appeal burdens on tenants, reduce the effectiveness of the statute and hinder it from achieving its full potential to protect British families.

CONCLUSION

Government action is rarely a panacea for the troubles of society. However—in instances of landlord mortgage default—innocent tenants, and society in general,[224] are at the mercy of both the disease and the cure. In an area of law where the impacts of involuntary displacement are significant, where the common law is silent, and where the market has failed to appropriately respond, our elected leaders should continue to move swiftly toward enactment and refinement of appropriate public remedies. In the quest to eliminate or mitigate the individual and societal harms of involuntary displacement, one thing is certain: statutory tenant protections must become permanent, comprehensive fixtures of United States and United Kingdom law.

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222. If the lease continuation provision recognized leases with up to twelve months remaining and a new, non-fraudulent lease had been signed just prior to the initiation of the repossession action, the tenant may be entitled to the entire 12 month possessory period, versus a mere two-month reprieve under the current reprieve application provision of the MRPTA.

223. *See* Roisman, *supra* note 17, at 823; PELLETIERE, *supra* note 41, at 8.

224. For example, evictions in multi-family units have caused the proliferation of vacant properties in neighborhoods, dramatic drops in property values that affect neighbors and their ability to refinance their own distressed properties, and the endangerment of residents as these properties become targets for "squatters, vandals and thieves." Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181, 188 (2010).

TRACING THE STEPS OF NORWAY'S CARBON FOOTPRINT: LESSONS LEARNED FROM NORWAY AND THE EUROPEAN UNION CONCERNING THE REGULATION OF CARBON EMISSIONS

Kathryn M. Merritt-Thrasher*

INTRODUCTION

Mainstream media debates regarding global warming run hot and cold over the question of man's direct contribution to the global warming dilemma through the massive use of fossil fuels, which create harmful carbon emissions.[1] Substantive debates, however, acknowledge the effect of carbon emissions and seek to determine the relative merits of reducing emissions through quantity-based regulations versus tax-based approaches.[2] The question of quota versus tax is made especially difficult given the fact that either strategy must be devised and implemented within the political structures of each country.[3] If the question of tax versus quota was posed in a social and political vacuum, where only cost efficiency and total effectiveness of the policies were considered, the best answer would be much easier to ascertain definitively. Unfortunately, such a vacuum does not exist, and either strategy must be implemented via political processes that take into account the short and long-term effects on the citizens of each country rather than pure economic theory.

It is certain that inadequacies exist for both tax-based and quota-based strategies when attempting to reduce carbon emissions.[4] In a tax-based approach, the burden of the tax falls more heavily on the poorest segment of the population, making it a regressive tax, which is exceedingly unpopular and difficult to impose.[5] In a quota-based system, real progress toward the

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1. *See Greenhouse Gases, Climate Change, and Energy*, ENERGY INFO. ADMIN., http://www.eia.doe.gov/oiaf/1605/ggccebro/chapter1.html (last modified Apr. 2, 2004).

2. *See* Eileen Claussen & Judith Greenwald, Op-Ed., *Handling Climate Change, in* PEW CENTER ON GLOBAL CLIMATE CHANGE (July 12, 2007), http://www.pewclimate.org/press_room/opinion_editorials/oped_miamih07122007; discussion *infra* Part II.

3. *See* Claussen & Greenwald, *supra* note 2; discussion *infra* Part V.C.

4. *See* Claussen & Greenwald, *supra* note 2; discussion *infra* Part II.C.

5. *See* ERIC WILLIAMS ET AL., NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS AND THE CENTER ON GLOBAL CHANGE, A CONVENIENT GUIDE TO CLIMATE CHANGE POLICY AND TECHNOLOGY 24 (vol. 2 2007), *available at*

goal of lowered emissions is questionable given the fact that unrealistically low numbers are likely used as a starting point in order to "cushion" future emission costs.[6] With all of the uncertainties surrounding the correct path to combating global warming, the best approach is to become educated on the true causes and effects of carbon emissions along with the success and failure of the strategies that have already been implemented in the world—specifically by Norway and by the European Union.

Global warming, or, more generally, climate change, would likely occur even without the intervention of humans because harmful gases are released into the atmosphere naturally.[7] However, humans contribute greatly to the release of gases such as carbon dioxide, methane, and nitrous oxide primarily due to the extraction and use of fossil fuels as energy sources.[8] Carbon dioxide releases into the atmosphere due to burning coal, oil, natural gas, and gasoline for energy production.[9] Methane gas releases into the atmosphere from natural sources such as rice paddies, but also from unnatural sources such as the burning of fossil fuels.[10] Nitrous oxide releases into the atmosphere naturally from the world's rainforests and oceans and unnaturally from the manufacture of certain materials such as nylon and the use of agricultural fertilizers.[11] Fluorinated gases, including hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride are synthetic greenhouse gases that are created in several industrial processes.[12] Although fluorinated gases are usually released into the atmosphere in smaller quantities than the other gases, the potency level of these gases makes them especially dangerous to the environment.[13] Collectively, these components are known as "greenhouse" gases, so named due to the effect upon the world's environment.[14] They are also frequently referred to as "carbon emissions."[15] It is believed that the collection and entrapment of these gases in the atmosphere is a major cause of global warming.[16]

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http://www.nicholas.duke.edu/ccpp/convenientguide/PDFs/Climate%20book%20vol%202.pdf; discussion *infra* Part III.F.

6. DANIEL H. COLE, SELLING HOT AIR: EMISSIONS TRADING AND OFFSETS IN CLIMATE POLICY, CHAPTER 3: EUROPEAN UNION—EMISSIONS TRADING SCHEME, (Cambridge University Press) (forthcoming 2011) (manuscript at 21) (on file with author).

7. *See Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/emissions/index.html (last updated Apr. 14, 2011).

8. *See id.*

9. *See id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

The true cost of industrialization is measured by the negative impact on the Earth's atmosphere.[17] While energy is vital to the existence of every country in the world, the current dependence on fossil fuels is creating a serious debate regarding the potential of an atmospheric nightmare due to the greenhouse gas emissions from burning fossil fuels.[18] While an impending ecological catastrophe is unlikely, seriously negative effects are being brought upon the environment with the ever increasing levels of greenhouse gas emissions.[19] It is imperative that technology turns in the direction of capturing, reducing, and eliminating these emissions in order to preserve and protect the Earth.[20] While technology is advancing in the direction of protecting the Earth, world politics and policy will play the greatest role in either advancing or delaying measurable progress in reducing greenhouse gas emissions.[21]

To understand the basic science of greenhouse gases, it is necessary to identify the main sources of carbon emissions along with possible alternatives to the fossil fuels which cause a majority of the emissions.[22] The world is currently so dependent upon fossil fuels to produce energy that it will be a cumbersome and expensive process to move from fossil fuels to clean energy sources.[23] While the environmental effects of carbon emissions are very real, there are also economic realities related to creating safe, sustainable clean energy alternatives.[24] Nations that take on the task of creating and utilizing clean energy sources may face a competitive disadvantage in the world marketplace as the extra cost of sustainable clean energy use is factored into the cost of production.[25]

Interestingly, one small country in the world that has spent nearly two decades aggressively attacking the problem of greenhouse gas emissions is Norway.[26] Much information can be learned from the strategies Norway has implemented in an effort to curb carbon emissions, both independently and in cooperation with the European Union's carbon emission reduction strategies.[27] A fundamental basis of Norway's plan is to create "an economy for the Earth—an economy for the common good."[28] In other

17. *See* discussion *infra* Parts I.A–C.
18. *See* discussion *infra* Part I.A.
19. *See* discussion *infra* Part I.A.
20. *See* discussion *infra* Part I.C.
21. *See* discussion *infra* Part I.C.
22. *See Greenhouse Gas Emissions*, *supra* note 7; *infra* Parts I.B–C.
23. *See* discussion *infra* Part I.D.
24. *See* discussion *infra* Parts II, III.
25. *See* discussion *infra* Parts II, III.
26. *See* discussion *infra* Part II.
27. *See* discussion *infra* Part II.
28. Hans Chr. Bugge, Keynote Address at the Commemoration Seminar for the 10th Anniversary of the Centre for Development and the Environment at the University of Oslo: Sustainable Development—the Challenge for Norway (Mar. 29, 2001), *in Preface* to

words, Norway is not simply seeking to create a plan for environmental protection; it is seeking to create a thriving economy with the responsible use of its natural resources for both the country's and the environment's good. Norway began by implementing one of the highest carbon tax rates in the world. These taxes were initially imposed on the amount of emissions created by any given industry in an effort to induce industries to reduce carbon emissions and invest in clean alternatives through a monetary incentive.[29] The results of this strategy are mixed, as one major problem stems from the exemption of several key industries possibly responsible for creating the greatest amount of emissions.[30] It is important to consider how much of an improvement could be made in carbon reduction if no exemptions were allowed from the carbon tax.[31]

Although there are mixed reviews on the effectiveness of the carbon tax, there has been environmental progress.[32] Additionally, much of the revenue collected by the carbon tax has been funneled into the support of research and development of "Carbon Capture and Storage" (sometimes called Carbon Capture and Sequestration), or CCS.[33] Norway realized that the continued use of fossil fuels would be necessary and invested in a plan to capture and store the harmful emissions created by burning fossil fuels.[34] Technology now exists to capture a large portion of these emissions and store them within the ocean floor, with the likelihood that only twenty percent of the carbon will return to the atmosphere in a time span of 300 years.[35] The possibility of successfully capturing and storing carbon emissions provides a tremendous benefit because a majority of the world bases its infrastructure on the use of fossil fuels.[36] The investment of time and money that is necessary to switch to clean energy sources is vast; therefore, the chance to continue to use fossil fuels while reducing harmful emissions provides an opportunity to make that transition in a slow, manageable progression.[37]

WILLIAM LAFFERTY ET AL., REALIZING RIO IN NORWAY: EVALUATIVE STUDIES OF SUSTAINABLE DEVELOPMENT, at xix (2002), *available at* http://www.prosus.uio.no/publikasjoner/Boeker/ relizing_rio_kapitelvis/04_preface.pdf.

29. Annegrete Bruvoll & Bodil Merethe Larsen, Statistics Nor., Research Dep't, Greenhouse Gas Emissions in Norway—Do Carbon Taxes Work? 16 (2002), *available at* http://www.ssb.no/publikasjoner/DP/pdf/dp337.pdf.

30. *Id.* at 22.

31. *See* discussion *infra* Parts II.A., II.C–D.

32. *See* discussion *infra* Part II.D.

33. Sonal Patel, *Norway Leads the Way on CCS*, POWER (Apr. 01, 2009), http://www.powermag.com/coal/Norway-Leads-the-Way-on-CCS_1820.html.

34. *Id.*

35. E. A. Parson & D. W. Keith, *Fossil Fuels Without CO2 Emissions*, 282 SCI. 1053, 1055 (1998), *available at* http://www.pulp.tc/Parson_Field_Fossil_Fuels_without_CO2.Science.pdf.

36. *See* discussion *infra* Part II.B.

37. *See* discussion *infra* Part II.B.

Although it is a sovereign nation, Norway has strong geographic and economic ties to the rest of Europe.[38] The European Union has introduced its own strategy to reduce carbon emissions, and although Norway is not a Member State, there is a cooperative effort between the two bodies.[39] The European Union has put in place an Emissions Trading Scheme, comparable to the proposed Cap and Trade policies in the United States.[40] A thorough analysis will evaluate the positive and negative effects of Norway's strategy not only in isolation but also in relation to and in cooperation with the strategies of the European Union.[41] This Note will determine the advantages and disadvantages of Norway's strategy to reduce carbon emissions,[42] both on its own and in conjunction with European Union strategies,[43] in order for countries around the world to integrate the most beneficial tactics in a cohesive, worldwide attack against global warming.[44]

Part I of this Note will examine and explain carbon emissions, also known as greenhouse gas emissions or greenhouse gases.[45] This section will detail the effects of the emissions on the environment as well as the human toll created by the release of greenhouse gases into the atmosphere and oceans.[46] The various types and sources of harmful emissions will be identified, including both man-made sources and naturally occurring sources.[47] Given the fact that fossil fuels create a large percentage of the harmful emissions, a variety of alternative energy sources are presented, ranging from solar and wind power to the ultimate alternative energy—nuclear power.[48] Finally, Part I of this Note will examine the global dependence on fossil fuels as a primary source of the vital energy necessary to survive, along with the unique energy mix utilized by Norway.[49]

Part II of this Note will focus on Norway, which has taken an aggressive stance on attacking the problem of greenhouse gas emissions.[50] The discussion will examine the various strategies implemented by

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38. *The World Factbook - Norway*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/no.html (last updated Apr. 6, 2011).

39. *See* discussion *infra* Part III.

40. *See* Sergey Paltsev et al., MIT Joint Program on the Science and Policy of Global Change, Assessment of U.S. Cap-and-Trade Proposals 2 (2007), *available at* http://apolloalliance.org/wp-content/uploads/2009/03/mitreport-cap-and-invest.pdf.

41. *See* discussion *infra* Parts II–III.

42. *See* discussion *infra* Part II.

43. *See* discussion *infra* Part III.

44. *See* discussion *infra* Part V.

45. *See* discussion *infra* Part I.

46. *See* discussion *infra* Part I.

47. *See* discussion *infra* Part I.

48. *See* discussion *infra* Part I.

49. *See* discussion *infra* Part I.

50. *See* discussion *infra* Part II.

Norway, with primary emphasis on the introduction of carbon taxes for many industries.[51] Additionally, Part II details the introduction of CCS, which Norway has successfully implemented in an effort to capture many harmful emissions created during the extraction and use of fossil fuels.[52] Part II concludes with an examination of the economic effects of the carbon tax on consumers and industries along with the measurable results of Norway's efforts.[53]

Part III of this Note will outline the carbon policies put forth by the European Union.[54] Part III begins with a basic overview of the Kyoto Protocol along with detailed information regarding the groundbreaking European Union Emissions Trading Scheme (EU ETS).[55] A discussion of the progression of the EU ETS policies from Phase I through the current version will be presented.[56] Additionally, the actual environmental progress made due to those policies will be examined.[57] Finally, this part will look at the compatibility of the EU ETS with non-Member States of the EU and with Norway in particular.[58]

Part IV of this Note examines the direction toward which Norway's carbon footprint is leading.[59] The current status of the serious debate over the existing carbon tax rate and exemption scheme will be discussed.[60] This section will look at changes that Norway has made and continues to make due to the influence of and cooperation with the EU policies.[61] The successes and failures of Norway's two-decade long attempt to mitigate harmful carbon emissions will be evaluated.[62] Finally, this Note will look at Norway's next steps as it continues its own plan of attack on climate change in cooperation with the European Union and the world as a whole.[63]

Part V of this Note provides an overview of what other nations in the world need to learn from the efforts put forth by Norway over the past two decades.[64] Specifically, this Note highlights the importance of integrating CCS technology for countries to continue the extraction and use of fossil fuels while simultaneously reducing carbon emissions.[65] Additionally, as

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51. *See* discussion *infra* Part II.A.
52. *See* discussion *infra* Part II.B.
53. *See* discussion *infra* Parts II.C–D.
54. *See* discussion *infra* Part III.
55. *See* discussion *infra* Parts III.A–B.
56. *See* discussion *infra* Parts III.C–D.
57. *See* discussion *infra* Parts III.C–D.
58. *See* discussion *infra* Parts III.E–F.
59. *See* discussion *infra* Part IV.
60. *See* discussion *infra* Part IV.A.
61. *See* discussion *infra* Part IV.B.
62. *See* discussion *infra* Part IV.C.
63. *See* discussion *infra* Part IV.D.
64. *See* discussion *infra* Part V.
65. *See* discussion *infra* Part V.A.

other countries consider legislative policies to induce emissions abatement, the structure and results of Norway's carbon taxation scheme should be carefully analyzed, especially with regard to the detrimental effect of subsidies and exemptions from the tax.[66] Finally, when considering the current position of the United States, it is recommended that legislative progress start at the state or regional level and work upward, as it has proven nearly impossible to enact meaningful legislation at the national level.[67] Overall, "global warming" is so named because it is a problem that must be addressed globally if real progress is to be made.[68] The nations of the world would be well served to study and consider carefully the information provided by Norway's efforts, as well as the efforts put forth by the European Union.[69]

I. WHAT IS ALL THE FUSS ABOUT CARBON EMISSIONS?

Carbon emissions are widely known to cause pollution and play a major role in climate change.[70] Additionally, Mark Jacobson, a professor of civil and environmental engineering at Stanford University, has directly linked one specific carbon emission, carbon dioxide, to increased human mortality.[71] According to Jacobson's computer model, "[F]or each increase of 1 degree Celsius caused by carbon dioxide, the resulting air pollution would lead annually to about a thousand additional deaths and many more cases of respiratory illness and asthma in the United States."[72] A direct cause and effect relationship is asserted between mortality and carbon dioxide, and as Jacobson states, "The study is the first specifically to isolate carbon dioxide's effect from that of other global-warming agents and to find quantitatively that chemical and meteorological changes due to carbon dioxide itself increase mortality due to increased ozone, particles and carcinogens in the air."[73] The link between carbon emissions and mortality extends beyond the effect on humans; the effect extends to every living species on the planet, and indeed, the planet itself.[74]

A. The Effect of Greenhouse Gases on the Environment

In addition to releasing carbon dioxide (CO_2), the burning of fossil

66. *See* discussion *infra* Part V.B.
67. *See* discussion *infra* Part V.C.
68. *See* discussion *infra* Part V.C.
69. *See* discussion *infra* Part V.C.
70. *See Greenhouse Gas Emissions*, *supra* note 7.
71. Louis Bergeron, *Study Links Carbon Dioxide Emissions to Increase Deaths*, STAN. REP., Jan. 3, 2008, http://news.stanford.edu/news/2008/january9/co-010908.html.
72. *Id.*
73. *Id.*
74. *See* discussion *infra* Part I.A.

fuels for energy also releases nitrous oxide (N_2O) and sulfur dioxide (SO_2) into the air.[75] These chemicals rise very high into the atmosphere where they mix with water and oxygen to become acid rain.[76] The acidic pollution becomes a part of not only rain but also snow, sleet, and fog.[77] The long-term effect of acid rain causes damage to waterways, vegetation, crops, animals, and humans.[78] These chemicals also become trapped in the ground-level ozone layer and create a haze known as smog.[79] In addition to being unappealing and damaging to the environment, smog is deadly to humans, causing lung damage and respiratory diseases.[80]

While carbon dioxide released into the air causes health problems, carbon dioxide emissions are also making their way into the world's oceans, with nearly six million tons of carbon being absorbed into the oceans every day.[81] The huge amounts of carbon are turning the ocean water acidic, creating a corrosive effect that will eventually affect food sources and habitats of many forms of ocean life, followed by many types of shellfish being affected, with the final human toll occurring when commercial fishing is no longer viable.[82] More carbon is absorbed by the cold arctic waters, and research suggests that "10% of the Arctic Ocean will be corrosively acidic by 2018; 50% by 2050; and 100% [of the] ocean by 2100."[83] Furthermore, "'[o]ver the whole planet, there will be a threefold increase in the average acidity of the oceans, which is unprecedented during the past 20 million years.'"[84]

Finally, a fundamental cause of global warming or climate change[85] is linked to the effects of greenhouse gas emissions.[86] The trend for global warming, or increases in average temperature ranges, is evidenced by increases in extreme weather conditions, the disappearance of glacier mass, the melting of Arctic Sea and Antarctic Sea ice, and even the increased

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75. *What Causes Acid Rain?*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/acidrain/education/site_students/whatcauses.html (last visited Apr. 14, 2011).

76. *Id.*

77. *Id.*

78. *Id.*

79. World of Earth Science, *Smog*, ENCYCLOPEDIA.COM (2003), http://www.encyclopedia.com/topic/smog.aspx.

80. *Id.*

81. *See* Robin McKie, *Arctic Seas Turn to Acid, Putting Vital Food Chain at Risk*, THE OBSERVER, Oct. 4, 2009, http://www.guardian.co.uk/world/2009/oct/04/arctic-seas-turn-to-acid.

