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The application deadline is March 1 for the academic year beginning late August; early applications are encouraged. For further information on both the LL.M. and the S.J.D. programs, please visit our website at http://www.law.arizona.edu/tradelaw/ or contact David A. Gantz (gantz@law.arizona.edu) or James C. Hopkins (hopkinsj@email.arizona.edu).

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Individuals interested in the JDAS program should contact Professor Brent White at JDAS@law.arizona.edu.

MASTER OF LAWS (LL.M.)
AND DOCTOR OF JURIDICAL SCIENCE (S.J.D.)
IN INDIGENOUS PEOPLES LAW AND POLICY

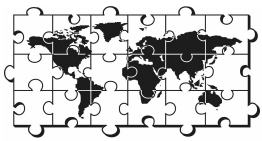
The University of Arizona in Tucson, in the heart of the American Southwest and Arizona Indian Country, is widely recognized as one of the world's leading academic centers for the study of Indigenous peoples' cultures, histories, languages, laws, and human rights. With the strengths of The University of Arizona in the field of Indigenous peoples studies, the James E. Rogers College of Law, working closely with Indigenous peoples, their leaders, and their communities, offers the interdisciplinary Master of Laws (LL.M.) and Doctor of Juridical Science (S.J.D.) Programs in Indigenous Peoples Law and Policy.

The advanced one-year degree LL.M. Program is designed to prepare lawyers to meet the unique and difficult set of challenges and problems confronting international and domestic law reform and policymaking in the field of Indigenous peoples' rights in the twenty-first century. As the highest degree offered in the field of law, the S.J.D. offers candidates an intellectually challenging opportunity for academic specialization.

The LL.M. Program in Indigenous Peoples Law and Policy is designed to educate graduate law students from the United States and foreign countries on the most important legal and policy issues confronting lawyers in the field of Indigenous peoples' rights, with particular emphasis on indigenous peoples in the United States, Canada, Australia, New Zealand, and Latin America. In addition, the LL.M. Program strives to promote a deeper critical and global understanding of the challenges and problems confronting lawyers and policymakers in the field of Indigenous peoples' rights.

Both LL.M. and S.J.D. students have an opportunity to take a large number of courses offered at the College of Law and/or other graduate and professional school programs at The University of Arizona. The College of Law offers 20 to 30 credit hours of specialized Indian law courses each fall and each spring semester. The S.J.D. Program also offers highly qualified candidates the opportunity to conduct advanced research and produce original scholarship under the guidance of its internationally renowned faculty, including S. James Anaya, recently the former United Nations Special Rapporteur on Rights of Indigenous People and author of *Indigenous Peoples in International Law* (2d ed.); Robert A. Williams, Jr., co-author of *Federal Indian Law: Cases and Materials* (5th ed.); Melissa L. Tatum, contributing author to *Cohen's Handbook of Federal Indian Law* and leading scholar in tribal court jurisdiction; as well as other academic experts in the field of Indigenous peoples' rights. In addition to traditional coursework, clinical opportunities available to LL.M. and S.J.D. students foster the connection between practical experience and scholarly development, resulting in direct public service that is attentive to local, state, national, and international needs.

Applications are accepted on a rolling basis, although prospective students are strongly encouraged to apply by March 15 for the academic year beginning mid-August. After March 15, admission is granted only on a space-available basis. Questions relating to the LL.M. and S.J.D. in Indigenous Peoples Law and Policy Program should be addressed to Professor Melissa L. Tatum, Director of the IPLP Program at mtatum@email.arizona.edu. Further information also is available at our website, http://www.law.arizona.edu/depts/iplp.



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CONSULTING INDIGENOUS PEOPLES IN THE MAKING OF LAWS IN MEXICO: THE ZIRAHUÉN AMPARO

Naayeli E. Ramirez Espinosa*

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I. INTRODUCTION

In August 2001, the Mexican Congress promulgated a constitutional amendment that established the current framework for Indigenous peoples' rights. Among other rights, the amendment established the right to be consulted. The federal government and authorities praised the amendment, but many Indigenous communities submitted judicial actions against it arguing that legislators had not consulted them in the drafting of the amendment. In this paper I discuss one of the many judicial actions against the amendment process for laws regulating Indigenous peoples, the *Zirahuén Amparo*. I argue that the changes made to the Constitution remain meaningless to many Indigenous communities due to a lack of dialogue, consultation, and a lack of initiatives to build and recognize Indigenous communities' jurisdiction.

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II. THE ZIRAHUÉN AMPARO

The Zirahuén Community[1] presented an *amparo* plea in the Federal District Court in Morelia, Michoacán on September 26, 2001.[2] The Community complained that the government failed to consult them on the federal constitutional amendment of August 14, 2001. According to the plaintiff, the authorities had a duty to consult them under the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169),[3] an international treaty Mexico ratified in 1992. This treaty establishes that authorities shall consult Indigenous peoples regarding legislative or administrative measures, which may affect them and their rights directly. The Zirahuén Community requested immunity against the constitutional amendment.

The trial judge denied the *amparo* and dismissed the plaintiff's claims. On December 4, 2001, the Community presented a *Recurso de Revisión* (an appeal). On October 4, 2002, the Second Chamber of the Supreme Court of Justice (SCSCJN)[4] changed the reasons for dismissal but also denied the *amparo* and dismissed the plaintiff's claims.[5] The SCSCJN decided that an *amparo* was

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[1] I use capital letters to distinguish the legal entity of the Zirahuén Community from the concept of territory and population living in the area of the Zirahuén Lake.

[2] The action of the Zirahuén Community is called *amparo*. *Amparo* means "protection" in Spanish. There are two kinds of *amparo* in Mexican legislation: direct and indirect. Direct *amparo*s (DA) are instruments used against the ruling of a lower court that are reviewed by higher courts (an appeal); indirect *amparo*s (IA) are instruments that can challenge any order, act, law, or decision made by any authority on constitutional grounds. In this sense, indirect *amparo*s are instruments established with the aim of protecting/enforcing constitutionalism and the rule of law. Sometimes indirect *amparo*s run parallel to the legal process that is challenged through the action, which in most cases is suspended while federal courts examine its constitutionality. The *Zirahuén Amparo* is exceptional in that it is a challenge against the process of constitutional reform that took place in August 2001. Still, the *Zirahuén* case ran parallel to an existing legal claim for extension of their communal property and was brought to the court within the context of such legal claim for extension. *See* González Oropeza, Manuel & Ferrer Mac-Gregor, Eduardo (Coord.) El juicio de amparo. A 160 años de la primera sentencia, Tomo II, IIJ-UNAM 2011, 10-15-2015 (Mex.) formato HTML, http://biblio.juridicas.unam.mx/libros/libro.htm?l=3065.

[3] International Labour Organization [ILO], Indigenous and Tribal Peoples Convention art. 6, Jun. 27, 1989, 28 I.L.M. 1382.

[4] The SCJN organizes itself in three organs: the first chamber, which reviews criminal and civil law cases; the second chamber, which reviews administrative and labor law cases; and the full bench, which reviews cases that are considered of particular importance.

[5] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, Segunda Sala, Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVI, Noviembre de 2002, formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Segunda%20sala/NOVENA/81.pdf.

not a judicial action that could be used against the process of reform and that the Zirahuén Community had not proven any harm nor any detriment to their rights and thus, did not have legal interest nor standing.[6] The Court rejected the claims and granted the plaintiffs no relief.[7]

A. The Broader Context of the Lawsuit

Most of Mexico's population is a mix of cultures and heritages from different parts of the world, the result of a complex and long history of migration. At the same time, Mexico's Indigenous population is numerically the largest in Latin America, estimated by the National Council of Population (CONAPO) at twelve million in 2014, or around ten percent of the Mexican population.[8] Zirahuén is a Purépecha community. The Purépecha are Indigenous peoples that inhabit a large part of what today is known as the State of Michoacán in the southwest of Mexico since time immemorial.[9] Their *cazontzi* (king) surrendered certain rights to the Crown of Castille in the 1520s through accords. The surrender indicated submission to the Crown but not conquest.[10] In 1530 conqueror Nuño de Guzmán annexed Michoacán after killing *Cazontzi Tzintzincha,* the last king of the Purépecha, violating previous accords.[11]

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[6] *Id*. at 135.