82. *Id.*

83. *Id.*

84. *Id.*

85. Throughout this Note, the terms "global warming" and "climate change" are used interchangeably.

86. *See supra* text accompanying notes 80–85.

spread of tropical diseases.[87] The National Climatic Data Center reports that the current progression of average temperature increase per century is between 5.4 and 6.3 degrees Fahrenheit.[88] This compares to a reported increase between five and nine degrees Fahrenheit in the past 18,000 years.[89] Given the current and potential destruction related to the effects of greenhouse gases on humans and the environment, the subject of carbon emissions, and the quest to reduce these emissions is an important, if not a vital, topic.[90]

B. Sources of Carbon Emissions

The largest source of carbon emissions across the globe occurs during the combustion of fossil fuels used to produce energy.[91] Burning coal, oil, and gas in power plants, factories, and transportation devices releases the carbon stored in fossil fuels in the form of CO_2.[92] In addition to the production of energy, CO_2 is released during the production of certain minerals, such as cement and lime; metals, such as iron, aluminum, and lead; chemicals, such as ammonia; and through the use of certain petroleum based products.[93] Since trees and plants naturally absorb carbon emissions from the air, mass deforestation can also lead to increased CO_2 levels.[94] Although CO_2 is the primary gas emitted during unnatural and natural processes, additional gases such as methane and nitrous oxide are also released and are included in the "greenhouse" gases.[95] Given the likelihood that global warming and environmental damage are directly linked to carbon emissions from burning fossil fuels,[96] it is logical that the world would seek scientific methods to mitigate the emissions caused by extraction and combustion of fossil fuels while simultaneously exploring alternative sources to supply global energy needs.

C. Alternatives to Carbon and Fossil Fuels

As a substitute to fossil fuels, energy can be produced from a variety

87. *Evidence of Global Warming*, ECOBRIDGE, http://www.ecobridge.org/evidence_of_global_warming.html (last visited Apr. 14, 2011).

88. *Id.*

89. *Id.*

90. *See* discussion *supra* Part I.A.; discussion *infra* Parts I.B, I.D.

91. *Human-Related Sources and Sinks of Carbon Dioxide*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/emissions/co2_human.html (last updated Apr. 14, 2011).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* discussion *supra* Part I.A.

of alternative sources.[97] These power sources include solar, wind, water (hydroelectric), hydrogen, and biofuels.[98] While sun, wind, and water are readily available around the world and pose no threat of pollution, these sources are often downplayed as being unreliable.[99] Skeptics question what will happen when the sun does not shine and the wind does not blow.[100] While the technology to produce solar and wind power is readily available and relatively inexpensive, neither of these clean energy alternatives can provide adequate energy to replace fossil fuels.[101] Waterpower, or hydroelectricity, has the capability to produce fairly vast quantities of electricity, but the proper sources are only available in certain areas, and degradation to land occurs both upstream and downstream of a dam.[102] Biofuels such as ethanol or biodiesel have gained a great deal of support, and many countries have pursued biofuels as a cleaner, renewable alternative to gasoline.[103] While it is true that biofuels are created from renewable sources such as corn, soy, barley, sugar cane, or animal fats, and that they produce significantly lower emissions when burned than fossil fuels, a significant amount of energy (electricity) is required to produce the fuels.[104] The question that remains is whether biofuels create an overall advantage in the reduction of total emissions, or whether they simply create a reduction in the emissions from the transportation sector.[105]

Finally, the substitution of nuclear power for fossil fuels is extremely attractive from the perspective of reducing carbon emissions but is a volatile issue for the public due to both immediate and long-term safety issues.[106] Nuclear power is created when energy is released by splitting heavy nuclei (fission) or by fusing light nuclei (fusion) in a nuclear reactor.[107] Although the process of fission releases a great deal of useable energy and is CO_2-negative, safe, long-term storage of the radioactive byproduct of nuclear waste is a matter of significant concern.[108] Nuclear

97. *See generally Renewable Biofuels and Other Alternative Fuel Sources*, BEYOND FOSSIL FUEL, http://www.beyondfossilfuel.com/alternative_fuels.html (last visited Apr. 14, 2011) (highlighting the various sources of alternative fuels).

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.*

103. Biofuels: Ethanol and Biodiesel Explained, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/energy_in_brief/biofuels_use.cfm (last visited Mar. 21, 2011).

104. *Id.*

105. *Id.*

106. *See* M.S. Dresselhaus & I.L. Thomas, *Alternative Energy Technologies*, 414 NATURE 332 (2001), *available at* http://docencia.izt.uam.mx/hcg/231236/material_adicional/AlternativeEnergy.pdf.

107. *Id.*

108. *Id.*

fusion could theoretically provide limitless, carbon-negative power; however, a safe, manageable engineering process has not been established.[109] Therefore, due to safety concerns, nuclear power's value as an alternative fuel source will likely continue to decline.[110]

D. Dependency on Carbon and Fossil Fuels

The difficulty inherent in producing continuously reliable, affordable energy from any of the aforementioned alternative fuel sources brings the world back to dependence on fossil fuels.[111] The entire world is dependent upon fossil fuels for one reason—reliable energy.[112] In the United States, as of 2006, eighty-five percent of all energy was produced from burning fossil fuels, accounting for approximately sixty-six percent of total electricity and nearly all energy used for transportation.[113] Forty-seven percent of this energy was created by burning petroleum, followed by twenty-seven percent from the burning of coal and twenty-six percent from the burning of natural gas.[114] In addition to the environmental and health problems caused by the burning of fossil fuels, a secondary problem for the United States is that in 2004, nearly sixty percent of the country's petroleum products were imported from non-domestic sources.[115] The United States' reliance on other countries for its supply of energy is an issue that needs to be addressed and radically altered.[116] While other nations have varying energy mix structures, fossil fuels are a predominant source of energy worldwide.[117] Strategies for reducing the emissions from fossil fuels and eliminating the reliance on fossil fuels are a global concern.[118]

E. A Case Study of Norway

Norway is unique in the fact that fossil fuels are an important part of the country's economy, yet fossil fuels are a relatively *un*important domestic energy source.[119] Norway is in the enviable position of having vast amounts of clean energy in the form of electricity produced from readily available hydro-power, providing many industries and residents the

109. *Id.*
110. *Id.*
111. *See* discussion *supra* Part I.C.
112. *Fossil Fuel and Energy Use*, SUSTAINABLE TABLE, http://www.sustainabletable.org/issues/energy/ (last visited Apr. 14, 2011).
113. *Id.*
114. *Human-Related Sources and Sinks of Carbon Dioxide*, *supra* note 91.
115. *See Evidence of Global Warming*, *supra* note 87.
116. *Id.*
117. *See Fossil Fuel and Energy Use*, *supra* note 112.
118. *See* discussion *infra* Parts II, III.
119. *See* BRUVOLL & LARSEN, *supra* note 29, at 5, 11.

ability to utilize emission-free electricity as a primary energy source.[120] However, Norway does produce and export vast amounts of oil and natural gas; in fact, this sector of the economy was responsible for approximately twenty-five to thirty percent of Norway's total carbon emissions between 1990 and 1999.[121] Over the same period, even though Norway implemented an aggressive carbon taxation plan, CO_2 emissions increased by nearly nineteen percent.[122] Given the increase in carbon emissions even in the face of aggressive taxation, Norway has also placed a great deal of importance on the future of Carbon Capture and Storage as a means of reducing emissions at the source of extraction and production of fossil fuels.[123]

II. NORWAY'S CARBON MANAGEMENT STRATEGY

In 1991 Norway introduced carbon taxes as the primary instrument of a multi-pronged national strategy to reduce greenhouse gas emissions.[124] The tax rates imposed on carbon are among the highest in the world and are intended to create significant changes in the total carbon emissions in the nation.[125] In addition to the introduction of carbon taxes, the Norwegian Pollution Control Authority implemented regulations aimed at treating landfills to reduce the methane emissions released during the decomposition process.[126] These regulations were introduced in conjunction with carbon taxes as another component of the national climate policy.[127] Finally, an additional facet of Norway's carbon management strategy is planned forest expansion in order to help mitigate the effect of carbon emissions on the atmosphere by absorbing carbon dioxide.[128]

Norway has aggressively pursued the fight against climate change not only through governmental policies but also by supporting technological

120. *Id.* at 8.

121. *Id.* at 5, 9.

122. *Id.* at 4, 22.

123. Arne Walther, Ambassador, Royal Norwegian Embassy Japan, Presentation of Norwegian Perspectives at Norway–Japan Seminar on the Carbon Value Chain Organized by the Embassy, Mitigating Climate Change (Oct. 9, 2009), *in Mitigating Climate Change*, ROYAL NORWEGIAN EMBASSY IN TOKYO, JAPAN (July 1, 2010), http://www.norway.or.jp/Embassy/english/ambassador/Ambassadors-Speeches/MitigatingClimateChange/.

124. BRUVOLL & LARSEN, *supra* note 29, at 4.

125. *Id.* at 21.

126. *Id.* at 23.

127. *Id.* at 4.

128. *See* Rolfe Winkler, *Norway Leads, US Lags on Environmental Policy*, REUTERS (Oct. 10, 2007, 7:58 PM), http://www.reuters.com/article/bondsNews/idUSN102814562007 1010? sp=true.

advancements through profits made in petroleum production.[129] The country's economic system is a mixture of public and private control, meaning that the government has partial ownership in the energy companies.[130] The blending of control allowed Norway to set up a fund derived from oil profits to move the country toward a green economy.[131] This fund, the Norwegian National Oil Fund, has grown to the point of being the third largest sovereign fund in the world, behind the sovereign funds of Abu Dhabi and Saudi Arabia, which are also state-owned investment funds.[132] Referred to simply as the "oil fund," "it invests the country's oil and gas income in stocks and bonds to save for future generations, when the hydrocarbons run out. Investments are made abroad to avoid overheating the economy."[133] Norway's fight against carbon emissions is intended to ensure the long-term future of the country.[134] Norway's concerted effort to make a difference in global warming has been implemented in a thoughtful manner that is also producing future rewards and protections for the country.[135]

A. Carbon Taxation—Pros and Cons

The carbon taxes imposed on gasoline in Norway are particularly high, contributing to thirteen percent of the cost of fuel in 1999, followed by taxes on auto diesel at fourteen percent of the 1999 cost and light fuel oil at seven percent of the 1999 cost.[136] Emissions levels caused by automotive transportation have decreased over the past decade, and although Norway does not have a domestic automotive industry, the majority of cars imported include technology to increase fuel efficiency, perhaps as a result of the high gasoline tax.[137] Even with the high fuel taxes, citizens continue to drive record miles in record numbers and seem simply to accept the high cost of fuel as part of the price of the freedom to drive.[138]

One point of contention in Norway's carbon taxation plan is the fact that several key industries are either cushioned or exempted from the taxes,

129. Lois Quam, *For Opportunities in the New Green Economy, We Should Look to Norway*, NORWAY.COM (Oct. 2, 2009), http://blog.norway.com/2009/10/02/for-opportunities-in-the-new-green-economy-we-should-look-to-norway/.

130. *Id.*

131. *Id.*

132. *The Norwegian Oil Fund Still Growing*, NORWAY.COM (Sept. 22, 2009), http://blog.norway.com/2009/09/22/the-norwegian-oil-fund-still-growing/.

133. *Id.*

134. *Id.*

135. *See* discussion *supra* Parts I.A–D.

136. BRUVOLL & LARSEN, *supra* note 29, at 5.

137. *Id.* at 11.

138. *Id.* at 22–23.

while others bear the full burden of taxation.[139] Norway is unique in that a large proportion of the energy consumed in the country is electricity, which is created by hydropower and produces no emissions.[140] However, Norway does produce a great deal of petroleum, both for domestic use and for export.[141] The emissions created by petroleum production contributed to approximately twenty-five to thirty percent of the total carbon emissions for Norway in the 1990s.[142] While the government set relatively high tax rates on this industry, it either partially or totally exempted other industries that also create significant emissions, such as the metal processing industry.[143] Additionally, "there [are] also exemptions for fishing, air and ocean transport, manufacturing of cement . . . and land-based use of gas."[144] For example, pulp and paper as well as herring flour manufacturers are subject to half carbon taxes.[145] While these exemptions from the tax scheme may be necessary either politically or competitively, the fact remains that a great deal of additional progress could be made toward the goal of decreasing greenhouse gas emissions if the exemptions were not present.[146]

B. Norway's Leading Edge Technology: Carbon Capture and Sequestration (CCS)

Given the looming tax burden, Statoil, a Norwegian oil company, invested in innovative technology called CCS at its new Sleipner oil and natural gas field.[147] The goal was to create a method of capturing the emissions created from the extraction of fossil fuels in order to avoid being taxed on emissions that enter the atmosphere.[148] Norway's Sleipner Project for carbon capture and sequestration began in 1996 and is the first commercial application of emissions avoidance technology.[149] Sleipner is an oil and gas field in the North Sea, and the carbon emissions created by operating the field were included in the carbon tax imposed by Norway.[150] Since 1996 nearly one million metric tons of carbon emissions have been sequestered annually, and the company's investment was paid back in only

139. *Id.* at 5.
140. *Id.* at 8.
141. *Id.* at 5.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 22.
147. *See* Howard J. Herzog, *What Future for Carbon Capture and Sequestration?*, 35 ENVTL. SCI. & TECH. 148, 151 (2001), *available at* http://sequestration.mit.edu/pdf/EST_web_article.pdf.
148. *See id.*
149. See id.
150. Id.

a year and a half in savings realized by avoiding the carbon tax.[151] According to the Massachusetts Institute of Technology,

> [c]arbon sequestration is a way to reduce greenhouse gas emissions. It complements two other major approaches for greenhouse gas reduction, namely improving energy efficiency and increasing use of non-carbon energy sources. Interest has been increasing in the carbon sequestration option because it is very compatible with the large energy production and delivery infrastructure now in place.[152]

Norway is considered the "Carbon Capture & Storage (CCS) capital of the world."[153] The Sleipner Project has safely removed and stored more than ten million tons of CO_2 from the Sleipner natural gas field without any evidence of leakage into the water.[154] The economic and environmental success of CCS is evident, and this technology is being studied and implemented in other areas around the world.[155]

C. Economic Effects of Carbon Taxation

The potentially negative impact of a carbon tax on individual consumers has long been a stumbling block to imposing such a tax.[156] The primary problem is that this type of tax is regressive; that is, the tax tends to affect the lowest income households unfairly, as this sector spends a greater percentage of income on energy.[157] When comparing the economic effect of a carbon tax that creates an additional ten dollar cost per barrel of oil, it is projected that households in the lowest twenty percent income level would realize a 2.4% increase in energy spending as compared to their wealth, while households in the highest twenty percent income level would only see an increase of 0.8%.[158] The imposition of the heaviest burden of the tax onto the poorest segment of the population is problematic for passing such a tax.[159] In an effort to address the problems caused by the regressive tax, Norway allocates a portion of the carbon tax revenue to

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151. *Id.*

152. *Carbon Capture and Sequestration Technologies @ MIT*, MASS. INST. OF TECH., http://sequestration.mit.edu (last visited Apr. 14, 2011).

153. David Hone, *A Focus on CCS in Norway*, SHELL (May 29, 2009), http://blogs.shell.com/climatechange/?p=469.

154. *Id.*

155. *See supra* notes 153–54 and accompanying text; *infra* notes 156–58 and accompanying text; discussion *infra* Part III.

156. *See* WILLIAMS ET AL., *supra* note 5, at 24.

157. *See id.*

158. *Id.* at 13–14.

159. *Id.*

offset individual income tax.[160] With this strategy, "[i]n 1999, the tax revenue reduced personal income taxes by an average of 790 Norwegian krones ($117) per person. Other portions of the tax revenues have been spent on research and development of renewable energy and energy efficiency technologies."[161]

A further consideration when implementing a carbon tax is the possibility of creating a competitive disadvantage in the world marketplace for industries affected by the tax.[162] The carbon tax increases a company's production costs, which then contributes to a higher market price or a company's lower profitability.[163] A competitive disadvantage could occur in a given market if a country unilaterally enacts a carbon tax while all other international competitors do not.[164] However, the intentions of the Kyoto Protocol are for all countries to create a method of reducing carbon emissions, both by enacting taxes and by means of technological advances.[165] Given the proposal of worldwide cooperation within the Kyoto Protocol,

> if carbon taxes were used as the sole means of meeting the Kyoto emissions obligations, the level of the taxes would be very high and could thus have significant implications for competitiveness. However, since all industrial countries will have to reduce emissions under the Kyoto Protocol, industries in different countries will almost simultaneously experience an increase in their costs.[166]

There is no doubt that a carbon tax adds cost to the bottom line of any industry and therefore eventually to the consumer.[167] However, it is one method that can ensure greater efficiencies, new technology, and concerted efforts to minimize levels of harmful carbon emissions.[168]

D. Measureable Effects of Norway's Carbon Policy

Between 1990 and 1999, Norway experienced gross domestic product

160. WILLIAMS ET AL., *supra* note 5, at 20.

161. *Id.*

162. *See* ZHONGXIANG ZHANG & ANDREA BARANZINI, WHAT DO WE KNOW ABOUT CARBON TAXES? 17 (2003), *available at* http://mpra.ub.uni-muenchen.de/13225/1/envwp carbon tax03.pdf.

163. *See id.* at 18.

164. *See id.*

165. *See id.* at 3; *infra* Part III.A.

166. ZHANG & BARANZINI, *supra* note 162, at 20.

167. *See id.* at 18.

168. *See supra* Part I.A.

growth of thirty-five percent.[169] With this substantial increase in gross domestic product, there is an expectation for emissions to increase due to increased energy demands.[170] During this period, actual carbon emissions increased nineteen percent, even with an aggressive carbon taxation policy.[171] While the increase in emissions is less than the percentage increase in gross domestic product, the main question is how much influence the carbon tax has on the quantity of emissions.[172] One study indicates that the direct effect of the tax has been relatively small; without the tax, actual emissions during the period would have increased approximately 21.3%, leaving an estimated reduction in emissions directly related to the carbon tax of only 2.3%.[173] The study instead contributes a switch in the energy mix to clean hydroelectricity as a major contributor to the reduction, along with the abatement of landfill gases, which reduced the emissions of methane, N_2O, and SF_6.[174] Even though the direct effect of the tax may be small, perhaps the high carbon taxes provided incentive to substitute fossil fuels with clean energy sources, where available, in order to avoid the tax.[175]

Again, a primary reason cited for a less than anticipated direct reduction through the carbon tax is the broad exemption allowed to several fossil fuel intensive industries.[176] These exemptions from the carbon tax were

> principally motivated by concern about competitiveness. The industries, in which we expect the carbon tax to be most efficient in terms of downscaling of the production and reduced emissions, are the same industries which are exempted from the carbon tax. The zero-tax industries consist mainly of the process industry, which explains why there is a close to zero effect of the tax on process related CO_2 emissions. If the metal sector and industrial chemicals had not been exempted from the carbon tax, a large share of these sectors would have proven unprofitable. Likewise, the low possibilities to substitute from heating oil for

169. BRUVOLL & LARSEN, *supra* note 29, at 22.
170. *Id.* at 9.
171. *Id.* at 22.
172. *See id.* at 22.
173. *Id.* at 22.
174. *Id.* at 16, 23.
175. *See id.* at 16.
176. *Id.* at 23.

> fishing and sea transport indicate that a tax would have reduced the production level in these industries.[177]

As previously stated, an exemption is likely in place due to political or economic realities; however, it does lead to a detrimental effect on the overall goal of measureable emission reduction.[178]

III. THE EUROPEAN UNION CARBON POLICY

A. The Kyoto Protocol

In December of 1997, the Kyoto Protocol to the United Nations Framework Convention on Climate Change was signed into agreement.[179] The Kyoto proposal allows

> countries considerable flexibility in the choice of domestic policies to meet their emissions commitments. Possible policies include carbon/energy taxes, domestic emissions trading, command-and-control regulations and other policies. Economists and international organizations have long advocated carbon taxes, because they can achieve the same emissions reduction target at lower costs than conventional command-and-control regulations. Moreover, carbon taxes can act as a continuous incentive to search for cleaner technologies, while for command-and-control regulations there is no incentive for the polluters to go beyond the standards.[180]

The Kyoto proposal outlined a system of tradable permits of CO_2 emissions among Annex I countries[181] with the intention of creating an efficient

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177. *Id.* at 22.

178. *See supra* Parts II.C–D.

179. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998); *Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/ items/2830.php (last visited Apr. 14, 2011).

180. ZHANG & BARANZINI, *supra* note 162, at 4.

181. Annex I parties include Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America. *List of Annex I Parties to the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE

method to achieve measurable emissions reductions.[182]

B. The European Union Emissions Trading Scheme

To achieve the goals set forth in the Kyoto Protocol, the European Union established the European Union Emissions Trading Scheme (EU ETS), which applies to industries that create approximately forty-five percent of the total carbon emissions in Europe.[183] The industries covered by the EU ETS include "facilities for electricity generation, the production and processing of ferrous and non-ferrous metals, energy intensive activities in the mineral industry and the pulp, paper and board production."[184] The EU ETS focuses on the point of combustion where carbon emissions are created.[185] This provides incentive for industries creating the emissions to invest in improved efficiencies and technologies to minimize the costs incurred from emissions.[186] As the current EU ETS covers a rather narrow segment of heavy industry, progress remains to be made in other areas.[187] Specifically, the goal is to include additional domestic industries not currently included in the EU ETS, as well as industries abroad, that may eventually join in international emissions trading.[188]

C. Past, Present, and Future Strategy of the EU ETS

The EU ETS was initiated in 2005, signaling the EU's intention to become a leading player in the fight to curb carbon emissions.[189] As the EU is one of the world's major contributors to greenhouse gas emissions, it is fair that the EU has become a leading player in the fight to curb carbon emissions.[190] The adoption of an emissions trading scheme instead of a direct carbon tax provides a level of flexibility for industries.[191] In essence,

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CHANGE, http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last visited Apr. 14, 2011).

182. *Kyoto Protocol*, *supra* note 179.

183. Gernot Klepper & Sonja Peterson, *Emissions Trading, CMD, JI, and More: The Climate Strategy of the EU*, 27 THE ENERGY J. 1, 1 (2006), *available at* http://www.hm-treasury.gov.uk/d/Klepper-Peterson-2006.pdf.

184. *Id.*

185. *See* PALTSEV ET AL., *supra* note 40, at 4.

186. *See id.*

187. *See id.*

188. *Id.* at 6.

189. *EU Emissions Trading System (EU ETS)*, DEPT. OF ENERGY & CLIMATE CHANGE (U.K.), http://www.decc.gov.uk/en/content/cms/what_we_do/change_energy/tackling_clima/emissions/eu_ets/eu_ets.aspx (last visited Apr. 14, 2011).

190. Atle C. Christiansen & Jorgen Wettestad, *The EU as a Frontrunner on Greenhouse Gas Emissions Trading: How Did it Happen and Will the EU Succeed?*, 3 CLIMATE POL'Y 3, 4–5 (2003).

191. *Id.* at 5.

certain industries that would face high costs to curb emissions could opt to purchase additional carbon allowances from other industries that have lower carbon abatement costs.[192] Industries able to change their energy usage in a cost-effective manner to reduce emissions have the ability to offset the costs incurred by selling unused carbon allowances in the trading scheme.[193]

D. Progress of the EU ETS From Inception to Present

Currently, the emissions trading scheme in the European Union encompasses approximately forty percent of all EU greenhouse gas emissions.[194] This surprisingly small percentage is due to the fact that the EU ETS focuses on CO_2 rather than attempting to encompass the entire array of greenhouse gases.[195] The EU directive is in sharp contrast to the Kyoto Protocol, which called for controlling all greenhouse gases and targeting emissions from all sources, rather than just carbon emissions.[196] The rationale behind limiting the EU ETS to carbon emissions was based on the belief that

> [i]nclusion of other greenhouse gases . . . is desirable but would be dependent on resolving monitoring, reporting and verification issues . . . . [T]he monitoring uncertainties are still too great for greenhouse gases other than carbon dioxide. For these reasons, emissions of greenhouse gases other than carbon dioxide are not included in the first phase of the scheme.[197]

Within each Member State of the EU, industries in the included sectors are required to obtain permits, with one permit equal to one ton of CO_2 emissions, representing the allowable amount of carbon emissions.[198]

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192. *Id.*

193. *Id.*

194. COLE, *supra* note 6 (manuscript at 14).

195. Raymond Kopp, Senior Fellow at Resources for the Future, Cong. Testimony Prepared for the U.S. Senate Comm. on Energy and Natural Res. Roundtable on the European Emissions Trading Scheme: An Overview of the European Union Emissions Trading Scheme 1 (Mar. 26, 2007), *in An Overview of the European Union Emissions Trading Scheme*, RESOURCES FOR THE FUTURE, http://www.rff.org/RFF/Documents/RFF-CTst_07-Kopp.pdf (last visited Apr. 14, 2011).

196. COLE, *supra* note 6 (manuscript at 15).

197. *Id.* (quoting *Commission Proposal for a Directive of the European Parliament and of the Council Establishing a Scheme for Greenhouse Gas Emission allowance Trading within the Community and Amending Council Directive 96/61/EC*, at 10, COM (2001) 581 final (Oct. 23, 2001)).

198. *Id.* (manuscript at 18). *See also* Council Directive 2003/87, art. 6(2)(e), 2003 O.J. (L 275) 32 (EC).

Detailed requirements were put forth for reporting and verifying actual emissions, including independent verification of emission rates and substantial penalties for non-compliance.[199] With the current emphasis on emissions trading, the EU had to focus on how to devise emissions allocations efficiently.[200] In theory,

> there are two basic methodologies for initial allocation of allowances. One option is some form of 'grandfathering', whereby allowances are distributed to companies on the basis of historical emissions or according to a certain performance standard ('benchmarking'). The alternative is that the government requires companies to buy allowances, for instance at a fixed price or in an auction.[201]

The EU opted to use a grandfathering method for allocation, in part to minimize objections of Member States against the alternative auction method.[202] The EU sets forth a clear system of compliance and reporting along with considerable financial penalties in order to ensure across-the-board compliance with the system.[203] Given that the EU ETS is directed at the point of combustion, it is expected that the companies covered by the system will directly bear the cost of emissions reduction both by the cost of allocation permits and by pursuing improved efficiency or alternative fuel sources.[204] Interestingly, however, during a trial phase of the system

> electricity price changes have appeared to reflect not so much the direct mitigation expenses but the changing marginal cost of permits, even though they were distributed for free. Given that the electricity markets are mostly deregulated in Europe such a pass through of permit price is, or should have been, expected.[205]

In the end, any actual or potential additional costs related to the reduction of carbon emissions will ultimately be borne by the consumer.[206]

At the beginning of Phase I of the EU ETS, approved carbon emissions allowances were in place equaling one and a half billion tons of

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199. *See* COLE, *supra* note 6 (manuscript at 18). *See also* Council Directive 2003/87, arts. 6–14, 2003 O.J. (L 275) 32 (EC).

200. *See* Christiansen & Wettestad, *supra* note 190, at 11.

201. *Id.*

202. *Id.*

203. *Id.*

204. PALTSEV ET AL., *supra* note 40, at 4.

205. *Id.*

206. *See id.*

CO_2 per year, which was nearly 100 million tons greater than actual current emissions.[207] This number can be explained by several possibilities, including Member States not wanting to impose undue hardship on the sectors involved, aggressive lobbying efforts by the industries, and the possibility of individual Member States creating excess allowances in order to benefit monetarily by trading them to other Member States.[208] The trading of allowances between industries and Member States began with Phase I on January 1, 2005, and "approximately 291 million allowances were traded in the EU ETS in its first year of operation. By October of 2006, the number of traded allowances had grown to 787 million."[209] While the volume of trading has steadily increased, the price of the allowances has fluctuated wildly, starting below €10/ton, then rising to €30/ton, and finally settling between €10/ton and €20/ton.[210] An unfortunate byproduct of the trading scheme is the fact that many consumers were essentially charged for the potential cost of emissions in the form of higher rates for energy sources even though the allowances were provided to the industry for free and the industry had the ability to sell excess allowances for profit.[211]

As the first phase of the trading scheme ended in 2007, the word "failure" was often used to describe the outcome.[212] The combination of the fact that no real progress was made toward actually reducing carbon emissions along with the fact that consumers were paying higher costs while several powerful industries raked in huge windfall profits from trading "free" emissions allowances left many citizens of the EU fully embracing the word "failure" to describe the EU ETS.[213] From the point of view of the scheme's framers, however, it was considered a success because a viable framework was put in place within each Member State from which to begin working toward real and measureable progress in reducing carbon emissions during the next phase.[214]

The major difference in Phase II of the EU ETS was the fact that instead of basing emission allocations on pure estimates, the allocations were now based on actual, measured emissions volume collected during Phase I.[215] Therefore, industries that attempted to reduce their cost of

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207. COLE, *supra* note 6 (manuscript at 23–24). *See also* Michael Grubb, Christian Azar & U. Martin Persson, Commentary, *Allowance Allocation in the European Emissions Trading System*, 5 CLIMATE POL'Y 129, 129–30 (2005).

208. COLE, *supra* note 6 (manuscript at 24).

209. *Id.* at 29. One allowance accounts for the equivalent of one ton of CO2 emissions. *See id.* at 18. *See also* Council Directive 2003/87, art. 6(2)(e), 2003 O.J. (L 275) 32 (EC).

210. COLE, *supra* note 6 (manuscript at 29–30).

211. *Id.* (manuscript at 31–32).

212. *Id.*

213. *Id.* (manuscript at 32).

214. *Id.*

215. *Id.* (manuscript at 33).

compliance by estimating a higher number of emissions in order to receive adequate or surplus allocations now would be issued allocations based on real numbers of the actual emissions created in the previous year.[216] These companies would then need to strive to reduce emissions from the actual prior year number rather than the inflated estimate previously presented.[217] Even though several Member States attempted to submit plans with inflated allocations, the plans were rejected and the Member States were forced to reduce the allocations drastically in order to pursue true progress toward CO_2 reductions.[218] With these more stringent requirements regarding the number of allowable allocations, an estimated 6.8% reduction over actual 2005 emissions was anticipated.[219] Additional controls over emissions allowances were put in place with a 2009 Directive to the EU ETS, which stated that "starting in 2013, more than 50% of allowances will be auctioned, rising to 100% by 2027."[220] Therefore, while the allowances were initially offered for free, by 2013 only fifty percent of the allowances will be free, fifty percent will have to be purchased, and by 2027 all emissions allowances will have to be purchased.[221] This is what provides the incentive for industries to reduce emissions in order to reduce the expense of purchasing allowances.[222] In addition, the directive carried a requirement that

> 50 percent of all auction revenues be used for (among other purposes) reducing GHG emissions, developing renewable energy resources (pursuant to a related EU policy mandating 20 percent of energy production from renewable sources by 2020), carbon capture and storage, measures to avoid deforestation or increase afforestation, and public transportation.[223]

Clearly, the EU recognizes the importance of a multi-pronged plan to make actual headway in achieving measurable emissions reductions in addition to the importance of more centralized control over the continued implementation of the EU ETS.

Perhaps the most important addition made to the EU ETS by the 2009 Directive is the recognition of CCS as a necessary component for successful

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* (manuscript at 40).
221. *Id.*
222. *Id.* (manuscript at 41).
223. *Id.* (manuscript at 40).

emissions reduction.[224] Specifically,

> on March 26, 2009, the European Parliament and Council approved a Directive that expressly recognizes carbon capture and storage (CCS) as a 'bridging technology that will contribute to mitigating climate change.' The Directive's Preamble (para. 5) predicts that carbon emissions avoided by CCS could amount to 15 percent of total required emissions reductions.[225]

The fact that the EU is now focused on including CCS technology as an important component of its emissions reduction strategy brings Norway directly into play, even though Norway is not a Member State.[226] Norway's leadership in the cutting edge CCS technology could play a vital role in the new and improved EU ETS.

E. Compatibility of EU ETS with Non-Member States

Although the Emissions Trading Scheme being utilized by the EU is intended for compliance by Member States, the scheme is ultimately geared toward compatibility with other nations in order to synergize a cohesive, global attack on greenhouse gas emissions.[227] This goal of a compatible trading scheme is only partly due to lofty, "green" goals.[228] It is also due to the fact that many states are already in the process of, or nearing the process of, becoming Member States of the EU, and in several of these states the abatement costs of changing fuel sources are significantly lower than in many current Member States.[229] Therefore, a trading scheme that would integrate with many nations and incoming Member States would prove beneficial, especially since new Member States are automatically required to adopt all EU legislation.[230] Additionally, greater participation in the trading scheme by additional countries would infuse a larger volume of allocation trading, leading to greater efficiencies in the trading system.[231] Finally, the ability to develop a successful trading scheme not only for Member States but also across many nations would establish the EU as the

224. *Id.*
225. *Id.* (manuscript at 41).
226. *Id.*
227. *See* Christiansen & Wettestad, *supra* note 190, at 12.
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.*

definitive leader in the fight to curb carbon emissions and global warming.[232]

F. Norway's Participation as a Non-Member State

A primary goal of the EU strategy is to create an overall cap on emissions levels of various industries in order to preserve the competitiveness of those industries across Europe.[233] According to this strategy,

> it is recognized that, at least initially, not all Member States may be able to join the system and that the sectors included may differ from one country to another. The expansion of the system to allow opt-ins from non-included sectors and closely allied non-EU members (Norway) is also anticipated.[234]

Although Norway is not a Member State of the EU, since 1994 it "has been part of the European Union's internal market through the Agreement on the European Economic Area (EEA Agreement)."[235] "Most EU legislation in the environmental field is also EEA-relevant, which means that Norway to a large degree has the same obligation to implement EU environmental legislation as the Member States."[236]

In order to pursue greater levels of greenhouse gas reductions, Norway put together a "Quota Commission" made up of participants from government, industry, and academia.[237] The purpose was to develop a useable cap-and-trade system to utilize in addition to the existing carbon taxation in an effort to further reduce carbon emissions.[238] Norway's proposed trading scheme is significantly more expansive than the EU Emissions Trading Scheme in that it would include more than eighty-eight percent of the country's greenhouse gas emissions, rather than

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232. *See id.*

233. A. DENNY ELLERMAN, MIT JOINT PROGRAM ON THE SCI. & POLICY OF GLOBAL CHANGE, TRADE PERMITS FOR GREENHOUSE GAS EMISSIONS: A PRIMER WITH PARTICULAR REFERENCE TO EUROPE 13 (2000), *available at* http://web.mit.edu/globalchange/www/MITJPSPGC_Rpt69.pdf.

234. *Id.*

235. STINE AAKRE & ASBJØRN TORVANGER, CTR. FOR INT'L CLIMATE & ENVTL. RESEARCH, CASE STUDIES ON CLIMATE CHANGE RESPONSE POLICIES AND STRATEGIES OF SELECTED ANNEX I COUNTRIES: NORWAY AND SWEDEN 11 (2007), *available at* http://www.cicero.uio.no/media/ 5960.pdf.

236. *Id.*

237. ELLERMAN, *supra* note 233, at 13–14.

238. *Id.*

focusing solely on CO_2.[239] As expected, the greatest area of contention within the Quota Commission surrounds the method of allocation.[240] Regarding the options presented for allocation,

> [a] bare majority of six (out of eleven) recommends that the government auction the permits and that the proceeds accrue to the government to reduce other taxes and to earn a "'double dividend.'" The sole industry representative and an environmental NGO recommended grandfathering of permits, and the other minority group consisting of civil servants from several ministries argued that allocation is a political issue and outside of the Commission's mandate.[241]

The vast discrepancies in opinion regarding the proper way to allocate emissions allowances is a crucial sticking point facing all countries currently contemplating a cap-and-trade system.

IV. WHAT DIRECTION IS NORWAY'S CARBON FOOTPRINT LEADING?

A. The Debate Over Taxes and Exemptions

Nearly two decades after its inception, a major topic currently being debated in Norway is the existing emissions tax structure and its inclusion of allowances and exemptions for certain industries.[242] A theory of "pure" economics would call for equal taxes for all emissions from all sources.[243] The tax scheme imposed in Norway, however, is not a "pure" tax; rather, it is influenced by politics and world markets.[244] For instance,

> in Norway, tax rates for greenhouse gas emissions vary from zero to NOK 872 per tonne CO_2 equivalent. Compared with the current carbon price in the EU emissions trading scheme, Norwegian households pay about NOK 0.5 billion more than they should for their CO_2 emissions, and the oil and gas extraction sector pays about NOK 1.5 billion too much. In contrast, the other polluters

239. *Id.* at 14.

240. *Id.*

241. *Id.*

242. *See* WILLIAMS ET AL., *supra* note 5, at 20.

243. *See* FINN ROAR AUNE & KNUT EINAR ROSENDAHL, ANALYSIS OF SELECTED RESOURCE AND ENVIRONMENTAL ISSUES, *in* SELECTED RESOURCE AND ENVIRONMENTAL ISSUES: NATURAL RESOURCES AND THE ENVIRONMENT 229, 232 (2008), *available at* http://www.ssb.no/ english/subjects/01/sa_nrm/nrm2008/kap15-resources.pdf.

244. *Id.* at 231.

> in the process industry, together with the transport sector, gas terminals, oil refineries, and the fisheries sector, pay NOK 2.8 billion less than they should in a cost-efficient system.[245]

The industries that are creating carbon emissions, yet paying reduced taxes, are benefiting from a system of exemptions and lower tax rates intended to protect the worldwide competitiveness of certain sectors.[246] This system of favoritism is a topic for serious debate within Norway.

Currently, the Research Council of Norway is studying the disparity between the current policy regarding carbon taxes and a tax scheme recommended by pure economic theory.[247] The assumption is that the current system of varying levels of taxes and subsidies prevents true cost efficiency.[248] The current carbon tax structure ranges from a nearly zero tax for sectors included in the tax exemption to a substantial tax of nearly NOK 300 per ton of CO_2 for the average household, whose primary emissions include petrol, diesel, fuel oil, and kerosene, all of which are levied with a hefty carbon tax.[249] Still, the highest tax rate is imposed on the actual extraction and production of oil and gas.[250] Regarding Norway's differing tax rates for various sectors,

> [t]he CO_2 tax contains exemptions for coal and coke used in production of cement and lightweight expanded clay aggregate in the processing industry and has a reduced rate for the paper and pulp industry and the production of fishmeal. A tax on heating oil (mineral oil) is applicable for the paper and pulp industry and the production of fishmeal. The tax on consumption of electricity is applicable for all manufacturing industries and greenhouse industries.[251]

Although these exemptions and disparities in tax rates do not comply with pure economic theory, they were set in place presumably to protect the included sectors from being priced out of world competitiveness due to

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245. *Id.* at 232.
246. *Id.*
247. *Id.* at 250.
248. *Id.*
249. *Id.*
250. *Id.*
251. LYNN PRICE ET AL., LAWRENCE BERKELEY NATIONAL LABORATORY, TAX AND FISCAL POLICIES FOR PROMOTION OF INDUSTRIAL ENERGY EFFICIENCY: A SURVEY OF INTERNATIONAL EXPERIENCE 7 (2005), http://www.efchina.org/csepupfiles/workshop/2006102695218825.1165929103267.pdf/IntlExp_FTpolicies_IndustrialEE_EN.pdf.

taxes aimed at an overall reduction of carbon emissions.[252] While economists looking to create the most cost efficient and effective measures to reduce carbon emissions would not allow such exemptions, real world implementation requires the tax structure to be enacted through politics and policy.[253] It is difficult to enact legislation imposing emissions taxes on domestic industries that are so burdensome as to make the industry non-competitive in the world market.[254] Therefore, the inadequacies and disparities of the emissions tax scheme are likely to continue.[255]

B. Incorporating European Union Policies

Beginning in 2006, Norway expanded its policies to encompass the policies set forth in the EU ETS.[256] With this change, the cost-effectiveness of greenhouse gas reductions improved for several market sectors.[257] Even with the cost improvement, the combined sectors with little or no exemptions still pay nearly NOK 2.1 billion more in carbon taxes than they would in a totally pure economic system that did not include any subsidies.[258] It would seem that the goal of Norway's carbon emissions strategy is not only to reduce carbon emissions, but also to generate tax revenue from sectors and industries that can "afford" it.[259] Many economists still believe that all greenhouse gas emissions should be taxed equally, without any form of subsidy for any sector.[260] These purists look to the possibility that future rules of competition within the European Economic Area (EEA), of which Norway is a party, will help to move Norway's climate strategy more toward a pure economic strategy and away from policies driven by politics.[261]

Norway not only provides critical energy resources for other nations, but it also provides energy in the most responsible manner possible for the environment.[262] The oil and gas exported from Norway may possibly be the "cleanest" fuel sources in terms of carbon emissions due to the extraordinary efforts of Norway to utilize CCS and other strategies to minimize greenhouse gas emissions during the extraction and production of fuel.[263] Additionally, Norway is committed not only to expanding its

252. AUNE & ROSENDAHL, *supra* note 243, at 249.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 251.
257. *Id.*
258. *Id.*
259. *See id.*
260. *Id.* at 251.
261. *Id.*
262. Walther, *supra* note 123.
263. *Id.*

utilization of CCS domestically in order to produce cleaner fuel, but also it intends to partner with other countries such as China to develop CCS technology for new coal plants in an effort to reduce global carbon emissions.[264] Given the predicted increase in world population and the corresponding increase in energy demand, Norway envisions its CCS technology as playing a key role in helping mitigate the expected increase in greenhouse gas emissions.[265] Furthermore, Norway is dedicating twenty percent of its EEA contributions for the next five years to fund CCS projects in various EU Member States, in addition to lending substantial technological support.[266] Along with the UK, Norway is funding a study of the viability of using the North Sea as a potential site for CCS installations.[267] The obvious benefit of CCS is the fact that the technology provides a responsible manner for the world to continue the widespread production and use of fossil fuels for energy while simultaneously reducing the harmful emissions that cause environmental damage.[268] Norway's foray into, and perfection of, CCS technology is likely the greatest contribution that will be made by this small country to the reduction of global emissions.