[7] *Id.*

[8] *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, INTERNATIONAL LABOUR ORGANIZATION (2009), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_171810.pdf [hereinafter *Indigenous & Tribal Peoples' Rights in Practice*]; *see also* Indicadores socioeconómicos de los pueblos indígenas de México, Estimaciones de la población indígena, a partir de la base de datos del XII censo general de población y vivienda 2000, Indigenous 2002, 10-10-2015 (Mex.), format PDF, http://www.cdi.gob.mx/indicadores/em_cuadro01.pdf .

[9] *See* Bernal, Ignacio, et al., Historia General de México, México: El Colegio de México, 2000; *see also* Castro Gutierrez, Felipe, Los Tarascos y el Imperio Español: 1600-1740, México, Universidad Nacional Autónoma de México Universidad Michoacána de San Nicolás de Hidalgo, 2004.

[10] Bernal, *supra* note 9, at 281.

[11] *Id*. European explorers arrived at what is now known as the Mexican territory in the 16th century. Even though there were many Indigenous nations, empires, kingdoms, and communities that were conquered or "annexed" later, it is usually considered that the conquest of Mexico by the Spanish occurred in 1521, when *Mexico-Tenochtitlan* fell. *Mexico-Tenochtitlan* is now Mexico City and was the capital of the Aztec empire. Several Papal bulls such as Pope Alexander VI's *Inter Caetera* of May 4, 1493, were helpful to the Spanish kingdom when establishing its jurisdiction over Mexican territory. Mexico was a Spanish colony from 1521 to 1821. The Viceroyalty of New Spain covered some areas of what today is Canada to Panama, Pacific islands (such as the Philippines), and some areas of Venezuela and Colombia. *See also* de Alcala, Jerónimo, Relación de Michoacán,

Purépecha communities in Mexico have suffered from policies of dispossession, genocide, slavery, and assimilation as other communities in Mexico and other parts of the world. Still, most Purépecha populations maintained varying control over parts of their territories until the 1930s. Some still do. Most Purépecha communities endured epidemics, converted to Christianity, and adapted to the political environment of Mexico.[12]

In Mexico, there is no registry of Indigenous peoples. The courts consider that a "consciousness of Indigenous identity" is sufficient to have legitimacy to begin or to appeal procedures in order to protect their Indigenous rights and freedoms.[13] The authorities that carry out the population census and the *Comisión Nacional para el Desarrollo de los Pueblos Indígenas* (CDI, Commission for the Development of Indigenous Peoples) consider language as the main indicator that distinguishes Indigenous peoples from non-Indigenous peoples.[14]

The laws regulating land and the rights of Indigenous peoples have changed considerably over time. In Mexico, as in most of Latin America, few Indigenous forms of law preceded the emergence of the modern nation-state and continue to coexist alongside state law.[15] One of those exceptional forms of law is communal ownership of land.[16] The Mexican Constitution recognizes public, private, and communal ownership of the land.[17] In Mexico, there are two schemes

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Linkgua digital, 2012; Florescano, Enrique, Historia General de Michoacán, Morelia, Michoacán: Instituto Michoacano de Cultura, 1989.

[12] This is an ambitious statement and it is contested from different perspectives. Many Purépecha people did not convert to Catholicism as many others that self-identify as indigenous in Mexico, e.g. many Huichol communities. The Yaqui people were always against the Spanish and afterwards, against the Mexicans. The Sierra Gorda was also importantly controlled by Indigenous nations until late 1810s. Today there are areas in Mexico where no government authorities exercise jurisdiction. *See* Bernal, *supra* note 9.

[13] Tribunal Electoral del Poder Judicial de la Federación, Sala Superior, Índice Jurisprudencia 2012, Comunidades indígenas. La conciencia de identidad es suficiente para legitimar la procedencia del juicio para la protección de los derechos político-electorales del ciudadano, 4-2012, 10-10-2015 (Mex.), formato DOC, http://www.ine.mx/ (type "Índice Jurisprudencia 2012" into search field (*Buscar*), then follow first result, titled "Jurisprudencia").

[14] *Indigenous & Tribal Peoples' Rights in Practice*, *supra* note 8.

[15] Rachel Sieder, *Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala*, *in* LAW IN MANY SOCIETIES: A READER, 152-153 (Lawrence M. Friedman, Rogelio Pérez-Perdomo & Manuel A. Gómez, eds., 2011).

[16] For example, the Aztecs had different kinds of communal possession of land. Among them were the *tlalmilli (*given to certain families that could give the land as inheritance but could not be leased or sold) and *altepetlalli* (worked by the entire community to cover public expenses), which belonged to the *calpullis* (the unit of social organization in the Aztec society). *See* Kohler, José, El derecho de los aztecas, en: Antología jurídica mexicana, México: UNAM-IIJ, 1992, p. 58.

[17] Constitución Política de los Estados Unidos Mexicanos, CP, art. 27 ¶ 1, Diario

of communal ownership: *ejido* and *communal property*.[18] *Comuneros*[19] (joint-holders of the communal property) and *ejidatarios* (members of an *ejido*) share rights and duties over land with other members of their community, and until recently it was not possible to sell your rights to the land. In the 1990s, the federal government started implementing programs (e.g. Programa de Certificación de Derechos Ejidales y Titulación de Solares "PROCEDE" [Program for Certification of Ejidal Rights]) to ease the process of selling rights of *ejido* and *communal* land. Many *ejidatarios* in Michoacán are now able to divide and sell their rights to the land.

According to Mexican law, the federal agrarian authorities are in charge of the organization and legal supervision of *ejidos* and communities, and the resolution of conflicts concerning *communal* and *ejido* property, whether Indigenous or non-Indigenous.[20] The members of the communities and *ejido* that hold property together are registered in the *Registro Nacional Agrario* (Agrarian National Registry). According to law, the list of *comuneros* is updated in community assemblies and registered before the Agrarian National Registry.[21] Indigenous *comuneros* are considered to be the descendants of those Indigenous families that have been living in the area since before Spanish colonization. But there is no formal legal requirement regarding such ancestry in all communities. Each community self-identifies as Indigenous or not, and decides by itself whom to add as members in their assemblies.

B. The Zirahuén Community

The Zirahuén Community is a legal entity that represents part of the population and territory of the community of Zirahuén, which is also comprised of the Zirahuén *Ejido*, other *ejidos*, and neighbors. To distinguish the Zirahuén Community from the community of Zirahuén, I use capital letters. The Zirahuén Community owns its land under a communal property regime.

Zirahuén is a small Community with around 250 members (at the time of writing there was a motion to increase the number of *comuneros* to around 550 people) and only 604 hectares of land surrounding the Lake Zirahuén.[22] It is one

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Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[18] *Id.* at art. 27 § VII.

[19] *Comunero* is a Spanish term that literally means member of a community. Usually the term refers to the individual members of a community that share the property, profit, and utilize it; in other words, the joint owners of the land.

[20] Ley Agraria [LAG] art. 40, 47 & 65, Diario Oficial de la Federación [DOF] 26-2-1992, últimas reformas DOF 28-11-2012 (Mex.).

[21] *Id*.

[22] Six hundred and four hectares is equivalent to 1,492 acres or six square kilometers.

of the most active Indigenous Communities in Mexico in the protection of communal properties. It has a long and notorious recorded history of judicial and legal conflicts regarding its land. It is one of the founding communities of the Unión of Comuneros Emiliano Zapata (UCEZ), a popular and active organization that works to maintain and protect communal properties of Indigenous communities in México.[23] The UCEZ is one of the most supportive communities outside of the Chiapas of the Zapatista Movement in Mexico. The Zirahuén Community was the first self-declared autonomous municipality (Caracol Zapatista) in Mexico.[24] The sessions of the Zirahuén Community assembly are carried out in Spanish and most of the members only speak Spanish.[25]

The colonial government of the Viceroyalty of New Spain recognized the Community and its territory through a deed from the year 1733, the Real Registry Title 1607.[26] Its territory at that time covered 21,183 hectares.[27] After independence, the Community divided part of its land and lost some of its territory to large owners.[28] During the Mexican Revolution of the 1910s, the community lost its legal status as a Community and legal recognition of their communal lands.[29] In 1916, the community sought to recover the recognition of their territory but the government only granted it land in the form of *ejido* in the 1930s. It was not until 1970 that the Community of Zirahuén regained its status as a Community along with 604 hectares of communal land.[30] As soon as it regained status, the Community requested an extension of land.