C. The Successes and Failures of Norway's Strategy

Over the past fifteen years, there have been some additional, specific areas of progress in Norway's fight to curb domestic greenhouse gas emissions.[269] During this time, recycling of household waste has increased from nearly zero percent to over forty percent, greatly helping moderate the harmful effects of landfill gases.[270] This would be considered a victory in itself; however, the progress is mitigated by the fact that within that same time period, the amount of household waste created per person has increased over fifty percent, thereby totally eliminating the positive benefit of the recycling program.[271] If one chooses to view this in a positive light, however, the beneficial results of the recycling program did mitigate the harmful effects of the fifty percent increase per person of household waste.[272] Continued progress in recycling efforts, in addition to efforts to decrease overall household waste bound for landfills, will further the positive abatement of harmful emissions from Norway's landfills.

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264. *Id.*

265. *Id.*

266. *EU, Norway Join Forces on CO2 Capture and Storage*, EURACTIV (May 29, 2009), http://www.euractiv.com/en/climate-change/eu-norway-join-forces-co2-capture-storage/article-182753.

267. *Id.*

268. *See* Herzog, *supra* note 147, at 2.

269. Bugge, *supra* note 28, at xviii.

270. *Id.*

271. *Id.*

272. *Id.*

While increased energy efficiency and alternative energy sources have been encouraged within the country, Norway's total energy consumption has increased substantially in the period between 1989 and 2001.[273] Notably, the number of vehicles on the road increased by more than one-third during that time, perhaps directly related to the fact that during the same period Norway's funding for public transportation was slashed in half.[274] While the vehicles on the road in Norway are more fuel efficient than ever, once again the benefits of this positive initiative are outweighed by the overwhelming trend of "more"—more people, more trash, more cars, more consumption, and more greenhouse gas emissions.[275]

The lofty goals Norway set for itself in 1987 regarding climate change strategy were partially derailed by the nation's growing unemployment rates and economic downturn in the 1990s.[276] The nation began to focus its attention on possible membership within the EU and the issues surrounding the EEA agreement.[277] Attention turned from creating a sustainable economy centered on clean fuel processes to merely minimizing negative environmental effects within the current economic structure.[278] Norway's goal of creating "an economy for the Earth—an economy for the common good"[279] seems to have taken a back seat in the wake of economic downturn, perhaps due to the fact that Norway's primary source of income is related to the sale of fossil fuels.[280]

Because imports of fossil fuels are expected to grow to encompass eighty-five percent of the overall energy requirements in Europe as well as the United States by the year 2030, it is understandable that Norway would continue to rely upon its vast natural resources to provide economic viability for the country.[281] Currently, Norway provides nearly fifteen percent of fossil fuels imported into the EU.[282] Therefore, Norway is likely to continue its current oil and gas production and eventually to expand to new fields, perhaps in cooperation with Russia in the far north regions and the Barents Sea.[283] The current political climate suggests that the importance of creating wealth for the nation through the sale of oil and gas

273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at xix.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. HEINRICH KREFT, AMERICAN INSTITUTE FOR CONTEMPORARY GERMAN STUDIES, GEOPOLITICS OF ENERGY: A GERMAN AND EUROPEAN VIEW 2, *available at* http://www.aicgs.org/documents/kreftenergy.pdf (last visited Apr. 14, 2011).
282. *Id.*
283. *Id.*

outweighs the importance of developing a sustainable alternative energy plan for the future.[284]

D. Norway's Next Steps

Norway faces difficult choices as to the next steps in the fight against climate change, with struggles emerging between the current economic conditions of citizens such as laborers in the oil and gas industry or commercial fishermen and the need aggressively to pursue other, sustainable energy sources for the future benefit of the country and the climate.[285] If Norway does not pursue changes, a degradation of its land, natural resources, and climate will certainly occur, especially given the natural increase in population and corresponding increase in gross national product expected over the next thirty years.[286] However, Norway has a history of making difficult choices that are in the country's best interest, and the nation is proud to have been one of the first to implement serious agendas in order to counteract the harmful effects of carbon emissions.[287] Norway needs once again to focus on the issue and move forward on a cohesive plan to create cooperation between political policy and scientific and technological possibilities regarding development of sustainable, clean energy.[288] International cooperation with the current and future agendas of the EU will be vital in successfully moving both Norway and the world closer to the goal of minimizing carbon emissions and creating long term, sustainable alternatives for fossil fuels.[289]

While the production of fossil fuels certainly provides economic stimulus to Norway, given that it currently ranks as the world's third largest exporter of oil and natural gas, it is time to consider not only the benefits of fossil fuels but also the previously underestimated costs.[290] A country that is heavily reliant upon the production of fossil fuels to sustain its economy is at the mercy of the continued "acceptability" of consumption of fossil fuels by the rest of the world.[291] This "acceptability" is determined not only by the cost of acquiring the fuel, but also by the long term cost to the planet due to climate change.[292] If and when the world as a whole begins to take the effects of global warming seriously, the demand for fossil fuels will

284. Bugge, *supra* note 28, at xix.
285. *Id.*
286. *Id.* at xix–xx.
287. *Id.* at xx.
288. *Id.*
289. *Id.*
290. Geir Westgaard, *The Extended Concept of Energy Security*, *in* EMERGING FROM THE FROST: SECURITY IN THE 21ST CENTURY ARCTIC 74 (Kjetil Skogrand ed., 2008).
291. *Id.*
292. *Id.*

begin to wane as countries seek clean energy alternatives.[293] Any nation, including Norway, whose national economy is linked to production of fossil fuels should begin to prepare for an eventuality that could include weaker demand for oil and gas.[294]

Norway plays a pivotal role in combating climate change not only because it has taken a leading role in enacting policies and practices to combat greenhouse gas emissions, but also because of its unique position in the world as a major exporter of both oil and natural gas.[295] Oil currently "accounts for a quarter of Norway's gross domestic product, half of [the] total exports, a third of total government income and a quarter of total investments."[296] Furthermore, natural gas is expected to surpass oil as Norway's leading energy export in the near future.[297] While Norway produces tremendous amounts of fuel in the form of oil and gas, the country itself relies primarily on hydropower domestically, leaving even greater amounts of oil and natural gas for export and economic benefit to the country.[298] Additionally, Norway is investigating other renewable energy sources for domestic use, especially in the area of wind power.[299]

Norway's efforts to be the world's "most responsible citizen" regarding carbon emissions also extend to the areas of forestry and shipping.[300] Unfortunately, carbon emissions also occur from both natural degradation of forests and intentional deforestation in developing countries. Harmful emissions from these sources alone total nearly seventeen percent of total greenhouse gas emissions annually.[301] Norway is playing an integral part in a program known as REDD, or Reductions in Emissions from Deforestation and forest Degradation.[302] In 2007 Norway pledged the equivalent of $500 million to this program to "promote sustainable forest management, contribute to the protection of biodiversity and secure the rights, involvement and livelihood of local communities and indigenous peoples. Besides reduced greenhouse gas emissions, REDD should also promote sustainable development and poverty reduction."[303]

In a 2007 report to Parliament, Norwegian officials outlined an updated climate policy with emphasis not only on renewed efforts to reduce domestic emissions, but also on facilitating a cohesive international climate

293. *Id.*
294. *Id.*
295. Walther, *supra* note 123.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*

agreement by working with developing countries to reduce carbon emissions.[304] Regarding additional emissions reductions within Norway, the proposed plan calls for a realistic reduction of an additional thirteen million to sixteen million tons of CO_2 by the year 2020.[305] It is understood that this level of emissions reduction is unlikely to be achieved solely by existing measures, such as the carbon tax.[306] Additional measures proposed to meet the emissions reduction goals include banning oil burners in new buildings, providing subsidies to convert old oil burners to alternative heat sources, developing sea windmill technology, increasing bio-energy development, improving public transportation, and creating a quota system for industries not currently covered by taxation or emissions trading.[307]

The measures pursued by Norway to reduce domestic greenhouse gas emissions are aggressive and not easily attained.[308] However, Norway contributes only two percent to overall global emissions; therefore, even drastic domestic reductions make a relatively small impact on overall world climate improvement.[309] Unfortunately, no matter how many improvements and sacrifices Norway makes, the true global polluters of the world greatly overshadow the benefits created by Norway's strides in emissions reduction.[310] However, Norway is committed to being a shining example in the world, partly due to the fact that it has become one of the richest nations through the export of oil and natural gas.[311]

V. PROPOSED GLOBAL IMPLEMENTATION AND INTERNATIONAL COOPERATION

A. Implementation and Adoption of Carbon Capture and Sequestration

Norway is just one small nation on the planet, and even with a successful carbon management strategy, the effect on the global environment will be minimal.[312] In order for progress to be made against climate change, countries around the world must study the lessons provided by both Norway and the European Union to determine what strategies to implement efficiently in the fight against global warming. One strategy,

304. THE NORWEGIAN CONFEDERATION OF TRADE UNIONS (LO), CLIMATE STRATEGY 5, *available at* http://www.lo.no/Documents/english/climate_strategy.pdf (last visited Apr. 14, 2011).
305. *Id.*
306. *Id.*
307. *Id.* at 5–6.
308. *Id.* at 6.
309. *Id.*
310. *Id.*
311. *Id.*
312. AUNE & ROSENDAHL, *supra* note 243, at 248.

recognized as crucial by the EU ETS,[313] is CCS technology.[314] Carbon capture and storage will allow the world to continue to use fossil fuels for the foreseeable future, while at the same time mitigating the harmful effects on the environment.[315] With the ability to use fossil fuels more responsibly, the world will have time to gradually develop an infrastructure that can be run on clean, alternative fuel sources.[316]

Norway's experimentation and perfection of CCS technology should be recognized and mimicked by countries throughout the world in order to combat global emissions. Because the world remains highly dependent upon fossil fuels and, until viable alternative fuels can be effectively integrated,[317] CCS technology can play a vital role in combating carbon emissions.[318] The oil and gas exported from Norway is possibly the "cleanest" fuel source in terms of carbon emissions, due to the extraordinary efforts of Norway to utilize CCS to minimize greenhouse gas emissions during the extraction and production of fuel.[319] Countries around the world need to follow Norway's example and incorporate this technology in order to create additional "clean" fuel sources.

B. Adoption of a Subsidy-Free Taxation Scheme

A key variable that participating countries must address is the choice of emission allowances or taxation. If taxation is used, participating countries must determine how to apply the tax structure. Currently, Norway's carbon emission strategy primarily taxes industries that can afford taxation and subsidizes or excludes industries that cannot afford taxation.[320] Many economists who believe that all greenhouse gas emissions should be taxed equally without any form of subsidy frown upon such a taxation scheme.[321] A subsidy-free taxation scheme is further preferred as various studies assert that, although Norway's taxes led to a substantial increase in the price of several types of fuel, the attributable decrease in carbon emissions equated to only 2.3% over the ten year time period from 1990 to 1999.[322] The assertion is that "[t]his surprisingly small effect relates to the extensive tax exemptions and relatively inelastic

313. "On March 26, 2009, the European Parliament and Council approved a Directive that expressly recognizes carbon capture and storage (CCS) as a 'bridging technology that will contribute to mitigating climate change.'" COLE, *supra* note 6 (manuscript at 41).

314. *See* discussion *supra* Part II.B.

315. *See* discussion *supra* Part II.B.

316. *See* discussion *supra* Part II.B.

317. *See Greenhouse Gas Emissions*, *supra* note 7.

318. *See* discussion *supra* Part II.B.

319. AUNE & ROSENDAHL, *supra* note 243, at 251.

320. *See id.*

321. *Id.*

322. BRUVOLL & LARSEN, *supra* note 29, at 1.

demand in the sectors in which the tax is actually implemented. The tax does not work on the levied sources, and is exempted in sectors where it could have worked."[323]

Norway is unique in that the majority of its energy is derived from clean electricity produced from hydropower.[324] Given the fact that emission-free electricity is a readily available power source, Norway's high carbon taxes have served to move industries away from fossil fuel energy sources and toward substituting electricity as an energy source whenever possible.[325] This has occurred because the cost to re-tool for electricity is often lower in the long run than paying the high carbon taxes for the continued use of oil or natural gas.[326] Unfortunately, many of the industries that create the highest emissions from fossil fuel use are the same industries that are exempted from the carbon taxes, thereby drastically reducing the positive environmental effects of the tax, as these industries have no economic incentive to re-tool from fossil fuel energy sources to clean electricity.[327] Overall, studies have determined that

Norwegian carbon taxes are high, but the emissions effect is low. This implies a high cost of reducing emissions from sources on which the tax is levied. For countries that consider implementing a carbon tax and in future Norwegian carbon tax policy, . . . a more broad based, cost efficient tax, which is uniform for all sources and greenhouse gases [is recommended]. With a more uniform distribution of the tax burden, it is possible to accomplish larger reductions in the greenhouse gas emissions at lower costs.[328]

For countries looking to implement carbon taxes as part of an emissions reduction strategy, Norway's taxation system should be carefully analyzed as to its structure and measureable results.[329] Norway's carbon tax scheme is more influenced by politics than by pure economics; therefore, the results of Norway's carbon tax scheme are compromised.[330] After studying the multitude of exemptions contained within Norway's carbon taxes,[331] a subsidy-free plan that taxes all emissions from all sources equally is likely to provide the most effective environmental benefits.[332] A subsidy-free plan would encourage the minimization of fossil fuel use where possible and the investment into clean, alternative fuel sources where

323. *Id.*
324. *Id.* at 8.
325. *Id.* at 16.
326. *Id.*
327. *Id.* at 22.
328. *Id.* at 23.
329. *See* discussion *supra* Parts II, IV.A, IV.C.
330. *See* discussion *supra* Part IV.A.
331. *See* discussion *supra* Part IV.A.
332. *See* AUNE & ROSENDAHL, *supra* note 243, at 250.

economically feasible.[333] When all sources and industries are taxed equally, the greatest reduction in emissions will likely be realized.

C. Necessary Global Cooperation and Implementation

The goal of minimizing global carbon emissions and creating long term, sustainable alternatives for fossil fuels is only possible through international cooperation. Such cooperation and implementation has proven difficult for many countries, including the United States. While the United States recognizes the importance of reducing carbon emissions, it has been impossible to enact legislation on a national level.[334] To date, national legislative proposals regarding climate change have failed, and only a nonbinding resolution has passed.[335] On May 23, 2006, the U.S. Senate Foreign Relations Committee passed Senate Resolution 312, a non-binding resolution on climate change.[336] The Sense of the Senate Resolution on Climate Change[337]

> acknowledges the growing scientific consensus that human activity is causing an accumulation of greenhouse gases in the atmosphere. It also asserts that Congress should enact a mandatory national program that slows, stops and reverses the growth of greenhouse gas emissions using a market-based structure. It notes that such a program would not be likely to significantly harm the U.S. economy and should encourage major U.S. trading partners to adopt similar programs.[338]

The nonbinding resolution, which acknowledges both the problem of greenhouse gas emissions and the need for the United States to implement a national program to counter the problem, stops well short of providing any possible solutions.[339] The United States is a major contributor to the global problem of climate change, and it is time for the United States seriously to

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333. *See* BRUVOLL & LARSEN, *supra* note 29, at 1.

334. *See id.* at 46.

335. Congressional Proposals regarding climate change including the Climate Stewardship Act of 2003, the Clean Air Planning Act of 2003, the Clean Power Act of 2003, the Clean Smokestacks Act of 2003, the Climate Stewardship and Innovation Act of 2005, and the Climate and Economy Insurance Act of 2005 have all failed to date. *Id.*

336. The Lugar–Biden Climate Change Resolution, S. Res. 312, 109th Cong. (2006).

337. *See* WILLIAMS ET AL., *supra* note 5, at 43. *See also* Energy Policy Act of 2005, H.R. 6, 109th Cong. (2005) and Energy Policy Act of 2005, H.R. 6, 109th Cong. (2005) (S.Amdt.866) (detailing the Energy Policy Act of 2005 and the amendment by Senator Bingaman).

338. WILLIAMS ET AL., *supra* note 5, at 43.

339. *See id.*

consider the examples provided by Norway and the EU and create a viable plan to reduce carbon emissions.

Although national legislation within the United States has failed at every turn, there has been successful legislation put in place at the state level. The California Global Warming Solutions Act of 2006[340] was signed into law on August 31, 2006, making California the first state to place a mandatory limit on greenhouse gas emissions.[341] The law calls for a one-quarter reduction in emissions by the year 2020 through the use of a cap-and-trade system that will cover all electricity utilized within the state.[342] The success of this legislation could lead to further legislation in other states and on a national level; however, failure to achieve the goals or implement the legislation in an economically feasible manner could spell doom for future legislation at the national level.[343]

Given the complex bureaucracy and current political chasm within the United States, it may prove difficult to enact sweeping federal regulations for either carbon taxes or cap-and-trade policies.[344] Instead, a more feasible recommendation may be to continue the agenda at the state or regional level where policies are enacted that will work effectively within that state or region.[345] Then, once mechanisms are in place regionally, cooperation across state lines or within regions can be integrated and the agenda to reduce carbon emissions can be expanded.[346] This is akin to considering Norway as a "state" which implemented its own agenda to reduce harmful emissions, and that "state" is now working in cooperation with the EU to expand and improve its agenda.[347] Additionally, the United States and other concerned countries need to study the feasibility of applying the CCS technology implemented in Norway in order to continue the use of fossil fuels while simultaneously reducing emissions.[348] The technology is available and successful, and the cost to implement it should be considered an extremely important and beneficial investment for both industries and state and national governments.[349] The United States should look to Norway and the EU as an existing paradigm rather than attempting to reinvent the emissions reduction wheel.[350]

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340. CAL. GOV'T. CODE § 12890 (West 2010).

341. *See* Samantha Young, *Schwarzenegger Signs Global Warming Bill*, WASHINGTON POST, Sept. 27, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092700174_pf.html.

342. *Id.*

343. WILLIAMS ET AL., *supra* note 5, at 45.

344. *See id.* at 30.

345. *Id.* at 46.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

CONCLUSION

Two decades ago, the small country of Norway made an important decision to enact policies aimed at reducing the amount of carbon emissions created within its borders.[351] Aggressive carbon taxes were enacted affecting many industries, and several positive results occurred.[352] First, a concerted effort was made to switch to alternative, cleaner sources of energy whenever the substitution was economically feasible.[353] Second, a portion of the taxes collected was set aside and invested by the government to provide for the future stability of Norway.[354] This investment fund has become the third largest sovereign fund in the world and is aimed at providing revenue for future Norwegian generations in the event that revenue can no longer be created by the production and export of fossil fuels.[355] Third, and perhaps most importantly, CCS technology was developed as a primary method of avoiding excessive carbon taxation.[356] This technology may prove to be beneficial to both the economy and the environment of not only Norway, but also of concerned nations around the world.[357]

While Norway has taken great strides in the fight against greenhouse gas emissions, the rest of the world has taken action as well.[358] The European Union has taken a leading role and has created a large, verifiable marketplace to trade emissions allowances across the EU and incoming Member States.[359] The EU ETS has been painstakingly developed and refined and is currently mandated for all Member States.[360] The EU ETS strategy to reduce emissions in the EU is working within the Member States and is producing cooperation in many areas with non-Member States, including Norway.[361]

After two decades of aggressively pursuing a strict emissions reduction strategy, the results of Norway's efforts remain mixed.[362] Several positive benefits have occurred, but the actual emissions reductions are less than hoped for, given the aggressive policies.[363] Once the EU began actively pursuing an emissions reduction strategy that was based on a

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351. *See* discussion *supra* Part II.
352. *See supra* notes 129–141 and accompanying text; discussion *supra* Part II.A.
353. *See supra* notes 131–134 and accompanying text.
354. *See supra* notes 135–141 and accompanying text.
355. *See supra* notes 135–141 and accompanying text.
356. *See* discussion *supra* Part II.B.
357. *See* discussion *supra* Part II.B.
358. *See* discussion *supra* Part III.
359. *See* discussion *supra* Part III.B.
360. *See EU Emissions Trading System (EU ETS)*, *supra* note 189.
361. *See* discussion *supra* Part III.E.
362. *See* discussion *supra* Part IV.
363. *See* discussion *supra* Part IV.A.

system of allocation rather than a direct tax, questions emerged as to whether Norway would abandon its current path.[364] However, the result has been that the EU's efforts have spurred Norway to forge ahead, combining its own strategies with many of those included in the EU plan.[365] Norway has rededicated itself to the pursuit of meaningful change by continuing, and likely expanding, its current carbon taxation along with incorporating cooperation with the EU ETS strategies.[366]

Norway is a prime example of what can be accomplished by a small country that is dedicated to making a difference. Although Norway's economy is heavily reliant on energy production, Norway still took a difficult and dedicated stance to reduce the harmful environmental effects of fossil fuel production and use.[367] While there have been bumps in the road, and not all of Norway's goals have been met as far as emissions reductions are concerned, many positive benefits have been realized.[368] If true progress is to be made in the fight against global warming, the countries of the world must seriously evaluate and utilize the information that can be gained from Norway's two-decade long fight to reduce carbon emissions and improve the future of the planet.[369]

364. *See* discussion *supra* Part IV.B.
365. *See* discussion *supra* Part IV.B.
366. *See* discussion *supra* Part IV.B.
367. *See* discussion *supra* Part II.
368. *See* discussion *supra* Part IV.C.
369. *See* discussion *supra* Parts II, IV.

HIGH STAKES: HOW TO DEFINE "DISABILITY" IN MEDICAL MARIJUANA STATES IN LIGHT OF THE AMERICANS WITH DISABILITIES ACT, CANADIAN LAW, AND THE IMPACT ON EMPLOYERS

Lindsey M. Tucker*

INTRODUCTION

Since California first blazed the trail to legalize medical marijuana by voter referendum in 1996, fourteen states and the District of Columbia have followed suit in an attempt to relieve patients from their torn decision between medicating themselves with medical marijuana and committing a crime.[1] The states have done this by removing or lowering state criminalization associated with marijuana possession and use for medical purposes.[2] Although states are rolling in the direction of legalizing medical marijuana, federal law is clear that marijuana is still an illegal Schedule I controlled drug with no recognized medical value.[3] In line with federal law, the Americans with Disabilities Act precludes the recognition of a marijuana addiction accompanied by current marijuana use to qualify as a disability under the Act.[4] While an addiction to marijuana is not a disability in the United States, recent Canadian case law concluded the opposite.[5] Neither our northern neighbor's position nor a minority of states' medical marijuana laws should make the rest of the United States second guess the legality of disability discrimination laws.[6]

Although medical marijuana laws provide a compassionate[7] answer for treatment-related issues in patients' lives, they leave questions open as to the impact on other realms of life, like employment.[8] In Canada, medical

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1. *Active State Medical Marijuana Programs*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=3391 (last updated Dec. 1, 2004).

2. *Id.*

3. 21 U.S.C. § 812 (2000).

4. *Facts About the Americans with Disabilities Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/facts/fs-ada.html (last modified Sept. 9, 2008).

5. *See* Rio Tinto Alcan Primary Metal v. C.A.W.-Canada, Local 2301 (2008), 180 L.A.C. 4th 1 (Can. B.C.).

6. *See infra* Parts III, IV.

7. *See infra* Part I.B.2 (discussing the term "compassion" in the medical marijuana context).

8. *See infra* Part I.B.2 (discussing state case law regarding medical marijuana).

marijuana laws have a direct effect on employers.[9] Canadian law requires employers to reasonably accommodate and excuse drug test provisions for medical marijuana users.[10] Different treatments between the U.S. government and the Canadian government on medical marijuana users' employment can be harmonized.[11] In the face of studies showing both the short- and long-term physical and cognitive effects of marijuana, employers have much at stake.[12] For example, employers must consider the impact upon employees, customers, and other stakeholders when making decisions for the future of their business regarding the use of medical marijuana in the workplace.[13] With safety and cost concerns, public policy within the United States is on the side of employers promoting drug-free work environments.[14]

This Note will not focus on the debate over legalization of marijuana or medical marijuana. Instead, the discussion will compare the effect that current medical marijuana laws have on established disability discrimination laws in the employment arenas of the United States and Canada. The analysis of U.S. statutory and case law will be limited to California, as the medical marijuana vanguard; Oregon, with much ongoing activity regarding its statutory and case law; and Michigan, as an Indiana neighbor and one of the most recent states to enact medical marijuana legislation.

Part I of this Note discusses the definition of marijuana and its purposes. Part I also explores the evolution of medical marijuana laws in the United States and Canada. Part II assesses the current statutory and case law regarding disability discrimination in the employment context in both the United States and Canada. Part III discusses the operational, economic, and public policy effects that medical marijuana has on the workplace. Part IV discusses how U.S. and Canadian law can be harmonized. Finally, Part V recommends that states protect an employer's right to enforce drug-free workplaces, draft medical marijuana acts cautiously, and pass bills to clarify existing medical marijuana acts. Additionally, Part V recommends that courts continue to read medical marijuana laws in light of their purpose of decriminalization of the use of medical marijuana, and that U.S. federal and state governments come to a uniform decision on how medical marijuana laws impact employment laws.

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9. *See Rio Tinto*, 180 L.A.C. 4th 1; N. Am. Constr. Grp. Inc. v. Alberta, 2003 ABQB 755 (Can. Alta.); Geldreich v. Whisper Corwood LP, 2009 BCHRT 178 (Can. B.C.).

10. *See Rio Tinto*, 180 L.A.C. 4th 1; *N. Am. Constr.*, 2003 ABQB 755; *Geldreich*, 2009 BCHRT 178.

11. *See infra* Part IV.

12. *See infra* Part III.

13. *Id.*

14. *Id.*

I. BACKGROUND ON MEDICAL MARIJUANA, LEGALIZATION OF MEDICAL MARIJUANA, AND THE U.S. AND CANADIAN EMPLOYMENT LAW SYSTEMS

A. Medical Marijuana

Cannabis sativa is the plant more commonly known as marijuana.[15] Marijuana has two recognized uses: recreational and medical.[16] These two uses may result in different legal consequences.[17] The use of marijuana for recreational purposes is illegal throughout most of the world including the United States and Canada.[18] However, the use of marijuana for medicinal purposes dates back to 2700 B.C.[19] Marijuana has been "promoted for a variety of conditions based on its putative analgesic, sedative, anti-inflammatory, antispasmodic, antiasthmatic and anticonvulsant properties."[20] Marijuana's use has been recognized for the treatment of acquired immune deficiency syndrome or AIDS, cancer and chemotherapy-induced nausea and vomiting, glaucoma, multiple sclerosis, spasticity, and epilepsy,[21] as well as chronic pain, arthritis, and migraines.[22]

While there are recognized medical benefits associated with the use of marijuana, there are also well-known harms, regardless of its use for medical or recreational purposes. Marijuana can either be smoked or swallowed; either form of consumption has intoxicating effects and potential harmful health consequences, such as euphoria, slowed thinking and reaction time, confusion, impaired balance and coordination, cough, frequent respiratory infections, impaired memory and learning, increased heart rate, anxiety, panic attacks, tolerance, and addiction.[23] In the 1930s, the United States staged a "war on marijuana" by associating fear with marijuana use through stories and movies produced by the Federal Bureau of Narcotics entitled "Marijuana—Assassin of Youth", "Marijuana—Sex-

15. Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35, 37 (2009).

16. *Id.* at 39–40.

17. *See infra* Parts I.B–C.

18. Cohen, *supra* note 15, at 37.

19. *Id.* at 35.

20. *Report 10 of the Council on Scientific Affairs (I-97)*, AMERICAN MEDICAL ASSOCIATION, http://www.ama-assn.org/ama/no-index/about-ama/13580.shtml (last visited Apr. 10, 2011).

21. *Id.*

22. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (A) (West 1996).

23. *Commonly Abused Drugs*, NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, http://www.nida.nih.gov/DrugPages/DrugsofAbuse.html (last visited Apr. 10, 2011).

Crazy Drug Menace", and "Reefer Madness."[24] Through these press tools, the bureau conveyed the message that "casual marijuana use . . . [would] lead swiftly to murder, rape, prostitution, addiction, madness, and death."[25] These portrayals succeeded in characterizing marijuana as a monster, and the harmful effects and fears associated with the drug masked its potential health benefits.[26]

B. Legalization of Medical Marijuana in the United States

The United States is a federation consisting of a centralized, federal government and fifty states each with their own state and local governments.[27] U.S. labor and employment laws exist both at federal and state levels.[28] These federal, state, and local discrimination laws may conflict with each other.[29] Where a conflict exists, the law offering the greatest protection for employees should govern.[30]

1. Federal Law

In 1937, the United States passed the 1937 Marijuana Tax Act, the first federal prohibition of marijuana.[31] During congressional hearings, counsel for the American Medical Association protested the proposed act, citing the potential for future medical benefits of marijuana.[32] In spite of those protests, Congress passed the Act on October 1, 1937.[33] Although not explicitly, the Act constructively outlawed marijuana through heavy administrative burdens and taxation on the grower, distributor, seller, and buyer.[34] Soon after the Act's passing, most states passed laws making it a felony to sell or use marijuana.[35]

Currently, marijuana is listed as a Schedule I drug under the federal Uniform Controlled Substance Act (CSA).[36] A Schedule I drug is a

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24. Kara Godbehere Goodwin, Note, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States "War on Drugs"*, 22 BUFF. PUB. INT. L.J. 199, 202 (2003).

25. *Id.*

26. *Id.*

27. INTERNATIONAL LABOR AND EMPLOYMENT LAW 235 (Philip M. Berkowitz et al. eds., 2d ed., vol. II 2008).

28. *Id.* at 247.

29. *Id.*

30. *Id.* at 247–48.

31. Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273, 275 (1998).

32. Goodwin, *supra* note 24.

33. *Id.*

34. *Id.*

35. *Id.* at 202–03.

36. 21 U.S.C. § 812 (2000).

substance that "has a high potential for abuse[,] . . . no currently accepted medical use in treatment in the United States[, and] . . . a lack of accepted safety for use of the drug or other substance under medical supervision."[37] Concurring with marijuana's characterization as a Schedule I drug, the United States Food and Drug Administration (FDA) maintains that marijuana has harmful effects and is not an approved pharmaceutical.[38] However, contrary state laws frustrate "the efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the [Food, Drug and Cosmetics] Act."[39]

In 2005, the United States Supreme Court in *Gonzales v. Raich* upheld the enforcement of the CSA against using and distributing medical marijuana even though their actions were legal under state law.[40] This permitted the United States Drug Enforcement Administration (DEA) to continue marijuana raids, even if those raids targeted individuals using or selling medical marijuana in compliance with state law.[41]

However, *Gonzales* is not the final say on DEA enforcement of the CSA in medical marijuana states. When President Barack Obama took office on January 20, 2009, he brought a different view than the previous administration on the enforcement of the CSA, which insisted on enforcing federal drug laws regardless of state laws.[42] On October 19, 2009, the U.S. Department of Justice, under President Obama's direction, issued a memorandum clarifying investigations and prosecutions in states with medical marijuana laws.[43] When marijuana is used or provided in accordance with state law, the memorandum states that "it is not a good use of federal manpower to prosecute those who are without a doubt in compliance with state law."[44] Rather, the memorandum urges that federal resources be used on the prosecution of people distributing and trafficking drugs and those using medical marijuana as a cover for other illegal conduct.[45]

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37. *Id.* § 812(b)(1).

38. *Inter-Agency Advisory Regarding Claims that Smoked Marijuana is a Medicine*, U.S. FOOD AND DRUG ADMIN. (Apr. 20, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108643.htm.

39. *Id.*

40. *See* Gonzales v. Raich, 545 U.S. 1, 2 (2005).

41. *See Feds: No More Arrests for Pot Smoking Patients*, MSNBC (Oct. 19, 2009, 11:02:03 AM), http://www.msnbc.msn.com/id/33376482/ns/health/?GT1=43001.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

2. State Law

Despite the federal government's position on medical marijuana, fifteen states, including Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia, have legalized medical marijuana through either state legislatures or voter referendums through compassionate use acts.[46] Maryland also has a compassionate use act but instead of complete legalization, the state criminal penalty has been lowered to a one-hundred dollar fine.[47]

California was the first state to enact medical marijuana legislation.[48] The Compassionate Use Act of 1996 decriminalized the usage and sale of medical marijuana in California.[49] The Act provides that its purpose is "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."[50] However, even though the Act safeguards a patient's right to use marijuana for medical purposes, the Act is not to "be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others."[51]

Oregon passed the Oregon Medical Marijuana Act in 1999. It states:

> [A] person engaged in . . . medical use of marijuana is excepted from the criminal laws of the state for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of

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46. ALASKA STAT. §§ 17.37.030–17.37.040 (1999); CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996); COLO. REV. STAT. ANN. § 18-18-406.3 (West 2001); HAW. REV. STAT. ANN. § 329-122 (West 2000); 2008 Me. Legis. Serv. 631 (West); MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008); MONT. CODE ANN. §§ 50-46-201, 50-46-205 (2004); NEV. REV. STAT. ANN. § 453A.200 (West 2000); N.J. STAT. ANN. § 24:6I (West 2010); N.M. STAT. ANN. § 26-2B-4 (West 2007); OR. REV. STAT. ANN. §§ 475.316, 475.340 (West 1999); R.I. GEN. LAWS ANN. § 21-28.6-4 (West 2006); VT. STAT. ANN. tit. 18, § 4474b (West 2004); WASH. REV. CODE ANN. §§ 69.51A.005–69.51A.060 (West 1999); *2010 Ballot Propositions and Judicial Performance Review*, ARIZ. OFFICE OF THE SEC'Y OF STATE, ARIZ. DEP'T OF STATE, http://www.azsos.gov/election/2010/info/PubPamphlet/english/Prop 203.htm (last visited Apr. 10, 2011); *A Bill, 18-622, in the Council of the District of Columbia*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/pdf_files/AINS_as_passed_at_COW_4_20_2010.pdf (last visited Apr. 10, 2011); Ashley Southall, *Washington, D.C., Approves Medical Use of Marijuana*, N.Y. TIMES (May 4, 2010), http://www.nytimes.com/ 2010/05/05/us/05marijuana.html.

47. *Active State Medical Marijuana Programs*, *supra* note 1.

48. *Id.*

49. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996).

50. *Id.*

51. *Id.*

> marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element.[52]

Michigan passed its Medical Marihuana Act in 2008 via voter referendum.[53] Michigan's law is similar to California's and Oregon's, but some striking differences exist.[54] Regarding protections for medical marijuana users, Michigan's law states:

> A qualifying patient . . . shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.[55]

However, the exceptions and scope of Michigan's law create a conflict regarding its legal protections. For example, Michigan's law does not require an employer to accommodate the use of medical marijuana by its employees and even goes as far as to itemize specific settings in which the influence of marijuana is not allowed:[56]

> (b) This act shall not permit any person to do any of the following: (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice. (2) Possess marihuana, or otherwise engage in the medical use of marihuana: (A) in a school bus; (B) on the grounds of any preschool or primary or secondary school; or (C) in any correctional facility. (3) Smoke marihuana: (A) on any form of public transportation; or (B) in any public place. (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of

52. OR. REV. STAT. ANN. § 475.309(1) (West 1999).

53. *Active State Medical Marijuana Programs*, *supra* note 1. Additionally, the term "marijuana" will be primarily used in this Note. However, in order to accurately cite authorities, "marijuana" and "marihuana" will be used interchangeably in accordance with the cited authority's use of the term.

54. *Compare* MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008) *with* CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996) *and* OR. REV. STAT. ANN. §§ 475.316, 475.340 (West 1999).

55. *See* MICH. COMP. LAWS ANN. § 333.26424 (West 2008).

56. *Id.* §§ 333.26424-333.26428.

> marihuana . . . .[57] (c) Nothing in this act shall be construed to require: (2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.[58]

If history teaches anything, it may be that legal challenges to the application and interpretation of Michigan's law are inevitable, as has been the case with older acts such as California's and Oregon's compassionate use acts.[59] Additionally, ten states have pending legislation or ballot measures to legalize medical marijuana, including Alabama, Connecticut, Delaware, Idaho, Illinois, Maryland, Massachusetts, New Hampshire, New York, and North Carolina.[60]

C. Legalization of Medical Marijuana in Canada

Canada is a federation consisting of ten provinces and three territories.[61] Canada has two levels of government: federal and provincial.[62] All Canadian jurisdictions prohibit discrimination against physical or mental disability.[63] The Canadian Human Rights Act governs such discriminatory practices in employment.[64]

The 1923 Opium and Narcotic Drug Act made marijuana illegal.[65] Similar to the U.S. current classification, marijuana was considered a Schedule I drug in Canada.[66] After a period of long, undulated debate and research as to whether marijuana should be approached on a criminal or health level, marijuana was reclassified as a Schedule II drug with a lower, misdemeanor-like criminal penalty for possession by the passage of the Canadian Controlled Drugs and Substances Act in May of 1997.[67]

An Ontario case paved the way for the legalization of medical marijuana.[68] In *R. v. Parker*, the Canadian courts signaled the legislature to step in and legalize marijuana for medical purposes.[69] The defendant

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57. *Id.* § 333.26427.

58. *Id.*

59. *See infra* Part II.A.

60. *10 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, http://medicalmarijuana.procon.org/viewresource.asp?resourceID=002481 (last updated Apr. 6, 2011, 10:40:13 AM PST).

61. INTERNATIONAL LABOR AND EMPLOYMENT LAW, *supra* note 27, at 53.

62. *Id.*

63. *Id.* at 69.

64. *See* Canadian Human Rights Act, R.S.C. 1985, c. H-6.

65. Goodwin, *supra* note 24, at 206.

66. *Id.* at 208.

67. *Id.* at 207–08.