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[23] Del Carmen Zárate Vidal, Margarita, En busca de la comunidad: identidades recreadas y organización campesina en Michoacán, México: El Colegio de Michoacán A.C., 1998, p. 63.

[24] Rojas, Rosa, La Jornada, Se suma CNI a declaratoria Zapatista, 22-06-2005 (Mex.), formato HTML, http://www.jornada.unam.mx/2005/06/22/index.php?section=politica&article=013n1pol.

[25] Interview with Eva Castañeda Cortés, Lawyer, Co-counsel of the Zirahuén Community, in Morelia, Michoacán, México (July 13, 2011).

[26] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 4.

[27] 21,183 hectares is equivalent to 52,344 acres or 211.83 square kilometers.

[28] Guevara Sánchez, Brenda Griselda, Comunidad y Conflicto: Zirahuén 1882–1963, Michoacán: Universidad Michoacana de San Nicolas de Hidalgo, 2010, p. 4-5. According to Guevara Sánchez, some historians, such as Roseberry, are of the opinion that this was a smart move on the part of the community because those communities in the same province of Michoacán that rejected all the attempts of the authorities to divide their lands finally lost them due to seizure by the authorities. Those that accepted the requests by the government for division, such as the community of Quiroga, were dissolved a bit later. Roseberry affirms that most of the communities that agreed to partially divide their lands survive today. Roseberry, William, *Neoliberalism,Transnationalization, and Rural Poverty: A Case Study of Michoacán, Mexico* 25 AM. ETHNOLOGIST 53, 53-54 (1998).

[29] *Id.*

[30] Interview with Eva Castañeda Cortés, *supra* note 25.

In 1992, article 27 of the Mexican Constitution was amended, establishing the current communal property regime and the Zirahuén Community's request for extension of land was labeled *rezago agrario*. This label means "agrarian delay" and includes cases or filings of requests for restitution for land, forests, and water that by 1992 were unresolved. To this day, the filings remain unresolved, mainly because land is unavailable to grant.

The Community has been requesting the restitution of their lands for almost a hundred years. Today, the Zirahuén Community claims 6,000 hectares of land, down from the original 21,500 hectares requested in 1916 and the 12,000 requested in 1978. The Community recognizes that 15,000 hectares have been given to the *ejidos* of *Zirahuén*, *Santa Rita*, *Santa Ana*, *Agua Verde*, and *Copándaro*, whose members were members of their ancestral Indigenous community living around the lake.[31] The 6,000 hectares of land that the Community claims are now in possession of many small and large private owners. In order to extend communal property to Zirahuén, the agrarian authorities would have to take lands from those private owners. To this day, authorities and the community have not been able to finally resolve the Zirahuén Community's request for an extension of land.

C. The Zapatista Movement, the San Andrés Accords, and the Constitutional Amendment of August 14, 2001

The *Zirahuén Amparo* was not an idea of the Zirahuén Community. Rather, Purépecha lawyers designed the plea using the legal profile of the Community to fight the constitutional amendment of August of 2001. Thus this *amparo* must be seen as part of a broader social and legal movement.

Efrén Capiz Villegas, the Zirahuén Community's former principal lawyer, designed the *amparo*. Efrén Capiz Villegas was a Purépecha man from a nearby community. The *comuneros* of the Zirahuén Community supported and voted for the making and submission of the plea in a Community assembly. Eva Castañeda Cortés, the Community's current principal lawyer, a Purépecha activist, and a co-drafter of the document, declared in an interview that the Zirahuén Community decided to support the legal actions taken by several Indigenous organizations against the reform: "They decided to support us in this quest" is the literal translation of her statement.[32] The following paragraphs explain that quest.

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[31] *Id.* 6,000 hectares is equivalent to 14,826 acres and 60 square kilometers.

[32] Interview with Eva Castañeda Cortés, *supra* note 25. Cortés also self-identifies as a Purépecha and is from a nearby community. The phenomenon of one group litigating on behalf of a movement can be seen in other cases regarding Indigenous issues all over the world. The Nibutani Dam case was also a court case brought on behalf of the Indigenous movement in Japan. In the Nibutani Dam case, the plaintiffs' main objective was not only to protect just their particular assets, it was also to protect the cultural and traditional assets

1. The Zapatista Revolution

On the last day of 1994, an armed group mainly comprised of Indigenous peoples called the Zapatista Army of National Liberation (hereinafter Zapatista Army) took the cities and towns of San Cristobal de las Casas, Las Margaritas, Altamirano, and Ocosingo in the State of Chiapas and declared war on Mexico.[33] Today, as it was in its origins, the Zapatista Army's main goals are the recognition of Indigenous peoples and their rights, and its activities are defensive against the military forces of Mexico.[34] A large network of organizations, institutions, and Non-Governmental Organizations (NGOs) around the world now supports the Zapatista Army (Zapatista Movement).

The Federal government started peace negotiations with the Zapatista Army in 1995. In 1996, the Federal Government and the Zapatista Army signed the San Andrés Accords.[35] The San Andrés Accords consummated a joint effort of the parties to achieve peace. They included a set of compromises from the federal government towards Indigenous peoples in Mexico.[36] One of the compromises was to work on a constitutional amendment that would include the opinion of those Indigenous peoples. Using most of the agreements discussed in the negotiation table of the San Andrés Accords, the *Comisión de Concordia y*

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of the Ainu people and make a legal statement of the situation of the Ainu in Japan. This can also be partly seen in Delgamuukw in Canada where two First Nations joined forces for litigation. All three cases were brought as part of a broader social movement as one of the strategies implemented to pursue the goal of protecting the rights and freedoms of their communities but also of Indigenous peoples more generally.

[33] Bernal, *supra* note 9, at 940.

[34] Primera declaración de la selva lacandona, Enlace Zapatista, 1-1-1994 (Mex.), formato HTML, http://enlacezapatista.ezln.org.mx/1994/01/01/primera-declaracion-de-la-selva-lacandona/. To hear Zapatista Army's declarations, see Enlace Zapatista, (Mex.), formato HTML, http://enlacezapatista.ezln.org.mx. One of the most relevant and recent declarations of the Zapatista Army is the Sixth Declaration of the Lacandona Jungle in 2005. *See* Cartas y comunicados del EZLN, (Mex.), formato HTML, http://palabra.ezln.org.mx.

[35] Los Acuerdos de San Andrés Larraínzar [San Andrés Accords], Mexico-Zapatista Army of National Liberation, Feb. 16, 1996.

[36] The San Andrés Accords is comprised of four parts and holds a commitment by the federal government to establish a new relationship with Indigenous peoples based on pluralism, sustainability, the participation of Indigenous peoples, free self-determination of Indigenous communities, and integrality. Among the commitments is the promotion and openness towards the participation of Indigenous peoples in the daily and continuous construction of Mexico; betterment of the quality of life of Indigenous peoples; recognition of Indigenous peoples in the Constitution and other laws; guarantee for the access to justice; promotion of the cultural expressions of Indigenous peoples; and education and job opportunities. The last part of the document is a commitment of both parties to send the proposals and agreed documents to the different assemblies in Mexico for their debate and decision-making. *See* Cartas y comunicados del EZLN, *supra* note 34.

Pacificación (COCOPA, Cooperation and Pacification Commission)[37] drafted a proposal of a constitutional amendment. The Zapatista Army accepted this proposal, called the COCOPA Proposal, but the federal government rejected it.

Most Indigenous nations participating in the negotiation process were very disappointed when the federal government rejected the COCOPA Proposal and ignored other commitments it had made in the San Andrés Accords. In 1998, there were several attempts to resume peace negotiations between the Zapatista Army and the federal government through the *Comisión Nacional de Intermediación* (CONAI, National Intermediation Committee)[38] but the Zapatistas rejected all of them. The Zapatista Army argued that the federal government had to comply with the San Andrés Accords before it would come back to the negotiation table.