68. *See* R. v. Parker (2000), 49 O.R. 3d 481 (Can. Ont. C.A.).

69. *See id.* paras. 207, 210.

suffered from epilepsy and used marijuana to reduce the frequency and intensity of seizures.[70] The defendant's residence was searched and he was charged with possession of marijuana in violation of the Controlled Drugs and Substance Act.[71] The court held that by charging the defendant with possession of marijuana, the criminal imposition impaired his rights under the Canadian Charter of Rights and Freedom to life, liberty and security of person.[72] A medical exception was read into the Controlled Drugs and Substance Act for the defendant until the legislature enacted medical marijuana laws.[73] Once enacted, Canada's Marihuana Medical Access Regulations state that "[t]he holder of an authorization to possess is authorized to possess dried marihuana, in accordance with the authorization, for the medical purpose of the holder."[74]

In June of 2001, responding to the decision in *R v. Parker*, the Canadian Controlled Drugs and Substances Act was amended, in connection with the Marihuana Medical Access Regulations, to "allow possession and purchase of marijuana for legitimate medical needs."[75] The Marihuana Medical Access Regulations authorize Health Canada, a department of the Canadian federal government in charge of "helping Canadians maintain and improve their health, while respecting individual choices and circumstances,"[76] to regulate medical marijuana use and distribution, which is available to those suffering from "grave and debilitating illnesses."[77] Canada makes the position clear that legalization only applies to certain authorized medical uses.[78] Further, marijuana is still considered a controlled substance in Canada although its controlled substance classification is different than in the United States.[79]

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70. *Id.* para. 3.

71. *Id.*

72. *Id.* para. 152.

73. *Id.* para. 210.

74. Marihuana Medical Access Regulations, SOR/2001-227 (Can.).

75. *Id.*

76. *About Health Canada*, HEALTH CANADA, http://www.hc-sc.gc.ca/ahc-asc/index-eng.php (last modified Feb. 16, 2011).

77. *Law Enforcement Issues—Medical Use of Marihuana*, HEALTH CANADA, http://www.hc-sc.gc.ca/dhp-mps/marihuana/law-loi/index-eng.php (last modified Sept. 15, 2010).

78. *Id.*

79. *Id.*

II. CURRENT U.S. AND CANADIAN DISABILITY DISCRIMINATION LAWS AND THE EFFECT OF MEDICAL MARIJUANA USE ON THOSE LAWS

A. U.S. Law

The Americans with Disabilities Act (ADA) is a U.S. federal law protecting employees from discrimination on the basis of disability.[80] Specifically, disability discrimination usually falls under the category of "disparate treatment cases," which is an "intentional discrimination based on illegal or protected criteria."[81] Title I of the ADA applies to private employers, state and local governments, employment agencies and labor unions, provided that such employers employ fifteen or more employees.[82]

Title I prohibits employers from discriminating against qualified individuals with disabilities in "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[83] The ADA defines a qualified individual as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[84] The ADA provides that "[a]n individual with a disability is a person who: [h]as a physical or mental impairment that substantially limits one or more major life activities; [h]as a record of such an impairment; or [i]s regarded as having such an impairment."[85]

Under the ADA, "[a]n employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an 'undue hardship' on the operation of the employer's business."[86] An undue hardship is "an action requiring significant difficulty or expense when considered in light of such factors as an employer's size, financial resources, and the nature and structure of its operation."[87]

The ADA does not protect "employees and applicants currently engaging in the illegal use of drugs . . . when an employer acts on the basis of such use."[88] Additionally, the ADA's restrictions on medical

80. INTERNATIONAL LABOR AND EMPLOYMENT LAW, *supra* note 27, at 248.
81. *Id.*
82. 42 U.S.C. § 12111 (2010).
83. *Id.* § 12112.
84. *Id.* § 12111.
85. *Facts About the Americans with Disabilities Act*, *supra* note 4.
86. *Id.*
87. *Id.*
88. *Id.*

examinations do not apply to illegal drug tests.[89] Employees who use illegal drugs can also be held to the same standard as other employees.[90]

The Americans with Disabilities Act Amendments Act of 2008 took effect on January 1, 2009.[91] The primary goal of this amendment was to broaden the scope of coverage for individuals to the maximum extent of the terms of the ADA.[92] The amendment keeps the basic definition of disability and alters or expands the definitions of "substantially limits" and "major life activities."[93] It is yet to be determined whether the amendment leaves the door open to protections for users of medical marijuana.

In *Ross v. RagingWire Telecommunications, Inc.*, Gary Ross sued his former employer under the California Fair Employment and Housing Act (FEHA) because Ross was fired after he failed a pre-employment drug test due to his use of medical marijuana pursuant to the California Compassionate Use Act.[94] Ross qualified as having a physical disability under FEHA due to strain and muscle spasms in his back; as such, Ross received disability benefits.[95] Ross' doctor recommended Ross use medical marijuana to alleviate his physical symptoms prior to his employment at RagingWire.[96] Ross had to take a pre-employment drug test and was up front with both the testing facility and his employer regarding his doctor's medical marijuana recommendation.[97] Despite the fact that Ross used marijuana under the recommendation of his doctor, Ross was terminated for testing positive for marijuana.[98] Based on these facts, the court held that the purpose of the Compassionate Use Act was to eliminate criminalization of medical marijuana and does not provide a remedy to Ross for the failure of an employer to accommodate the employee's use of marijuana under the FEHA.[99]

Justice Kennard, in dissent, did not believe that the California Compassionate Use Act was intended to allow an "employer [to] fire an employee for such marijuana use even when it occurs during off-duty hours, does not affect the employee's job performance, does not impair the employer's legitimate business interests, and provides the only effective

89. *Id.*

90. *Id.*

91. *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/ada/amendments_notice.html (last visited Apr. 10, 2011).

92. *Id.*

93. *Id.*

94. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 202 (Cal. 2008).

95. *Id.* at 203.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 204–05.

relief for the employee's chronic pain and muscle spasms."[100] Justice Kennard further argued that when voters gave patients access to medical marijuana, they did not intend for patients to be excluded from employment.[101] Justice Kennard would hold that unless an employer shows that an employee's off-duty use of doctor-approved medical marijuana "is likely to impair the employer's business operations in some way," the employee's termination is a result of disability discrimination.[102]

When interpreting the Compassionate Use Act in light of the facts of this case, Justice Kennard maintained that "[c]ourts must construe statutes to effectuate the purpose of the law."[103] Subsection B of the Act provides that "patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."[104] While the majority focused on the Act's purpose of removing criminalization at the state level, Justice Kennard emphasized the inclusion of "sanction" in the statutory provision.[105] Specifically, he equated termination of employment as a sanction against marijuana users merely acting pursuant to the Act.[106] Justice Kennard summarized the majority's holding as leaving two choices for patients seeking to relieve their symptoms with marijuana: "continue [to receive] the benefits of marijuana use . . . and become unemployed, giving up what may be their only source of income, or continue in their employment, discontinue marijuana treatment, and try to endure their chronic pain [or other continuing symptoms]."[107] The dissent believed this was not the intent of the California voters when they passed the Act.[108]

Justice Kennard would allow an employer to offer a "reasonable and effective form of accommodation."[109] The FEHA requires an employer to make reasonable accommodations for a "known physical or mental disability of an applicant or employee."[110] These provisions of the FEHA regarding reasonable accommodation "are to be construed liberally to accomplish each of its purposes."[111] The dissent disagreed with the majority in that "accepting an employee's physician-approved, off-duty marijuana use for medical treatment is not a reasonable accommodation

100. *Id.* at 209 (Kennard, J., dissenting).
101. *Id.*
102. *Id.* at 209–10.
103. *Id.* at 211.
104. *Id.* at 210.
105. *Id.* at 211.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 209.
110. *Id.* at 211.
111. *Id.* at 211–12.

because federal law prohibits marijuana possession."[112] The exact wording of the FEHA includes the "adjustment or modification of examinations, training materials or policies" as a reasonable accommodation.[113] In applying these suggested accommodations to this case, Justice Kennard believed that the "modification of an employer's policy, such as a policy concerning employee drug use" would be reasonable.[114] Justice Kennard rejected the proposition that something an employee does off duty that is illegal under federal law but permitted under state law can never be reasonably accommodated.[115] The factors used to determine if an accommodation is reasonable consider "its benefits to the employee, the burdens it would impose on the employer and the other employees, and the availability of suitable and effective alternative forms of accommodation."[116] An employer can disregard the FEHA if it can show that the accommodation "would impose an undue hardship on the operation of its business."[117]

Therefore, according to Justice Kennard in dissent, RagingWire would have to show that the employee's off-duty use of medical marijuana, which is illegal under federal law, would have an adverse effect on its business operations.[118] RagingWire raised the argument that it may lose business opportunities with state agencies or with federal grants because of its inability to comply with drug-free workplace requirements imposed by state and federal law.[119] Justice Kennard rejected this argument because the purpose of such laws were to "provide a drug-free workplace, which is defined as a site . . . at which employees of the entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance [such as marijuana]."[120] However, Ross was not seeking to use marijuana at the workplace but at home as a medical treatment.[121] Justice Kennard asserted that an employee's marijuana use at home and an employer's accommodation of employee's use will not interfere with an employer's drug-free workplace certification.[122]

In *Washburn v. Columbia Forest Products, Inc.*, the Oregon Supreme Court held that an employer does not have to accommodate an employee's

112. *Id.* at 212.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 213.
119. *Id.*
120. *Id.*
121. *Id.* at 204.
122. *Id.* at 213.

medical marijuana use and that the particular illness from which the employee suffered did not constitute a disability under state law.[123] In *Washburn*, an employee was terminated from his position after failing a drug test because of his use of medical marijuana to address the leg spasms that he suffered at night.[124] The employer had a policy that prohibited employees from coming to work with alcohol or illegal drugs in their systems.[125] The employee challenged his termination by alleging the employer discriminated against him based on his disability.[126] The Oregon Supreme Court held that the employee was not disabled under Oregon law.[127] Oregon Statutes 659A.100 to 659A.145, based on the provisions of the Americans with Disabilities Act, provide for the protection of disabled persons against employment discrimination and mandate reasonable accommodation by employers for such disabilities.[128] The Oregon Supreme Court interpreted the state definition of disability as allowing for mitigating factors to counteract a disability.[129] Because the employee was able to counteract the leg spasms with medication, the court held that the employee's impairment did not rise to the level of a disability as defined by the state's statute.[130]

A concurring opinion in *Washburn* relied on a different analysis to reach the same conclusion that the employee was not entitled to a reasonable accommodation.[131] The concurrence stated that accommodation for medical marijuana use was not required because the federal Controlled Substances Act preempts state law with respect to reasonable accommodations.[132] Even for medical purposes, "[t]he Controlled Substances Act prohibits possessing, manufacturing, dispensing, and distributing marijuana."[133] According to the concurrence, the employee could not use the marijuana without possessing it, thereby violating federal law; therefore, this violation of federal law preempted state law requiring the employer to reasonably accommodate the employee's use.[134]

In *Emerald Steel Fabricators v. Bureau of Labor and Industries*, a temporary worker was hired as a drill press operator in a steel fabricating

123. Washburn v. Columbia Forest Products, Inc., 340 Or. 469, 478–80 (2006).
124. *Id.* at 472.
125. *Id.* at 472–73.
126. *Id.* at 472.
127. *Id.* at 477–78.
128. *Id.*
129. *Id.* at 479–80.
130. *Id.*
131. *Id.* at 480–81 (Kistler, J., concurring).
132. *Id.* at 481.
133. *Id.* at 481–82.
134. *Id.*

business.[135] When the worker was hired, he was told that at the end of a ninety-day period he would have to submit to a drug test before he could be eligible for permanent employment.[136] The worker used marijuana one to three times per day for medical purposes; however, he never used marijuana on the job, his supervisor did not suspect the worker used marijuana, and the worker produced satisfactory work.[137] As the ninety-day test date approached, the worker notified his supervisor that he was a medical marijuana user under Oregon law.[138] The supervisor was unsure what effect that would have on the worker being offered permanent employment. One week after the worker notified his supervisor, the decision was made not to permanently hire the worker.[139] The worker filed a complaint with the Bureau of Labor and Industries (BOLI) Civil Rights Division alleging the employer "(1) discharged [worker] because of his disability . . . and (2) failed to reasonably accommodate [worker's] disability . . . ."[140] The employer asserted the following defenses:

> [1] Oregon's Medical Marijuana Law does not require employers to accommodate the use of medical marijuana in the workplace or to accommodate off-duty use of medical marijuana in such a fashion that the employee would or could still be affected by such usage while on duty. [2] [Employer] is not required to accommodate medical marijuana users by permitting them to work in safety-sensitive positions that would or could endanger the safety of themselves, co-workers or the public. [3] [Employer] is free to require that employees behave in conformance with the Federal Drug-Free Workplace Act of 1988. The protections of that Act do not apply to someone illegally using drugs, and marijuana is an illegal drug under Federal Law. [4] Oregon law prescribes that [Oregon's disability laws] be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990 . . . . That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law.[141]

135. Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 186 P.3d 300, 302 (Or. Ct. App. 2008), *rev'd*, 348 Or. 159 (2010).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 302–03.

140. *Id.* at 303.

141. *Id.* at 303–05 (citation omitted).

The BOLI found that by firing the worker due to medical marijuana use, the "employer failed to reasonably accommodate [worker's] disability as required by Oregon statutes on unlawful discrimination against disabled persons."[142] The Oregon Court of Appeals affirmed the BOLI's decision due to inadequacies of the preservation of error for review.[143] The result in *Emerald Steel Fabricators* clearly conflicted with the holding of the Oregon Supreme Court in *Washburn*, leading to the Oregon Supreme Court's reversal and reiteration of its holding in *Washburn*.[144]

B. Canadian Law

The Canadian Human Rights Act contains Canada's discrimination laws.[145] Under the Human Rights Act, disability is a prohibited ground of discrimination.[146] "It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."[147] "It is a discriminatory practice for an employer . . . (a) to establish or pursue a policy or practice . . . that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."[148] An employer must accommodate an employee's disability to the point of undue hardship.[149]

In *Geldreich v. Whisper Corwood, LP*, Geldreich alleged employment discrimination against his employer, Whisper Corwood.[150] The employer denied discrimination and moved to dismiss the complaint under the Human Rights Act.[151] Geldreich worked as a Team Leader for the employer, which ran a saw mill and lumber yard.[152] The employer fired Geldreich after multiple employees reported that Geldreich smoked marijuana at the mill.[153] The employer had both a no-smoking policy and drug-free policy, of which the employer claimed Geldreich had

142. *Id.* at 301.

143. *Id.* at 308.

144. *See generally* Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 348 Or. 159 (2010).

145. *See* Canadian Human Rights Act, R.S.C. 1985, c. H-6.

146. *Id.*

147. *Id.*

148. *Id.*

149. CANADIAN HUMAN RIGHTS COMM'N, CANADIAN HUMAN RIGHTS COMMISSION'S POLICY ON ALCOHOL AND DRUG TESTING 2 (2009), *available at* http://www.chrc-ccdp.ca/pdf/padt_pdda_eng.pdf [hereinafter CHRC TESTING POLICY].

150. Geldreich v. Whisper Corwood LP, 2009 BCHRT 178, para. 1 (Can. B.C.).

151. *Id.* para. 2.

152. *Id.* para. 4.

153. *Id.* para. 5.

knowledge.[154] The issue before the court was whether Geldreich "had either an actual or perceived mental disability which was a factor in the [employer's] decision to terminate him or whether his actual or perceived mental discrimination required accommodation in the workplace."[155] The court held that an obligation to accommodate "is not triggered by casual drug use against company policy. It is triggered when an employees [sic] is suffering from an addiction which requires accommodation or treatment."[156]

In *Rio Tinto Alcan Primary Metal v. C.A.W.-Canada, Local 2301*, the labor Arbitration Board held that an addiction to marijuana constituted a physical disability under Section 13 of the Canada Human Rights Code.[157] An employee was terminated from his job at a smelting plant when he was caught smoking marijuana during his shift.[158] At the time of termination, the employee had worked for the employer for thirty-four years and had a good overall work record.[159] However, the employee did have a history of alcoholism and convictions for driving under the influence.[160] The employee had gone to treatment for his alcoholism and had been sober for over fifteen years.[161] By 2006, marijuana had taken the place of alcohol for the employee, and he was smoking daily.[162] The employee's job with the employer was in a safety-sensitive position.[163] The employer had a zero tolerance policy, which was communicated to all employees and provided for immediate termination for conduct of this nature.[164]

The arbitration board member relied on the Human Rights Code in deciding upon the legitimacy of the employee's dismissal.[165] The Human Rights Code is comparable to the Americans with Disabilities Act and provides that an employer cannot "refuse to continue to employ a person or discriminate against a person regarding employment . . . because of . . . physical or mental disability."[166]

After deciding that the marijuana addiction was a disability, the board member looked to see if the disability was a factor in the employee's

154. *Id.* para. 6.
155. *Id.* para. 9.
156. *Id.* para. 14.
157. Rio Tinto Alcan Primary Metal v. C.A.W.-Canada, Local 2301 (2008), 180 L.A.C. 4th 1 (Can. B.C.).
158. *Id.* paras. 2, 6.
159. *Id.* para. 7.
160. *Id.* paras. 7–11.
161. *Id.* para. 11.
162. *Id.* para. 10.
163. *Id.* para. 2.
164. *Id.* para. 12.
165. *Id.* paras. 69–75.
166. *Id.* para. 69.

dismissal.[167] The board member found that the addiction led to a lack of control on the employee's part, including an inability to make choices about when and where to smoke.[168] This effect of the addiction was in part attributable to the employee's dismissal, despite the fact that the employer argued that the employee was dismissed because he was smoking in a safety-sensitive position and violated the zero tolerance policy.[169] Additionally, the board member found that since the addiction qualified as a disability, the employer had to reasonably accommodate the disability to the point of undue hardship.[170] Under these circumstances, the board member concluded that the employee's dismissal should be set aside.[171] The board member noted that the employee had committed a serious misconduct, but that the addiction, which led to a loss of control, could be considered a mitigating factor in determining that the dismissal was inappropriate.[172] To strike a balance between the seriousness of having and using drugs at a safety-sensitive workplace and the disability of the employee, the board member concluded the disciplinary action should be a lengthy suspension followed by reinstatement.[173]

In *North American Construction Group, Inc. v. Alberta*, a prospective employee failed a mandatory pre-employment drug test after testing positive for marijuana.[174] As a result of the failed test, the employee was not hired.[175] The employee brought suit under Alberta's human rights laws.[176] The employee was HIV-positive and smoked marijuana to relieve nausea.[177] The employee sought a position as a heavy crane operator with the employer.[178] The employee had an accident-free safety record.[179] The employee argued that he was aware of the safety requirement of the position and that he would never smoke marijuana at the workplace.[180] The employer refused to hire the employee due to the drug test results and further alleged that the employee was not up front about his medical

167. *Id.* paras. 95–106. A board member is the Canadian equivalent to an administrative law judge in the United States. *See* Labour Relations Code, R.S.B.C., ch. 244, part 8 (2004), *available at* http://www.lrb.bc.ca/code/#part8.

168. *Rio Tinto*, 180 L.A.C. 4th 1, paras. 46–57.

169. *Id.* paras. 96–98.

170. *Id.* paras. 95, 105.

171. *Id.* para. 102.

172. *Id.* para. 103.

173. *Id.* para. 104.

174. N. Am. Constr. Grp. Inc. v. Alberta, 2003 ABQB 755 (Can. Alta.).

175. *Id.* para. 2.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

marijuana use.[181] The court held that the acts of the employer warranted investigation and determination by a human rights panel on the legality of the employer's refusal to hire the employee.[182] The court found that the complaint had merit "based on the clear evidence of the [employer's] hiring policy directives, i.e. drug-testing results as a conclusive determination of physical disability as a basis for denial of employment."[183]

C. Synopsis of American and Canadian Law

The laws of Canada and the United States are similar regarding recreational use of marijuana. Both find that a lack of an addiction to marijuana precludes a finding of disability.[184] Beyond this, the two countries' views diverge. The holding in *Rio Tinto* defines disability to include a current addiction to marijuana, even when marijuana is used at the workplace in a safety-sensitive position.[185] The ADA is clear that a current addiction to an illegal substance does not constitute a disability.[186] In continuation of the parallel views, Canada has required accommodation of medical marijuana use in the workplace, while California, which has the most liberal view on marijuana legalization in the United States, has held that state medical marijuana laws do not affect the definition of disability.[187]

III. EFFECT OF MARIJUANA IN THE WORKPLACE

Mixing medical marijuana use and the workplace is a dangerous combination, even if its use occurs outside of work.[188] Public policy encourages drug-free workplaces, and an employer's tools to promote a drug-free work environment have increased dramatically over the last few decades.[189] Additionally, even though state laws are becoming increasingly divergent from federal law with respect to medical marijuana, there are distinct federal benefits for employers who keep drugs out of the

181. *Id.*

182. *Id.* para. 8.

183. *Id.* para. 25.

184. 42 U.S.C. §§ 12101–12117 (2010); Geldreich v. Whisper Corwood LP, 2009 BCHRT 178 (Can. B.C.).

185. Rio Tinto Alcan Primary Metal v. C.A.W.-Canada, Local 2301 (2008), 180 L.A.C. 4th 1 (Can. B.C.).

186. 42 U.S.C. §§ 12101–12117.

187. Washburn v. Columbia Forest Products, Inc., 340 Or. 469 (2006); Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200 (Cal. 2008); *N. Am. Constr.*, 2003 ABQB 755 (Can.).

188. *See infra* note 23 and accompanying text.

189. *See infra* Part III.A.

workplace.[190] Requiring employers to accommodate an employee's use of medical marijuana complicates the drug-free workplace goal of an employer and compromises an employer's federal benefits.

A. Drug-Free Workplaces: Public Policy

There is a range of public policy reasons behind supporting drug-free workplaces, including the loss of government funding for projects, the correlation between a worker's impairment and absence and efficiency rates, employer liability due to acts of an impaired worker, and fiscal consequences suffered by the employer, employer's shareholders, employees, and customers.[191] Employers adopt drug-free workplace policies to "improve work safety, to ensure quality production for customers, and to enhance [their] reputation in the community by showing that [they have] taken a visible stand against chemical abuse and the associated detrimental effects."[192]

Employers contracting with the federal government endanger profits and future contract opportunities if they fail to maintain workplaces that are not drug-free.[193] Federal law requires employers to notify employees that the use of controlled substances, which includes marijuana, is prohibited.[194] The federal government can terminate a particular grant and even impose five years of ineligibility from receiving future grants if an employer does not maintain a drug-free workplace.[195]

Employers not only stand to lose lucrative relationships at the federal level but also with states that invoke laws that criminalize the use of medical marijuana.[196] For example, California requires all employers who receive state funding, regardless of the dollar amount of the contract or grant, to comply with California's Drug-Free Workplace Act of 1990.[197] In exchange for the continuation of state grants, the Act requires an employer to: i) provide annual certification that controlled substances, including marijuana, are prohibited; ii) implement drug-free awareness programs that educate employees on the dangers of using drugs, educate employees on the consequences associated with drug use, and provide employees with access to drug counseling; and iii) make an employee's compliance with the

190. *Id.*

191. Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act: Ross v. RagingWire* Telecommunications, 12 CHAP. L. REV. 71, 73–74 (2008).

192. *Id.* at 74 (quoting Dolan v. Svitak, 527 N.W.2d 621, 626 (Neb. 1995)).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

program a condition of employment.[198] The importance of such programs is reiterated through the associated penalties, which include delay of payment, contract or grant termination, a combination of both delay and termination, or ultimately debarment.[199] These federal and state laws are not simply lip service; an employer's falsification of compliance can end in suspension or termination of the contract or grant and an employer's ultimate disbarment in the grant program.[200]

An employer's concern with maintaining a drug-free workplace goes beyond compliance with federal and state laws to encompass fears of the effect that marijuana has on an employee's performance.[201]

> [Safety hazards are a reason to] be concerned from an occupational hazard standpoint . . . . [The employee using medical marijuana] could drop or mishandle or lose control of [merchandise or equipment] because of their impaired mind-altered judgment. The job would really need to require no judgment of any kind. No coordination, no technical judgment or no thinking skills in order to argue [medical marijuana] would be safe in the workplace.[202]

Studies show an invasive range of effects marijuana has on a person, even when used as medication, which support "[e]mployer fears of employee absenteeism, shiftlessness, or malfeasance while under the influence of marijuana."[203]

> While not discounting the potential benefits to patients and recommending further study, American Medical Association studies state that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes. Marijuana increases the heart rate, and a person's blood pressure may decrease on standing. Marijuana intoxication can cause impairment of short-term memory, attention, motor skills, reaction time, and the organization and integration of complex information. Users may experience intensified senses, increased talkativeness, altered

198. *Id.*

199. *Id.*

200. *Id.* at 74–75.

201. *Id.* at 75. *See also* Tahman Bradley, *Walmart Fires Cancer Patient with Prescription for Medical Marijuana*, ABC NEWS (Mar. 17, 2010), http://abcnews.go.com/Business/michgan-man-fired-walmart-medical-marijuana/story?id=10122193.

202. Bradley, *supra* note 201.

203. Fetra, *supra* note 191, at 75.

> perceptions, and time distortion followed by drowsiness and lethargy. Heavy users may experience apathy, lowered motivation, and impaired cognitive performance.[204]

Whatever effects are experienced because of marijuana use, they become magnified in the work environment.[205] The use of marijuana has been linked with "increased absences, tardiness, accidents, workers' compensation claims, and job turnover."[206] In the context of employee absenteeism, as a result of increased respiratory illnesses, "[p]eople who smoke marijuana frequently, but do not smoke[] tobacco, have more health problems and miss more days of work than nonsmokers."[207] While at the job, the work performance and skills of an employee who uses marijuana become diminished.[208] Illustrating this point, "[a] study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55% more industrial accidents, 85% more injuries, and a 75% increase in absenteeism compared with those who tested negative for marijuana use."[209]

Additionally, the United States Department of Health and Human Services conducted a study comparing employees who had used marijuana within the past month and employees who had not.[210] The study found that employees using marijuana were 7.9% more likely to have worked for three or more employers in the past year, 4.9% more likely to have missed two or more days in the past month due to illness or injury, and 8.6% more likely to have skipped one or more days of work over the past month.[211] This study highlights the concerns regarding the duration of employment and attendance for employees who are currently using marijuana.[212]

Although many state medical marijuana laws expressly prohibit requirements that employers accommodate an employee's use of marijuana at work, some argue that an employer's duty to accommodate should extend to an employee's off-the-clock use.[213] However, the effects of marijuana

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204. *Id.* at 75 (quoting *About AMA: Report 1 of the Council on Scientific Affairs (A-01) (2001)*, AM. MED. ASSOC., http://www.ama-assn.org/ama/no-index/about-ama/13652.shtml (last visited Apr. 10, 2011) (citing PIERRI J. CHAIT, EFFECTS OF SMOKED MARIJUANA ON HUMAN PERFORMANCE: A CRITICAL REVIEW, *in* MARIJUANA/CANNABINOIDS: NEUROBIOLOGY AND NEUROPHYSIOLOGY 387–424 (A. Bartke & L. Murphy eds., CRC Press 1992))).

205. *Id.*

206. *Id.* at 76.

207. *Id.* at 75.

208. *Id.* at 75–76.

209. *Id.* at 76.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 76–77.

do not magically wear off once an employee clocks in.[214] Marijuana has short-term and long-term effects.[215] Prolonged exposure can result in respiratory illnesses, decreased cognitive ability, and up to six months of memory defects after the last usage.[216]

Another legitimate concern involves the extent of unknown liability employers face because of the actions of employees under the influence of marijuana.[217] Employers are rarely held liable for an employee under the influence of alcohol or drugs when driving, operating heavy machinery, or engaging in other safety-sensitive tasks.[218] However, courts have expanded the scope of employment, holding employers liable in order to compensate victims for wrongful acts of employees that are "bizarre and unforeseeable acts, or brutal, violent, and sexual crimes."[219] "Forcing the employers to retain current drug users would close off one of the few methods that modern employers have left to insulate themselves from unlimited liability."[220] Employment decisions are business decisions. Thus, employers must retain the ability to make the decision that will foster and promote the overall health of their businesses.[221]

Driven by employer confusion and concern over what medical marijuana laws require employers to do when an employee uses medical marijuana, two identical bills were introduced in the Oregon House of Representatives in 2009.[222] House Bills 2497 and 3052 sought to "clarify that employers are not required to accommodate medical marijuana in the workplace, regardless of where the use occurs."[223] Oregon business and industry was represented at the House Business and Labor Committee

214. *Id.* at 77.

215. *Id.* at 77–78.

216. *Id.*

217. *Id.* at 79.

218. *Id.*

219. *Id.*

220. *Id.* at 79–80 (quoting Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL'Y 757, 840 (1998)).

221. *See id.* at 79–80.

222. Associated Oregon Industries, *Business Groups Testify on Key Marijuana-Employee Bills,* OR BUS. REP. (Mar. 25, 2009), http://oregonbusinessreport.com/2009/03/business-groups-testify-on-key-marijuana-employee-bills/.

223. Associated Oregon Industries, *supra* note 222 (including testimony of Associated Oregon Industries, Oregon's largest business lobby; employment law attorneys; Western Partitions, a union contractor with up to one thousand employees; Oregon Self-Insurers Association, representing one hundred and thirty employers; Silverton Hospital; staffing companies such as The Stoller Group, which places over eighteen thousand employees with temporary employment each year; American Society of Safety Engineers, representing eight hundred occupational safety, health, and environmental professionals; and Serenity Lane, a private, not-for-profit treatment center for alcoholism and drug abuse).

hearings on the bills.[224] Business representatives reiterated their concerns regarding the requirement of employers to accommodate a Schedule I controlled substance, the increasing number of Oregon citizens holding licensure cards under the state's medical marijuana law, and the loss of federal funding and jobs if employers cannot certify compliance with the Drug-free Workplace Act.[225]

Specifically, a large union contractor addressed liability concerns with regard to a recent accident involving a medical marijuana user who used marijuana at lunch, returned to work and fell, resulting in a shattered leg.[226] The employer spent more than five years and fifty thousand dollars accommodating the medical marijuana user, had trained the employee in fall protection, and yet was still liable for the fall.[227] Safety issues infiltrate every workplace, and employers are craving clarity regarding their rights to maintain drug-free work environments.[228]

Organizations providing medical care are also not immune from the legal limbo.[229] The Oregon Self-Insurers Association testified to a recent incident at a large health care facility in which a pharmacy technician who used medical marijuana caused frequent mistakes with patient medications.[230] Oregon's Silverton Hospital prohibits "employees to work while using drugs or alcohol, including prescriptive narcotic medication in which the strength is known and the dosage specified."[231] This policy highlights the fear over the lack of medical marijuana dosage recommendations and inconsistent strengths from plant to plant.[232] Another source of apprehension stemming from the unique qualities and effects of marijuana is the potential abuse and dependency on the drug.[233] In Oregon, there are currently no conditions for medical marijuana users to receive abuse and dependency evaluations.[234]

B. Tools to Create and Maintain Drug-Free Workplaces

Demonstrating the importance of having drug-free workplaces, U.S. employers have many tools to ensure an employee's compliance.[235] These tools to help implement and enforce drug-free workplaces include drug

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224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See infra* Part III.B.

policies, employee drug testing, and other resources from occupational safety and health administrations.[236] Canada has a similar arsenal; however, a major difference exists in that Canadian employers have a limited ability to drug test employees.[237]

Similar to the structure of the ADA and state disability discrimination laws, the Occupational Safety and Health Act (OSHA) is a federal act, and each state enacts their own occupational safety and health laws.[238] OSHA was passed in 1970 with the purpose of assuring

> safe and healthful working conditions for working men and women; by authorizing enforcement of the [Act's] standards . . .; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in . . . occupational safety and health.[239]

The federal and state occupational safety and health laws support, and the federal and state governments sometimes even impose, responsibilities on employers to address substance abuse issues.[240] The U.S. Department of Labor (DOL), which implements OSHA, encourages, supports, and provides employer resources to ensure drug-free workplaces.[241] The DOL takes the position that drug-free policies at work "improve workplace safety and health in organizations of all sizes and in all industries."[242] Additionally, "[t]hey also play an important role in fostering safer and drug-free families, schools and communities across the [United States]."[243] Specifically, the DOL encourages an employer's overall drug-free workplace program to include a drug-free workplace policy, supervisor training, employee education, employee assistance, and drug testing.[244] An

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236. *See infra* Part III.B.

237. *See* CHRC TESTING POLICY, *supra* note 149.

238. *See* 29 U.S.C. § 667 (2004).

239. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 650-700 (2004), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=2743.

240. Office of the Assistant Secretary for Policy, *Working Partners for an Alcohol- and Drug-Free Workplace: Frequently Asked Questions,* U.S. DEP'T OF LABOR, http://www.dol.gov/asp/programs/drugs/workingpartners/faq.asp#q1 (last visited Apr. 10, 2011) [hereinafter *Working Partners FAQs*]. *See* Fetra, *supra* note 191.

241. Office of the Assistant Secretary for Policy, *Working Partners for an Alcohol- and Drug-Free Workplace: Drug-Free Workplace,* U.S. DEP'T OF LABOR, http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dfwp.asp (last visited Apr. 10, 2011).

242. *Id.*

243. *Id.*

244. *Id.*

employer's drug-free policy should be specific to the needs of each individual business and minimally address the purpose for the policy, include a description of prohibited behaviors, and discuss consequences for violation of the policy.[245]

The DOL does not regulate drug testing of employees.[246] However, the DOL does recognize the strong policy behind drug-free workplaces and includes drug testing as a suggested element for an employer's drug-free workplace program.[247] With respect to workplace drug testing, "[g]enerally, employers have a fair amount of latitude in handling drug testing as they see fit . . . . However, there may be state laws that impact how drug testing is implemented."[248] Some state laws go to the extreme of requiring employee drug testing in order for an employer to be awarded a contract.[249] Many U.S. employers utilize some form of drug testing in association with drug-free workplace policies, with "84[%] of employers [requiring] pre-employment drug screening, 73[% requiring] reasonable-suspicion testing, 58[% requiring] post-accident testing, and 39[% requiring] random testing."[250]

The Canadian Centre for Occupational Health and Safety (CCOHS) was developed in 1978 to be at the forefront for "work-related injury and illness prevention initiatives and occupational health and safety information."[251] One of the goals of CCOHS is to "provide[] Canadians with unbiased, relevant information and advice that supports responsible decision-making and promotes safe and healthy working environments."[252] As opposed to the extent that the DOL provides information and resources to drug-free workplace programs as a whole, CCOHS mainly focuses on substance-abuse programs in the workplace.[253] As a similar rationale to develop entirely drug-free workplaces, CCOHS recognizes that the impacts

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245. Office of the Assistant Secretary for Policy, *Working Partners for an Alcohol- and Drug-Free Workplace: Drug-Free Workplace Policy*, U.S. DEP'T OF LABOR, http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/policy.asp (last visited Apr. 10, 2011).

246. *See Working Partners FAQs*, *supra* note 240.

247. *Id.*

248. *Id.*

249. *See* OR. REV. STAT. ANN. § 279C.505(2) (West 2005) (requiring that "every public improvement contract . . . contain a condition that the contractor shall demonstrate that an employee drug testing program is in place").

250. Eve Tahmincioglu, *Wal-Mart Worker Fired Over Medical Marijuana*, MSNBC (Mar. 17, 2010, 2:44:13 PM EST), http://www.msnbc.msn.com/id/35913492/ns/business-careers/ (discussing 2006 report from the Society for Human Resource Management).

251. *CCOHS: About Forum*, CAN. CENTRE FOR OCCUPATIONAL HEALTH AND SAFETY, http://forum05.ccohs.ca/about.html (last visited Apr. 10, 2011).

252. *Id.*

253. *OSH Answers: Health Promotion/Wellness/Psychosocial*, CAN. CENTRE FOR OCCUPATIONAL HEALTH AND SAFETY, http://www.ccohs.ca/oshanswers/psychosocial/ (last visited Apr. 10, 2011).

of substance abuse include "premature death/fatal accidents, injuries/accident rates, absenteeism/extra sick leave, and loss of production."[254] Components of a suggested substance abuse program include: statement of the purpose and objectives of the program; definition of substance abuse; statement of who is covered by the policy and/or program; statement of the employee's rights to confidentiality; that arrangements have been made for employee education; that arrangements have been made for training employees, supervisors, and others in identifying impaired [behavior] and substance abuse; provision for assisting chronic substance abusers; outline of how to deal with impaired workers; if necessary, statement of under what circumstances drug or alcohol testing will be conducted, and; provision for disciplinary actions.[255]

The allowance of employee drug testing in Canada is built upon a different legal structure than the hands-off approach of the United States, which leaves these decisions mostly up to the employer.[256] In Canada, drug testing and an employer's decision based on those test results are governed by the Canadian Human Rights Commission (CHRC) and are heavily tied to discrimination laws.[257] The CHRC recognizes that "[s]afety is important to employees and employers,"[258] but strives to strike a balance so that "safety must be ensured in ways that do not discriminate against employees on the basis of a prohibited ground of discrimination."[259]

Consistent with the Human Rights Act, which prohibits "discrimination on the ground of real or perceived disability, drug . . . testing [is] prima facie discriminatory."[260] The reasoning is "that a drug test cannot measure impairment at the time of the test, [and] requiring an employee or applicant for employment to undergo a drug test as a condition of employment may be considered a discriminatory practice on the ground of disability or perceived disability."[261] In the case of marijuana use, the grounds for discrimination would be "the actual or perceived possibility that an individual may develop a drug or alcohol dependency in the future."[262]

Canadian law does make an exception to the general rule regarding drug testing and that relies on there being a "bona fide occupational

254. *OSH Answers: Substance Abuse in the Workplace*, CAN. CENTRE FOR OCCUPATIONAL HEALTH AND SAFETY, http://www.ccohs.ca/oshanswers/psychosocial/substance.html (last visited Apr. 10, 2011).

255. *Id.*

256. *See* CHRC TESTING POLICY, *supra* note 149, at 2–4.

257. *See id.*

258. *Id.* at 2.

259. *Id.*

260. *Id.* at 3.

261. *Id.*

262. *Id.* at 3–4.

requirement."[263] Therefore,

> [i]f testing is part of a broader program of medical assessment, monitoring and support, employers can test for drugs in any of the following situations: for "reasonable cause," where an employee reports for work in an unfit state and there is evidence of substance abuse; after a significant incident or accident has occurred and there is evidence that an employee's act or omission may have contributed to the incident or accident; or following treatment for drug abuse, or disclosure of a current drug dependency or abuse.[264]

However, pre-employment drug testing, as a general rule, is prohibited.[265] A drug test is considered a medical examination and, therefore, is "limited to determining an individual's ability to perform the essential requirements of the job."[266] Under the Human Rights Act, a drug test does not reasonably gage if a worker will be impaired while working because a pre-employment drug test that has a positive result does not "predict whether the individual will be impaired at any time while on the job."[267] Similarly, random drug testing does not help effectuate the goal that workers are not impaired while working because "a positive drug test [does not] measure present impairment and . . . only confirm[s] that a person has been exposed to drugs at some point in the past."[268]

C. Accommodation of Disabilities

Putting aside the benefits and policy rationales behind requiring an employer to accommodate an employee's disability, employers must also develop and implement the accommodation for medical marijuana use, which in some cases may be very burdensome.[269] An example of such a burden would be the accommodation of medical marijuana use and the complications it creates with the ADA and employer programs such as loss of funding, OSHA compliance, drug testing, and drug-free workplace policies.[270]

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263. *Id.* at 5.
264. *Id.*
265. *Id.* at 6–7.
266. *Id.* at 6.
267. *Id.*
268. *Id.* at 7.
269. *See supra* Part III.A.
270. *Id.*

When an employee requires workplace accommodation, such considerations should be ad hoc and specific to the employee's limitation and needs.[271]

> [A reasonable accommodation under the ADA] may include: making existing facilities used by employees readily accessible to and usable by persons with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position; acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[272]

The Job Accommodation Network (JAN), working through the U.S. Department of Labor's Office of Disability Employment Policy, suggests the following questions to guide the development of employee accommodations:

> 1) What limitations is the employee . . . experiencing? 2) How do these limitations affect the employee and the employee's job performance? 3) What specific job tasks are problematic as a result of these limitations? 4) What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations? 5) Has the employee . . . been consulted regarding possible accommodations? 6) Once accommodations are in place, would it be useful to meet with the employee . . . to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed? 7) Do supervisory personnel and employees need training regarding [the employee's disability]?[273]

Under the Canadian Human Rights Act, an employer's "duty to accommodate means the employer must implement whatever measures

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271. Linda Carter Batiste, *Accommodation and Compliance Series: Employees With Drug Addiction*, JOB ACCOMMODATION NETWORK (Sept. 5, 2008), http://www.jan.wvu.edu/media/drugadd.html#Acc.