2. The Rejection of the Constitutional Amendment of August 14, 2001

In 2000, the party controlling the Federal government changed for the first time in more than 60 years. Vicente Fox, from *Partido Acción Nacional* (PAN, National Action Party), presented the COCOPA Proposal to the Senate in one of his first acts as President of Mexico.[39] The Senate worked on the draft and changed the Proposal. The Senate finalized a project of amendment on April 25, 2001. It approved the project on July 18, 2001 while the Permanent Commission of the Federal Congress was on recess.[40] The Senate's bill was not agreeable to a

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[37] The COCOPA was a commission of the Congreso de la Unión [Federal Congress]. The Federal Congress is organized in an Upper Camera, the Senate and the Lower Camera, the Deputies. The COCOPA was integrated by deputies and senators of all parties represented in the Congress and had as objective to support the process of negotiation and dialogue between the Federal Government and the Zapatista Army. The COCOPA was established in 1995 and ceased its negotiating activities shortly after President Ernesto Zedillo rejected its constitutional proposal in 1996. Bernal, *supra* note 9.

[38] The CONAI was an institution integrated by intellectuals, artists, and recognized leaders of the larger civil society. The aim of the Committee was to act as the mediator between the Zapatista Army and the Federal Government. The CONAI was formally established in 1994 but Bishop Samuel Ruiz had already been acting as a mediator before the establishment of the CONAI. López y Rivas, Gilberto, Autonomías: Democracia o contrainsurgencia, México, D.F.: Ediciones Era, 2014.

[39] Comisión de Concordia y Pacificación, Propuesta introducido por Vicente Fox Quesada, Secretaria de Gobernación, Diario Oficial de la Federación [DOF] 5-12-2000 (Mex.), formato PDF, http://www.diputados.gob.mx/comisiones/asunindi/Iniciativa%20de%20%20Presidente%20VFox.pdf (last visited Oct. 27, 2015).

[40] Constitución Política de los Estados Unidos Mexicanos, CP, arts. 1, 2, 4, 18 ¶ 6, 115, Diario Oficial de la Federación [DOF] 14-8-2001 (Mex.), formato PDF, http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_151_14ago01_ima.pdf (last visited Oct. 27, 2015).

large portion of the Indigenous population in Mexico, including the Zapatista Movement because it did not establish a constitutional framework for promoting, protecting, and providing autonomy to Indigenous peoples in Mexico.

Zapatista Army representatives presented an argument in favor of the COCOPA Proposal in the Federal Deputies Chamber of the Congress on March 28, 2001, urging the Federal Congress to pass such proposal.[41] On April 30 of 2001, the Zapatista Movement publicly expressed its rejection of the Senate's finalized proposal of amendment, "contending that it betrayed the San Andrés Accords," and that it did not respond to the needs and demands of Indigenous peoples in Mexico. Indigenous communities all over Mexico campaigned through media, held blockades and protests, and organized a large walk that crossed the country.

The amendment remains among the most contested constitutional amendments in Mexican history.[42] Of thirty-two federal entities (thirty one states and one federal district), eight states rejected it (Baja California Sur, Guerrero, Hidalgo, México, Oaxaca, San Luis Potosí, Sinaloa, and Zacatecas) and seven abstained from voting. The amendment passed with only the minimum votes allowed.[43] Municipal governments, state legislatures, and Indigenous communities brought legal actions against the amendment.

Hundreds of municipalities in the states of Oaxaca, Chiapas, Tabasco, Veracruz, Michoacán, Hidalgo, Puebla, and Guerrero submitted *Controversias Constitucionales* (Constitutional Controversies),[44] a different judicial action,

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[41] Transcript of the Work Session of the United Commissions of Constitutional and Indigenous Issues of the Federal Congress with delegates of the Zapatista National Liberation Army and the Indigenous National Congress, Second Ordinary Period, 58th Legislature, Mar. 28, 2001, Diary 13, Formato HTML, https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507251,es [hereinafter Transcript of the Work Session].

[42] Constitutional amendments in Mexico are common; the Mexican Constitution has been reformed on more than 200 occasions. *See* Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF], (Mex.), formato HTML, http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm.

[43] Manuel González Oropeza, *Recent Problems and Developments on the Rule of Law in Mexico*, 40 TEX. INT'L L.J. 577, 578 (2005); Mariscal, Angeles & Ruiz, Victor, La Jornada, Rechazo en Oaxaca, Chiapas y Tlaxcala a la Entrada en Vigor de Reformas en Materia Indigena, 15-8-2001 (Mex.), formato HTML, http://www.jornada.unam.mx/2001/08/15/007n1pol.html.

[44] Constitutional controversy is the translation of "controversia constitucional." Constitutional controversy is a cause of action to solve conflicts of competency, power or jurisdiction between authorities. It is a claim of unconstitutionality of actions of an authority. This cause of action does not comprehend electoral or territorial issues. The Supreme Court of Justice of Mexico (SCJN) is the only court that reviews this kind of action. The authorities that can bring this claim are the Federal Government, provincial governments, the Federal District government, the municipalities, the Congress, and the powers and organs of government of the provinces and of the Federal District. Only those

which only government authorities can bring against the amendment.[45] The legislatures and state executive powers of Oaxaca and Chiapas also challenged the amendment. Courts reviewed these challenges together with the indirect *amparo*s submitted by Indigenous communities. The Supreme Court of Justice of Mexico (SCJN) dismissed all challenges, *amparos* and *controversias constitucionales*, as "notoriously out of order" following the pattern used for the *Zirahuén Amparo* and explained in this paper.[46]

The amendment[47] established that indigenous communities are entities of "public interest" indicating tutelage of the state over the communities and a

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decisions that are voted with a supermajority of eight justices make the acts challenged invalid with general effects.

[45] For a list of Constitutional Controversies, *see* Suprema Corte de Justicia de la Nación [SCJN], Nos. de Controversia 30/2001, 37/2001, 47/2001-51/2001, 329/2001-340/2001, Diario Oficial de la Federación [DOF] 2001 (Mex.), formato PDF, http://www.legisver.gob.mx/transparencia/FraccionXXVII/LISTADO_CONTROVERSIAS_DIGITALIZADAS.pdf (last visited Oct. 27, 2015).

[46] The SCJN had a press conference (No. 066/2002) on September 6, 2002 regarding its decision on the constitutional controversies. The plenary resolved by eight votes against three that all constitutional controversies against the reform were to be considered improper or out of order (*improcedente*). The reason given was that the court did not have the power to review processes of reform of the Constitution. Many constitutional controversies were presented. The audience in which this issue was solved was not a public one. López Barcenas, Francisco, Zúñiga Balderas, Abigail & Espinoza Sauceda, Guadalupe, Los pueblos indígenas: Ante la suprema corte de justicia de la nación, Mexico: COAPI, 2002, vol. 6 Serie Derechos Indígenas, p. 23, http://www.lopezbarcenas.org/sites/www.lopezbarcenas.org/files/LOS%20PUEBLOS%20INDIGENAS%20ANTE%20LA%20SUPREMA%20CORTE.pdf (last visited Oct. 27, 2015).

[47] The constitutional amendment, as finally approved by the Federal Congress, added and changed articles 1, 2, 18 and 115 of the Mexican Constitution. The amendment added two paragraphs to article 1 regarding the prohibition of all kinds of discrimination and slavery in Mexico. Article 2 was significantly reformed, providing more precise rights to Indigenous communities. Article 18 was modified to promote the incarceration of prisoners in prisons closer to their communities. And finally, article 115 was changed to add legislation regarding the association of Indigenous communities or organizations. The amended article 2 prescribes as follows:

> The Mexican Nation is unique and indivisible. It is a multicultural nation that originates from its Indigenous tribes, it is essentially integrated by descendants of those inhabiting the country before colonization, who preserve their own social, economic, cultural and political institutions, or some of them.
>
> A consciousness of Indigenous identity is the fundamental criteria that determine to whom apply the provisions on Indigenous people. Indigenous communities are communities that constitute cultural, economic and social units, settled in a territory and recognize their own

authorities, according to their own customs and traditions.

Indigenous peoples' right to self-determination shall be exercised within the framework of a constitutional autonomy ensuring national unity. The recognition of Indigenous peoples shall be done in States' and Federal District's Constitutions and laws, taking into account the general principles established in the Constitution, as well as ethno-linguistic and land settlement criteria.

A. This Constitution recognizes and guarantees the Indigenous peoples' right to self-determination and, consequently, the right to be autonomous, so that they can:

I. Decide their internal forms of coexistence, as well their social, economic, political and cultural organization. II. Apply their own legal systems to regulate and solve their internal conflicts, subject to the general principles of this Constitution, respecting constitutional guarantees, human rights and, taking special consideration of the dignity and safety of women. The law shall establish the way in which judges and courts will validate the decision taken by the communities according to this article. III. Elect, in accordance with their traditional rules, procedures and customs, their authorities or representatives. Exercise their own form of government, guaranteeing women's participation under equitable conditions before men, and respecting the federal pact and the sovereignty of the States and the Federal District. IV. Preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity. V. Maintain and improve the environment and protect the integrity of their lands, according to this Constitution. VI. Attain preferential use of the natural resources of the sites inhabited by their Indigenous community, except for the strategic resources defined by this Constitution. The foregoing rights shall be exercised respecting the forms of property ownership and land possession established in this Constitution and in the laws on the matter as well as respecting third parties' rights. To achieve these goals, Indigenous community may form partnerships under the terms established by the Law. VII. Elect Indigenous representatives for the town council. The constitutions and laws of the States shall regulate these rights in municipalities, with the purpose of strengthening Indigenous peoples' participation and political representation, in accordance with their traditions and regulations. VIII. Have full access to the State's judicial system. In order to protect this right, in all trials and proceedings that involve natives, individually or collectively, their customs and cultural practices must be taken into account, respecting the provisions established in this Constitution. Indigenous people have, at all times, the right to be assisted by interpreters and counsels familiar with their language and culture. The constitutions and laws of the States and the Federal District shall regulate the rights of self-

hierarchy that subordinates Indigenous communities to provincial and federal authorities.[48] The approved amendment also recognized only "the association of Indigenous communities at the municipal level," implying a disregard for proposals to allow free association of Indigenous organizations and communities at all levels. It also limited the access of Indigenous communities to their property in consideration of neighbors and state authorities. The COCOPA Proposal, on the other hand, had classified Indigenous communities as entities of "public law," recognized association of Indigenous communities at all government levels and ruled that ancestral Indigenous territory would be used and enjoyed collectively.[49]

The approved constitutional amendment also disregarded a proposed reorganization of the state and municipal territories in consideration of Indigenous communities.[50] This issue had been broadly discussed in the negotiations of the San Andrés Accords during the 1990s and many Indigenous communities consider it a central reform to achieve autonomy and protect their rights. Indigenous communities have pressed for a reorganization of municipal governments according to communities since long before the uprising of the Zapatista Army. Nevertheless, there is no legislative initiative and the government has not taken any administrative measure to reorganize municipalities in accordance to ancestral territories and communities.

> determination and autonomy looking for the best expressions of the conditions and aspirations of Indigenous peoples, as well as the rules, according to which Indigenous community will be defined as public interest entities.

The article continues on establishing the obligations of the state towards Indigenous peoples. These obligations include providing health services, education and consulting Indigenous communities in the drafting and preparation of the development plans of the federal and state governments. Constitución Política de los Estados Unidos Mexicanos, CP, art. 27 ¶ 1, Diario Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[48] Transcript of the Work Session, *supra* note 41; s*ee also* Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 365/2001, Diario Oficial de la Federación [DOF] 2001 (Mex.), formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20%C3%A9poca/2001/365_01.pdf.

[49] The text of the COCOPA proposal can be accessed online through the Center of Documents about Zapatism. Centro de documentación sobre Zapatismo, Iniciativa de Reformas Constitucionales en material de Derechos y Cultura Indígena presentada por la Comisión de Concordia y Pacificación, 29-11-1996 (Mex.), formato HTML, http://www.cedoz.org/site/content.php?doc=404&cat=6. The word "territory" was taken out of the final constitutional proposal completely.

[50] *See* Centro de documentación sobre Zapatismo, Compromisos para Chiapas del Gobierno del Estado y Federal y el EZLN, correspondientes al Punto 1.3. de las Reglas de Procedimiento, 16-2-1996 (Mex.), formato HTML, http://www.cedoz.org/site/content.php?doc=367&cat=6.

In my opinion, the re-delimitation and organization of municipalities according to Indigenous communities is a necessary measure to build autonomy, jurisdiction, and ease certain processes of consultation. At the same time Indigenous peoples would be more protected because municipalities enjoy more political influence and can take advantage of a different set of causes of action against authorities' acts, such as the establishment of new laws and regulations. Municipal authorities are usually consulted when state authorities plan the application of new regulatory and administrative measures and are able to establish their own normative systems.

C. The *Amparo* Actions

The Zirahuén Community had a robust file in the Secretary of Agrarian Reform requesting restitution, extension, and entitlement to their lands. So, its lawyers thought it would be straightforward to prove their legal interest. Still, only exceptional claims against the Constitution, a constitutional amendment, or the process of constitutional reform are allowed. The *Zirahuén amparo* was a complicated legal strategy because of so-called "legitimization" issues. The Community tried to take advantage of an isolated guideline established by the SCJN in September of 1999 that allowed citizens to challenge the legality of the process of reform of the Constitution.[51] This guideline established that when

[51] Suprema Corte de Justicia de la Nación [SCJN], 193249. P. LXII/99, Diario Oficial de la Federación [DOF] 9-1999 (Mex.), formato PDF, http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/193/193249.pdf. This thesis establishes that when challenging a constitutional amendment process, it is not the content of the Constitution but the actions carried on during the legislative process that culminate in its reform that are challenged. In a case against a process of amendment, the responsible authorities are the authorities involved in this process, from which the act emanates. These authorities have to adjust their actions to the legal regulations and framework established to protect the principle of legality. The court also established the fact that while the reform process had as result a law elevated to the status of supreme law, the protective efficacy of an *amparo* as a means of constitutional control had the aim of ensuring the legality of all processes and acts of the authorities. To not allow an action against the process of reform would leave violations of the formalities and regulations established in Article 135 of the Constitution without remedy. *See also* Suprema Corte de Justicia de la Nación [SCJN], 193251. P. LXIV/99, Diario Oficial de la Federación [DOF] 9-1999, (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/193/193251.pdf. The SCJN established this guideline in the context of the case of Manuel Camacho Solís, who challenged a constitutional reform that established new rules that did not allow him to compete for office as the Mexico City governor in 1997. He argued that the process of reform was illegal for several reasons. Among those reasons was that the presenters of the proposal in Congress were senators, who cannot submit proposals to the Federal Congress. The court allowed his argument establishing a thesis (guideline) that allowed the process of reform of the Constitution to be challenged by an indirect *amparo*. Suprema Corte de Justicia de la Nación [SCJN],

reviewing the legality of the constitutional reform process, the courts had to apply a test to check whether authorities fulfilled all procedural requisites regarding constitutional amendments.[52] But the SCJN rejected this guideline while the Community of Zirahuén's appeal was under review. This change precluded the possibility of using an *amparo* and became a source of uncertainty for courts and Indigenous plaintiffs alike.

The Community offered only written documentation; no oral evidence was offered at trial.[53] The Community brought their title from 1733 as evidence to the court, the documents that proved their current application for extension of their territory, and other documents, such as assembly decisions and documents that proved the ratification of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169). The trial court also requested evidence from different authorities regarding their participation in the process of reforming the Constitution. The most relevant were the reports of actions by state legislatures regarding the voting processes for the amendment.