272. 42 U.S.C. § 12111 (2010).

273. Batiste, *supra* note 271.

necessary to allow its employees to work to the best of their ability."[274] Measures of accommodation include "eliminating or changing rules, policies, practices and [behaviors] that discriminate against persons . . . [with disabilities]."[275] When an employer develops an individualized accommodation for an employee, considerations include a "determin[ation of] what barriers might affect the person requesting accommodation; explor[ation of] options for removing those barriers; and accommodat[ion] to the point of undue hardship."[276] As with the ADA, Canadian discrimination laws require an employer to accommodate a disability up to undue hardship.[277] An employer's duty to accommodate is excepted when:

> a rule, standard or practice is based on a bona fide occupational requirement . . . [which] means that an employer or service provider can only deny accommodation if it does something in good faith for a purpose connected to the job or service being offered, and where changing that practice to accommodate someone would cause undue hardship to the employer or service provider, considering health, safety and cost.[278]

With respect to health and safety, if an accommodation "would pose an undue risk to the health and safety of that person, or others, then an employer or service provider may be able to establish undue hardship."[279] In examining cost, undue hardship is not met just because "some cost, financial or otherwise, will be incurred . . . ."[280] To reach undue hardship, the cost has to be "so high that it affects the very survival of the organization or business, or it threatens to change its essential nature"[281] and can be measured through such factors as "the size and financial resources of the employer, and external financing, and details of any additional risks or detriments."[282] Additionally, other factors to determine undue hardship include "the type of work performed, the size of the

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274. *Duty to Accommodate Fact Sheet*, CAN. HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.ca/preventing_discrimination/duty_obligation-en.asp (last updated Oct. 06, 2010).

275. *Overview of the Duty to Accommodate*, CAN. HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.ca/preventing_discrimination/page1-en.asp (last updated Aug. 23, 2004).

276. *Id.*

277. CHRC TESTING POLICY, *supra* note 149, at 7–11.

278. *Duty to Accommodate Fact Sheet*, *supra* note 274.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

workforce, the interchangeability of job duties, financial ability to accommodate, the impact on a collective agreement, and impact on employee morale."[283]

There are examples in Canada of employers providing an area at work for medical marijuana users to use the drug.[284] Although the dispute did not reach the level of a court order, two college professors used Canada's human rights laws to petition their employers, the University of Toronto and York University to accommodate their medical marijuana use.[285] Even though it was a long battle for Professor Doug Hutchinson and Professor Brian MacLean, one year and three months respectively, their employers eventually conceded.[286] Each professor qualifies to use medical marijuana under Canadian law.[287] Now, each professor is provided a room in which they are allowed to smoke in while on the job.[288] York University Professor Maclean argued that "[w]ithout the medication, [he was] disabled and . . . not able to carry out meaningful and valuable, productive work."[289] University of Toronto Professor Hutchinson likened a lack of accommodation to smoke at work with "kill[ing himself]—either literally or professionally."[290] In making its decision to accommodate the professor by providing him with a "smoking room," the University of Toronto hired a consultant to help best make the decision.[291]

The United States is not replete with examples of businesses accommodating the use of medical marijuana.[292] Newbridge Securities, a Florida firm, accommodates the medical marijuana use of one of its brokers.[293] Although Florida is not a medical marijuana state, the employee smokes legally as part of a test program through the U.S. government.[294] It is possible that the employee could handle millions of dollars of his clients' money while under the influence, but this risk is taken with the knowledge of his clients and the support of his employer.[295] While Newbridge

283. *Preventing Discrimination*, CAN. HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.ca/preventing_discrimination/page3-eng.aspx (last updated May 6, 2005).

284. *See* Natasha Elkington, *Two Canada Professors Win Right to Toke Up at Work*, REUTERS (Nov. 15, 2006, 5:34 AM EST), http://www.reuters.com/article/oddlyEnoughNews/idUSN1431354020061115.

285. Elkington, *supra* note 284.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. Intini, *supra* note 284.

291. *Id.*

292. *See* Stephanie Armour, *Employers Grapple with Medical Marijuana Use*, USA TODAY (Apr. 18, 2007, 11:49 PM), http://www.usatoday.com/money/workplace/2007-04-16-medical-marijuana-usat_N.htm.

293. *Id.*

294. *Id.*

295. *Id.*

Securities accommodates the use of medical marijuana on the job, another option for employers would be to utilize flexible work schedules to accommodate medical marijuana use so as to decrease the likeliness of an employee being under the influence while on the clock.[296]

Many employers in the United States do not reach the stage of weighing the options for accommodation because employees are terminated if they test positive for marijuana.[297] As its predecessor states have experienced, what protections an employee or employer has under Michigan's medical marijuana laws are under fire.[298] Joseph Casias worked for Walmart for five years before being terminated for a positive post-accident drug test.[299] Casias uses medical marijuana legally under Michigan law.[300] Employers, including Walmart, are faced with diverging state and federal employment laws, as well as the real-life consequences of liability, such as negligence, if an employer is aware of an employee's marijuana use and a customer is injured as a result of the employee's error.[301] Although medical marijuana supporters call Walmart's decision "uncompassionate," Walmart feels it is "unfortunate."[302] Walmart is "sympathetic to Mr. Casias' condition. [However, as an employer, Walmart has] to consider the overall safety of [its] customers and associates, including [the patient], when making a difficult decision like this."[303]

Many businesses are not accommodating employee medical marijuana use, and U.S. courts are increasingly backing this stance.[304] Casias has not decided if he will go to court to contest his termination, but he has contacted the Michigan Department of Civil Rights, which will investigate the matter to determine if Walmart violated any disability discrimination laws.[305] What happens in Michigan if this decision is challenged may further divide how medical marijuana laws are applied—this time across state lines.[306] A direct conflict exists between

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296. *Id.*

297. *Id.* *See supra* Part II.A. *See also* Tahmincioglu, *supra* note 250; Bradley, *supra* note 201.

298. *See* Tahmincioglu, *supra* note 250. *See also* Bradley, *supra* note 201.

299. *See* Tahmincioglu, *supra* note 250.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *See* Bradley, *supra* note 201. *See also* Troy Reimink, *Wal-Mart's Firing of Employee for Using Medical Marijuana Incites Boycott*, MICHIGAN LIVE LLC (Mar. 17, 2010, 7:18 AM), http://www.mlive.com/news/index.ssf/2010/03/wal-mart_fires_battle_ creek_em.html (discussing further consequences such as the call by marijuana

Michigan's medical marijuana law, which provides protection against "disciplinary action by a business for medical marijuana use" and the Michigan employer's legal right to terminate employees after failing a drug test.[307] Michigan attorney Michael Komorn believes society places a stigma on marijuana use that adversely affects even those who use it legally for medical purposes, and that "[i]n order to protect patients there has to be an evolution in thinking."[308]

IV. RECOMMENDATION

Current laws should be amended and new laws drafted to clarify that employers do not have to accommodate medical marijuana in the workplace. As it stands, employers within the United States do not know what to do regarding medical marijuana.[309] They are in legal purgatory between federal and state law.[310] Employers are unsure to what extent medical marijuana affects, or does not affect, their decisions regarding hiring, firing, liability and accommodation.[311] Oregon employment lawyer Richard Meneghello succinctly describes the current reality of the employer stating, "[i]t's almost an untenable situation. Employers are screaming for answers. We know they [are] looking for clear answers, and there [is] not one out there right now. There [is] a lot of uncertainty. Employers are living in a dangerous situation."[312] With the number of states legalizing medical marijuana increasing and other states with pending medical marijuana legislation, companies all over the country, whether in a medical marijuana state or not, are debating the employer's situation.[313] The effects of marijuana use including absenteeism, malfeasance, and turn over[314] may not be demonstrated by every medical marijuana user, but regardless, a stigma regarding marijuana use, medical or not, exists.[315]

The uncertainty of medical marijuana law may also be multiplied if states have differing laws regarding medical marijuana and employers. This issue is particularly prudent in areas where people live in one state but work in another. Theoretically, a similar problem may arise when an individual's place of residence and work location are separated by the U.S.-Canadian border. However, due to the legal structure upon which each country's substantive laws are based, it makes more sense to reconcile

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advocates to boycott Walmart and the holding of a rally in support of the terminated employee).

307. *See* Reimink, *supra* note 306.

308. *Id.*

309. *See supra* Part III.

310. *Id.*

311. Armour, *supra* note 292.

312. *Id.*

313. *Id.*

314. Fetra, *supra* note 191, at 75.

315. *See* Armour, *supra* note 292.

diverging U.S. law than to blindly follow Canada's lead.

Times are changing: states are permitting medical marijuana; several states have pending medical marijuana legislation including traditionally conservative states; states are pushing further to legalize the recreational use of marijuana; and federal law, which prohibits any use of marijuana, has subsided in actively enforcing federal law against patients complying with state law.[316] Although Canada's policy reflects the opposite stance of this Note, the uncertain effect medical marijuana has in the employment arena is uniform throughout the entire country. This situation requires current action from the federal and state governments of the United States to create a uniform application of the laws.[317]

A. States Should Protect Employers' Rights

States should protect an employer's right to enforce a drug-free workplace through a variety of measures, such as cautiously drafting medical marijuana acts, passing bills to amend existing acts to clarify that employers have no duty to accommodate medical marijuana use, and ensuring that courts continue interpreting medical marijuana laws with an eye toward decriminalization.[318] When drafting medical marijuana legislation, the purpose of the law should be clearly stated and the law should be given proper scope and limitations.[319] Additionally, states with pending medical marijuana legislation should review the language of existing acts and the past and current lawsuits regarding the acts when drafting new legislation.

The purpose of the California Compassionate Use Act is to exempt patients requiring medical marijuana treatment from "criminal prosecution or sanction."[320] The Oregon Medical Marijuana Act has a similar purpose to exempt such users from state criminal laws for possession.[321] However, additional provisions of Oregon's law specifically refer to the requirements of employers.[322] With regard to the application of the law to the workplace, the original language in the Oregon Medical Marijuana Act, ORS 475.300 to 475.346, reads "[n]othing in ORS 475.300 to 475.346 shall be construed to require: . . . (2) An employer to accommodate the medical use of

316. *See* William M. Welchand & Donna Leinwand, *Slowly, States Are Lessening Limits on Marijuana*, USA TODAY (Mar. 9, 2010, 11:25 AM), http://www.usatoday.com/news/nation/2010-03-08-marijuana_N.htm.

317. *See supra* Parts I.B–C., II.

318. *See infra* Part IV.A.

319. *See generally* CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996); OR. REV. STAT. ANN. §§ 475.300, 475.346 (West 1999); MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008).

320. CAL. HEALTH & SAFETY CODE ANN. § 11362.5.

321. OR. REV. STAT. ANN. §§ 475.300–475.346.

322. *Id.*

marijuana in any workplace."[323] This provision is ambiguous in that it may only exempt an employer from accommodating the actual ingestion of marijuana in the workplace. Oregon State Representatives Bruce Hanna and Mike Schaufler introduced and sponsored identical bills in 2009 to remedy this ambiguity.[324] Bills such as House Bill 2497 and House Bill 3052 sought to clarify the requirements of employers regarding accommodation of medical marijuana.[325] The proposed bills would have amended Section 475.340 of the Act to read:

> Nothing in ORS 475.300 to 475.346 shall be construed to: . . . (2) Require an employer to: (a) Accommodate the medical use of marijuana in any workplace regardless of where the use occurs; (b) Allow an employee or independent contractor to possess, to consume or to be impaired by the use of marijuana during working hours; or (c) Allow any person who is impaired by the use of marijuana to remain in the workplace. (3) Preclude or restrict an employer from establishing or enforcing a policy to achieve or maintain a drug-free workforce.[326]

As gaps and ambiguities are found in current state medical marijuana laws, legislatures should take steps to amend their statutes in order to ameliorate the problems.[327]

In contrast, the purpose of the Michigan Medical Marihuana Act is to protect marijuana users from criminal penalty but also prevent them from being "denied any right or privilege, including . . . disciplinary action by a business."[328] This may appear to be a clearly stated purpose, but the statute also provides that employers are not required to accommodate medical marijuana use.[329] Under Michigan's law, employers are not required to accommodate the use of "marihuana in any workplace or any employee working while under the influence of marihuana."[330] This potential conflict is exemplified by Walmart's recent firing of Joseph Casias.[331] While an

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323. *Id.*

324. H.B. 3052, 75th Gen. Assemb., Reg. Sess. (Or. 2009); H.B. 2497, 75th Gen. Assemb., Reg. Sess. (Or. 2009).

325. Associated Oregon Industries, *supra* note 222.

326. H.B. 3052, 75th Gen. Assemb., Reg. Sess. (Or. 2009); H.B. 2497, 75th Gen. Assemb., Reg. Sess. (Or. 2009).

327. *See generally* CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996); OR. REV. STAT. ANN. §§ 475.300–475.346 (West 1999); MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008).

328. MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008).

329. *Id.*

330. *Id.*

331. *See supra* text accompanying notes 297–308.

employee may argue that medical marijuana was not used at the job, effects of marijuana use may linger both in the short- and long-term, resulting in the employee being under the influence while on the job.[332]

As states with pending legislation work toward final statutory language, they should adopt a clear purpose, like California and Oregon, which provide a compassionate solution for patients who were once forced to choose between medication and committing a criminal act.[333] The purpose should not further compromise the health and safety of the patient or others by allowing marijuana, in any form, to waft into the workplace.[334]

State courts should continue to side with employers on these tough decisions.[335] As the courts in California and Oregon have done, medical marijuana legislation should be interpreted consistently with their purpose, which is to decriminalize medical marijuana use.[336] Courts have remained mindful of the federal classification of marijuana as a Schedule I drug.[337] State laws decriminalizing medical marijuana have been upheld; however, courts have been less willing to allow medical marijuana laws to preempt federal disability laws, which are structured around the federal illegality of marijuana.[338]

It is one thing for state employment laws to differ by providing a greater degree of protection than federal law, but passing and upholding laws that are in direct conflict with federal law is another.[339] The business setting minimizes the definition of state lines and the division of country and state.[340] Profit from federal projects and losses from potential disability discrimination violations and civil suits are too high of stakes for the federal government to remain silent.[341] The federal government has eased state fears of passing medical marijuana laws by taking a back seat to enforcement.[342] Although the federal government is acquiescing to some degree, federal law clearly illegalizes any use of marijuana.[343] Adding fuel

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332. *See supra* Part III.A.

333. *See generally supra* Part I.B.

334. *See supra* Part III.

335. *See* Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 202 (Cal. 2008); Washburn v. Columbia Forest Products, Inc., 340 Or. 469, 478–80 (2006); Tahmincioglu, *supra* note 250.

336. *See Ross*, 174 P.3d at 202; *Washburn*, 340 Or. at 478–80.

337. *Ross*, 174 P.3d at 202; *Washburn*, 340 Or. at 478–80.

338. *See Washburn*, 340 Or. at 481.

339. *See id.*; INTERNATIONAL LABOR AND EMPLOYMENT LAW, *supra* note 27, at 247–48.

340. *See generally* Fetra, *supra* note 191, at 74.

341. *See supra* Part III.

342. *Feds: No More Arrests for Pot Smoking Patients*, *supra* note 41.

343. *Id.*

to the fire, laws from state to state diverge on these important issues.[344] The time is now for the United States, at both federal and state levels, to enact uniform laws regarding the impact that medical marijuana may have in the employment sector.

Canada requires employers to accommodate the use of medical marijuana and recognizes a current addiction to and use of a drug such as marijuana as a disability that must be accommodated.[345] Although United States law currently does not recognize an addiction to a drug accompanied by current use as a disability and should not require employers to accommodate the use of medical marijuana, the two countries' differing legal positions can be harmonized.[346] As a matter of constitutionality, medical marijuana is legal in Canada.[347] The United States is nowhere near that position; the U.S. Supreme Court has upheld the current classification of marijuana as a Schedule I drug and has permitted raids that enforce federal drug laws in medical marijuana states.[348] Conversely, in Canada, the use of drug testing is a privacy issue and may be discrimination in and of itself; however, while not regulated by the U.S. government, drug testing is encouraged by both federal and state governments to ensure safe and healthy workplaces.[349] Medical marijuana and drug-free workplace polices are on different legal footings in Canada and the United States. Although the outcomes differ, each country's laws consistently reflect the legal evolution that has played out in each country. Therefore, the United States should not wildly abandon all precedent that has supported decades of marijuana laws. Instead, the United States should seek to find its own balance in order to protect and support a bedrock of U.S. society—its employers.

CONCLUSION

Medical marijuana legislation is a compassionate solution to keep suffering patients from becoming criminals.[350] However, states should enforce these laws with the intent to decriminalize medical marijuana without infringing upon an employer's duty to maintain healthy and safe

344. *Compare* CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996), *and* OR. REV. STAT. ANN. §§ 475.300–475.346 (West 1999), *with* MICH. COMP. LAWS ANN. §§ 333.26424–333.26428 (West 2008).

345. *See supra* Parts I.C, II.B.

346. *Facts About the Americans with Disabilities Act*, *supra* note 4.

347. *See* R. v. Parker, (2000) 49 O.R. 3d 481 (Can. Ont. C.A.).

348. *See* Gonzales v. Raich, 545 U.S. 1, 2 (2005).

349. *See Working Partners FAQs*, *supra* note 240; CHRC TESTING POLICY, *supra* note 149, at 2–4.

350. *See* Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 202 (Cal. 2008); Washburn v. Columbia Forest Products, Inc., 340 Or. 469, 478–80 (2006).

workplaces.[351] States with pending legislation should review the language of current medical marijuana acts and carefully draft provisions regarding the act's purpose, limitation, and scope.[352] Additionally, legislatures should review past and current case law, taking lessons from gaps or ambiguities in other state acts.[353]

States with current medical marijuana laws should take steps to amend their laws to clarify that employers are not required to accommodate an employee's use or influence of medical marijuana regardless of where such use occurs.[354] Courts interpreting state medical marijuana laws should do so with the spirit of the intention of the laws—decriminalization.[355] Differences from state to state regarding the effect medical marijuana laws have on employers and the legalization of medical marijuana will continue to pose conflicts as long as federal laws are contradictory to state laws.[356] U.S. laws should not be patterned after Canadian laws simply because Canada is our neighbor. Each country's views of employer accommodation and disability discrimination laws rest on different foundations.[357] Instead, the United States, including states with medical marijuana laws, should remain consistent with the current understanding of disability under the Americans with Disabilities Act.[358] State medical marijuana acts do "not stand as a statutory trump card over every other statute and common law duty. Employers have a duty to their employees, customers, and the general public, to provide a safe and drug-free workplace."[359] Therefore, employers should not be required to accommodate the use of medical marijuana by employees.

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351. *See supra* Parts III, IV.
352. *See supra* Part IV.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. Brief for Pacific Legal Foundation and National Federation of Independent Business as Amici Curiae Supporting Petitioner, Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries of the State of Oregon, 230 P.3d 518 (Or. 2010) (No. A130422).