D. The Decisions Rendered in the Case

The First Federal District Court of Michoacán and the SCSJN on appeal, both dismissed the Community's claims. In his decision, the district court judge denied the *amparo* because he considered that the Zirahuén Community's argument regarding the constitutionality of the process due to the infringement of an international treaty was without legal fundament.[54] The judge concluded that the plaintiffs did not demonstrate the unconstitutionality of the process of reform. He also found that the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) did not regulate the process of amendment of the Constitution and thus was not binding.[55] Today, this interpretation is obsolete because current Article I of

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193250. P. LXIII/99, Diario Oficial de la Federación [DOF] 9-1999 (Mex.), formato PDF, http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/193/193250.pdf.

[52] *Id.* The test asks: (1) whether two thirds of the Federal Congress approved the amendment; (2) whether the legislatures of the different states had rendered an opinion on the amendment; (3) whether an absolute majority voted for the amendment in the state legislatures; (4) whether there is a declaration of homologation of the law; and (5) whether the appropriate authorities brought the amendment proposal to the Federal Congress.

[53] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5.

[54] *Id.* at 29-32.

[55] *Id.* at 29-30. The process of reform is not regulated by international treaties or federal laws because the legislative power cannot be subject to any other rules in any other legal or political system and is only subject to the formalities established in the Constitution itself. Under this premise, it is irrelevant that part of the Mexican legal system did not abide by an international treaty because the Constitution is the apex of the Mexican legal system, over which there is no law.

the Constitution provides that all human rights established in international treaties ratified by Mexico are to be enjoyed and protected, and the duty to consult is considered to be a human right.[56]

The Zirahuén Community appealed the decision, arguing that the trial judge did not comply with the courts' duty of *suplencia de la queja*.[57] They also argued that he erred in his analysis about the binding power of the international treaty, which should have been considered "supreme law" (constitutional level law). In addition, they argued that he did not correctly assess the issue of the detriments to the rights of the Community or harm. In the opinion of the Zirahuén Community, the detriment to their right to be consulted ought to be considered in regard to the standards set by the international treaty, which are considerably higher than those contained in the constitutional amendment.[58] They also made other arguments regarding procedural issues such as the lack of reports regarding the final votes for the approval of the amendment in certain states' legislatures.

There were many *amparo*s related to the constitutional amendment of August 14, 2001 but the Second Chamber of the Supreme Court of Justice of Mexico (SCSCJN) only heard the case of Zirahuén, probably because it was among the strongest and most complete of the cases. The *Tribunales Colegiados* (federal high collegiate tribunals) heard the rest of the *amparos* following the direction of the Zirahuén decision. The two drafters of the decision were two veteran members of the court, Lourdes Ferrer Mac-Gregor Poisot, Secretary of the Court,[59] and Justice Mariano Azuela Güitrón.[60]

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[56] Constitución Política de los Estados Unidos Mexicanos, CP, art. 1 ¶ 2, art. 27 ¶ 1, Diario Oficial de la Federación [DOF] 5-2-1917, últimas reformas DOF 29-07-2010 (Mex.).

[57] The Constitution and *Amparo* Law require judges to investigate all possible arguments of unconstitutionality in cases regarding claims of violations to the rights over communal and *ejido* land. This is called *suplencia de la queja*, which in English is translated as the courts' inquisitorial supplementary function. This task of the judiciary in agrarian amparo cases is meant to protect weaker parties in the judicial process and avoid the application of unconstitutional laws to communities and *ejidos*. This task includes the mending of omissions, errors, or deficiencies in the claims of the weaker party and requesting evidence that the plaintiffs could not supply. *See* El juicio de amparo. A 160 años de la primera sentencia, *supra* note 2.

[58] In the claims, the plaintiffs make a comparison of certain words used in different sections of the international treaty, the COCOPA proposal and the decree of reform, e.g. the word "territory" in comparison to "place."

[59] "Secretary of the Court" is the literal translation of the position in Spanish: *Secretario de la Corte*. The *secretarios* work with the justices in the drafting of the decision. They are well prepared professionals who sometimes act as law professors, and who could become justices themselves.

[60] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 1.

The SCSCJN decided that the Zirahuén Community did not have standing because the Community's rights were not affected detrimentally by the amendment. In the opinion of the court, there were no partial or total privations of their lands consequent to the amendment.[61] But, the cause of action did not allow the Zirahuén Community prove any detriment to their land or rights due to the amendment. Their action was against the constitutionality of the process of amendment of the Constitution and thus their cause of action only allowed them to prove such unconstitutionality. Further, the plaintiffs could not allege an affectation by the content of the Constitution due to a characteristic of the *amparo* action, presented only within the next 30 days of the promulgation of the law. To require the plaintiff to prove a detriment to their rights from the content of the amendment within an action against the process of amendment asked for the impossible.

1. Whose Harm?

It was legally impossible for the Zirahuén Community to prove harm due to the approval of the amendment because such harm could only be understood and proven in terms of a comparison of the standards set in the San Andrés Accords, the COCOPA Proposal, the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the constitutional amendment of 2001. From the plaintiff's perspective, the constitutional amendment granted a lower degree of self-determination[62] and established a higher degree of subordination to federal and provincial authorities than the propositions contained in the COCOPA Proposal's clauses. The Court did not consider the COCOPA proposal and the San Andrés Accords legally binding and dismissed these arguments.

The decision did not discuss how the lack of jurisdiction and a subordinate position of Indigenous communities would affect their rights to protect their community, culture, and the possibility to exercise their autonomy to self-determine their political, economic and social life. The SCSCJN relied

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[61] *Id.* at 133-35. The new guideline was established in a case presented by the municipality of San Pedro Quiatoni in Oaxaca challenging the same reform in almost the same sense as the *Zirahuén* case. The municipality did not use an *amparo*, but instead used a controversia constitucional. *See* Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 82/2001, Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20época/2001/82_01.pdf.

[62] Autonomy is a concept related to the idea of self-determination. The concept of autonomy implies the right that Indigenous peoples have to control their territories and natural resources. It also regards their right to govern themselves. Aparicio Wilhelmi, Marco, *La Libre Determinación y la Autonomía de los Pueblos Indígenas. El Caso De México*, 29-5-2008 (Mex.), formato PDF, http:www.juridicas.unam.mx/publica/rev/boletin/cont/124/art/art1.htm#N*.

exclusively on its own views and perspectives on the merits of the constitutional amendment. It was not critical of its own cultural background nor its legal assumptions in assessing the plaintiffs' claims. This lack of awareness or mindfulness was amplified by the fact that the court had the duty of *suplencia de la queja.*

The Court went as far as to state that it was not legally appropriate to protect them from the constitutional amendment because granting the *amparo* would cause the plaintiffs harm.[63] According to the Court, the amendment benefited Indigenous communities.[64] The court interpreted the rights established in the Constitution to be minimum standards that state legislatures could expand.[65] This radical opinion shows that the Zirahuén Community could not prove the harmfulness of the amendment process. The Court dismissed the suit because it considered the plaintiffs' evidence of no consequence or relevance in determining the constitutionality of the process of reform. The Court did not recognize, study, or evaluate the Zirahuén Community's perspective on their own harm and did not express any knowledge or recognition of Purépecha normative perspectives and the Community's legal context. Thus, I conclude that the SCSCJN in Zirahuén was formalistic and unaware of the diversity in Mexico.

2. Remedies for Whom?

As I stated before, weeks before the SCSCJN resolved the Community of Zirahuén's appeal, the SCJN abrogated the guideline established in 1999 that allowed *amparo* actions to challenge the legality of the process of constitutional amendment.[66] The current ruling principle is that there are no judicial resources to challenge the process of constitutional amendment on any basis. The court concluded that if it had continued to hold otherwise, difficulties would arise in choosing an appropriate remedy for the plaintiff.

The Zirahuén Community did not request to re-do the process of amending the constitution by consulting indigenous peoples and communities, but

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[63] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 125.

[64] *Id.* at 122.

[65] Estudio sobre los pueblos indígenas y el derecho a participar en la adopción de decisiones, Información sobre México, 2002 (Mex.), formato PDF, http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MexicoContribucion-1.pdf. This guideline also seems to suggest that the freedom of association can be expanded through legislative means at the state level.

[66] Suprema Corte de Justicia de la Nación [SCJN], 185941. P./J., Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185941.pdf. This is a Jurisprudence (legal interpretation principle) that is legally binding.

rather requested immunity from the amendment. Still, the SCSCJN found that the proper remedy would have been to re-do the process of amendment and consult the Community, which would affect the entire Mexican population. Thus, what the court found to be the appropriate remedy was a relief that it could not legally grant. The court stated:

> [T]he lack of legal interest of the plaintiffs to bring this *amparo* case is evident if we hypothesize that if a decision gave constitutional protection against the challenged amendment process, such decision would be detrimental for the community instead of benefiting it, because the favorable constitutional norms included in the amendment could not be applicable to the community. *Moreover, attending to the relativity principle of all amparo decisions (according to articles 107, fr. II of the Amparo Law), such hypothetical decision could not force the reforming organ of the Constitution to redo the process of reform because that would be like giving general effects to the decision instead of only protecting the plaintiff in the case*.[67]

The *principle of relativity* is a basic principle governing *amparo* actions. It means that the remedies of an *amparo* action must be of *relative effect*s, relative meaning affecting only the plaintiff. An *absolute effect* remedy is a remedy that affects the entire population or a broad section of the population. Absolute remedies can be granted in some cases by the SCJN but only for certain causes of action: *acciones de inconstitucionalidad* (actions of unconstitutionality)[68] and *Controversias Constitucionales* (Constitutional Controversies).

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[67] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 123 [emphasis added].

[68] There are three legal actions established for the "control of constitutionality of legal norms": *amparo*, *controversia constitucionales* (constitutional controversy) and *accion de inconstitucionalidad* (action of unconstitutionality). Action of unconstitutionality is an action to challenge the constitutionality of a law. It is only available to the General Prosecutor of the Republic, political parties (only for challenging electoral laws at the federal and provincial level), the National Commission of Human Rights, one third of the members of the Federal Deputies (for challenging federal laws, and laws passed by the Federal Congress), one third of the members of the Senate Chamber (to challenge federal laws and laws passed by the Federal Congress and international treaties), one third of the members of provincial deputies chambers (against laws passed by the provincial legislature), and one third of the members of the Federal District Legislative Assembly (against laws passed by the Assembly). If unconstitutionality is found, the laws become void. The Supreme Court is the only court in Mexico with jurisdiction to review actions of unconstitutionality. The Constitution requires a supermajority of eight votes in order to declare a law unconstitutional through this action.

The greatest number of challenges against the constitutional amendment was *controversias constitucionales* because lawyers and experts thought this cause of action was more likely to succeed than an *amparo*. It was available for Indigenous communities that were represented by municipal governments. However, the Community of Zirahuén could not use this cause of action because it is not a municipality.[69]

Many years later, in May of 2014, the SCSCJN decided a Constitutional Controversy of Cherán, a Community close to Zirahuén in Michoacán.[70] The Community of Cherán submitted this Constitutional Controversy for the lack of consultation regarding the Michoacán constitutional amendment of March of 2012 about Indigenous peoples' rights.

In the case of Cherán, the SCSCJN found that because the municipal council was a representative organ of the Indigenous community, it had the right to be consulted by the state congress regarding constitutional amendments on Indigenous peoples' rights and regulations.[71] Nevertheless, the SCSCJN did not declare the amendment null; the SCSCJN held that the amendment of March 16 of 2012 had no legal effects between the parties. This decision left the municipality of Cherán in limbo within the legal system in Mexico. Cherán may enjoy an autonomy that few municipalities in Mexico enjoy, but it does so at a high cost and with few consequences for the relationship between the federal and state governments, judiciary, and legislatures with Indigenous peoples. For example, in June 25, 2014, the Constitution of Michoacán[72] was again amended as to Indigenous peoples' rights and the regulation of political parties and the Congress again proceeded with the amendment without consulting the Municipality.[73] Today, other communities are in the same situation as if the decision that granted

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[69] *See* Suprema Corte de Justicia de la Nación [SCJN], 185941. P./J., Diario Oficial de la Federación [DOF] 2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185941.pdf.

[70] Suprema Corte de Justicia de la Nación [SCJN], No. de Controversia 32/2012, Diario Oficial de la Federación [DOF] 2012 (Mex.), formato DOC, http://www.diputados.gob.mx/LeyesBiblio/compila/controv/172controv_23sep14.doc.

[71] *Id.* at 43. The Concejo Mayor del Gobierno Comunal [Major Council of Communal Government] of the municipality of Cherán was first recognized by Consejo General del Instituto Electoral de Michoacán [General Council of the Electoral Institute of Michoacan], in its acuerdo [decree] CG-14/2012 on January 25th, 2012. Periódico Oficial del Gobierno Constitucional del Estado de Michoacán de Ocampo, Instituto Electoral de Michoacán, 2015 formato PDF http://transparencia.congresomich.gob.mx/media/documentos/periodicos/qui-9215.pdf.

[72] The complete name is Constitución Política del Estado Libre y Soberano de Michoacán [Constitution of the Free and Sovereign State of Michoacán].

[73] In the diary of debates of the 110th session of the Michoacán congress, the congress recorded that the Commission of the Major Council of the Communal Government of the Indigenous Municipality of Cherán manifested its rejection of the congressional actions regarding the amendment since there was no previous consultation.

the *amparo* to Cherán had never existed. This shows the inadequacy of legal remedies for transgressions against the duty to consult in Mexico and the challenges that need to be confronted in order to fill this gap and protect the constitutional rights of Indigenous peoples.

3. Whose Rights?

The Zirahuén decision created *isolated theses*, which are legal guidelines. Higher courts establish *isolated theses* for lower courts to use when trying cases. One of the theses of the Zirahuén case created the "territorial principle of Indigenous peoples" as a principle now enshrined in the Constitution.[74] The most progressive feature of the guidelines the SCSCJN developed in the *Zirahuén Amparo* is a thesis that interprets article two of the Constitution as establishing the unit of Indigenous territory. This guideline considers the unit of Indigenous territory to be an expression of the autonomy of the Indigenous community. And this autonomy regards the capacity to decide how to exploit the resources of the territory and the freedom of Indigenous communities to associate with other Indigenous communities at the municipal level. However, the guidelines also emphasized the principle of "national unity" and its limitation of Indigenous peoples' rights.[75]

The term "national unity" is now the most relevant principle limiting the right to self-determination and autonomy of all Indigenous communities in Mexico. Professor Jorge Alberto González Galván, among other scholars has criticized the inclusion of this principle in the amendment. He argued that adding the statement that "Mexico is a single and indivisible nation" to a Constitution that also states "recognition of Mexico as a multicultural society" was unnecessary and ambiguous. It was unnecessary because Indigenous peoples' claims arise within the state, and so do not intend to sever or divide.[76]

The SCSCJN interpreted the rights of the Community of Zirahuén under the premise that any interpretation of the constitutional rights of Indigenous

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[74] The Constitution never uses the word "territory." *See* Suprema Corte de Justicia de la Nación [SCJN], 185567 CXXXVIII/2002, Diario Oficial de la Federación [DOF] 11-2002 (Mex.), formato PDF, http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/185/185567.pdf. None of the theses established in this case can be used to create jurisprudence, which means they are not a source of law but mere standards to be used by lower courts receiving similar cases.

[75] Suprema Corte de Justicia de la Nación [SCJN], 185565 CXL/2002, Diario Oficial de la Federación [DOF] 11-2002 (Mex.), formato PDF, http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MexicoContribucion-1.pdf.

[76] González Galván, Jorge Alberto, La reforma constitucional en materia indígena, Cuestiones Constitucionales, 2002 (Mex.), formato PDF, http://www.redalyc.org/articulo.oa?id=88500709.

peoples in Mexico, as with any constitutional article, must be made in consideration of the principle of "national unity."[77] It also held that the principles of "gender equality, the federal pact and provincial sovereignty" limit the rights of Indigenous peoples to elect their own representatives and give effect to their own practices of political organization. The SCSCJN has confirmed these principles in several cases since then. The most recent guidelines in this respect (2010) also use the language of a "diminished national sovereignty":

> [T]he Constitution recognizes and guarantees the fundamental right of all populations, among them Indigenous populations and communities to self-determination; the autonomy to decide their internal ways to socialize and their economic, political, cultural and social organization; and decide their fate. Nonetheless, such right is not absolute; meaning that such autonomy is to be exercised within the limits of the principle of National Unity . . . the recognition of their rights does not in any way imply a *diminished national sovereignty and does not imply the creation of a state within the Mexican state*. The recognition of the power of self-determination of Indigenous peoples does not imply their political independence and sovereignty but only the possibility to freely elect their situation within the Mexican state [emphasis added].[78]

This has provoked considerable hesitation among government authorities to address the problems, complaints, and concerns of Indigenous Communities. Authorities interpret the rights of Indigenous peoples as narrowly as possible, limiting the aim of the 2001 constitutional amendment of achieving the protection and promotion of a multicultural society.

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[77] Comunidad Indígena de Zirahuen, Municipio de Salvador Escalante, Michoacán, *supra* note 5, at 67.

[78] Suprema Corte de Justicia de la Nación [SCJN], XVI/2010, Diario Oficial de la Federación [DOF] 2-2010 (Mex.), formato PDF, https://www.scjn.gob.mx/Primera_Sala/Tesis_Aisladas/TesisAisladas1Sala201020110524.pdf. The guideline concerned the case of Alejandro Paredes Reyes et al. (Direct *Amparo* 3/2009) decided in October of 2009. The isolate thesis considers articles 2, 40, and 41 of the Constitution. Article 2 has been cited and quoted above as the one that establishes the rights of Indigenous communities. Articles 40 and 41 are part of Chapter I of the Constitution, which refers to issues of National Sovereignty and Forms of Government. Article 40 establishes that the Mexican state is a Democratic Republic organized in a Federation of Sovereign States and article 41 establishes that the sovereignty resides in the people, who exercise it through the Powers of the Union and the states.

III. CONCLUSIONS

The case that I describe and discuss in this article reveals the considerable difficulties that Indigenous peoples face in protecting their right to be consulted through the courts in Mexico. The *Zirahuén Amparo* shows that the current interpretation of Indigenous peoples rights is formalist and does not promote or enable a truly multicultural society.

Firstly, the courts' interpretative approach assumes that since the federal congress and the courts considered the new constitutional standards a benefit for the plaintiffs, the amendment was good whether Indigenous communities agreed or not. This standard for review of the Zirahuén Community's harm imposed a culturally biased set of rules that undermined the normative systems and perspectives of the Indigenous plaintiff. It also left a vulnerable population without the protection of international and constitutional law.

The judges seemed to not comprehend how the trial process and its rules prevented them from writing a decision that enhances legal diversity. In my opinion, this is because courts have no vision of reconciliation of the current dominant normative perspectives with Indigenous peoples' normative perspectives. This urgently needs to change. The judiciary needs to give proper recognition to the existing and historical agreements between Indigenous communities and authorities and their violations, and educate legal professionals and judges about Indigenous normative systems and perspectives.

Moreover, the courts' decisions in Zirahuen did not provide certainty on the duty to consult. The federal judiciary affirms it is making an effort in this respect but the fixation on principles and precepts such as "national unity" and "diminished sovereignty" will not help the judiciary to fight such uncertainty. Interpretations based on such principles and paradigms allow authorities and third parties to remain doing as less as possible to contact and consult Indigenous peoples for development plans and other projects while ambitious constitutional regulations are in place with the aim of promoting self-determination and autonomy among Indigenous peoples. At the same time, the courts should be mindful of the need to grant more far-reaching remedies to provide certainty to communities, government agencies, authorities, and investors.

Until now, courts have granted remedies that have left Indigenous communities in risky situations. Such is the case of Cherán mentioned above. The lack of appropriate remedies is very problematic, and Indigenous peoples wonder if it is possible to transform rights into outcomes within the current legal environment.

Finally, any meaningful transformation of the legal environment will require the recognition and building of some kind of jurisdiction of Indigenous communities. This could be achieved partly through a re-organization of municipal governments according to Indigenous communities. It is an ambitious project but in my perspective only a radical project will change the pseudo-

colonial and monotonous pattern of the relationships between the Mexican State and its Indigenous peoples.

RESCUING ARBITRATION IN THE DEVELOPING WORLD: THE EXTRAORDINARY CASE OF GEORGIA

Steven Austermiller*

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I. INTRODUCTION

Arbitration has played an important role in dispute resolution in many countries. While it has a long history,[1] it only recently re-emerged in the 20th century as an essential mechanism for modern economies. Most legal professionals in the developed world are aware of its myriad advantages: lower costs, faster resolution, decisional finality, international enforcement, privacy, procedural flexibility, informality, and expert, impartial, party-chosen neutrals. Although arbitration is now ubiquitous in the developed world,[2] many

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1 STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 9 (ALM ed. 2002).

2 KATHERINE V.W. STONE & RICHARD A. BALES, ARBITRATION LAW 3 (2d ed.

underdeveloped countries are just beginning to incorporate arbitration into their dispute resolution regimes.[3] If implemented well, arbitration can help reduce court caseloads,[4] increase foreign investment[5] and foreign aid[6] in the host country, and promote general economic development.[7]

Although much has been written about alternative dispute resolution (ADR) in the developing world, there is a relative dearth of academic literature on the implementation of arbitration specifically.[8] It is worth exploring whether

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2010).

[3] *See* Roberto Danino, *The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries*, 17 EUR. BUS. L. REV. 327, 333 (2006) (noting arbitration growth in developing and transition countries over the past decade).

[4] *See* Kiarie Njoroge, *Judiciary Moves to Cut Case Backlog Through Arbitrators*, BUS. DAILY (July 28, 2014, 7:48 PM), http://www.businessdailyafrica.com/Judiciary-moves-to-cut-case-backlog/-/539546/2400826/-/av3arqz/-/index.html; *Arbitration Center in Nairobi to Reduce Case Backlog*, STANDARD REP. (Sept. 30, 2014), http://www.standardmedia.co.ke/article/2000136635/arbitration-centre-in-nairobi-to-reduce-case-backlog?articleID=2000136635&story_title=arbitration-centre-in-nairobi-to-reduce-case-backlog&pageNo=1.

[5] Felix O. Okpe, *Endangered Elements of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development and Host States*, 13 RICH. J. GLOBAL L. & BUS. 217, 249 (2014).

[6] Most multilateral lenders, such as the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the Asian Development Bank require arbitration while implementing contracts. *Position Paper on Arbitration in Thailand*, AM. CHAMBER COM. THAIL. (Oct. 2009), http://www.amchamthailand.com/acct/asp/default.asp (follow "Position Papers" hyperlink under "Resources and Archive" tab).

[7] *See* CHRISTIAN BUHRING-UHLE, LARS KIRCHHOFF & GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 57-60 (2d ed. 2006).

[8] Most of the literature focuses on mediation and its variants. *See* SCOTT BROWN ET AL., ALTERNATIVE DISPUTE RESOLUTION PRACTITIONER'S GUIDE (Ctr. for Democracy and Governance, USAID 1998), http://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf (last visited Sept. 13, 2015); Emily Stewart Haynes, *Mediation as an Alternative to Emerging Post-Socialist Legal Institutions in Central and Eastern Europe*, 15 OHIO ST. J. DISP. RESOL. 257 (1999); Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT'L & COMP. L.J. 343 (2004); Steven Austermiller, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 YALE HUM. RTS. & DEV. L.J. 132 (2006); Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327 (2002); Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235 (2001); William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47 (2011); Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006); Eduardo R. C. Capulong, *Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 OHIO ST. J. ON DISP. RESOL. 641 (2012); Nancy D.

arbitration is a useful tool for economic and social development or an unwelcome Western transplant that international players have imposed.[9] This article seeks to contribute to the discussion by focusing on an interesting developing world case study: arbitration in Georgia. Georgia is a post-communist, post-war country that has undertaken extensive structural reforms and is now on the doorstep of European Union membership.

Section One provides a brief historical summary. Section Two discusses the country's colorful yet regrettable history of dispute resolution. It explores the effects of almost 200 years of Russian and Soviet domination on the development of arbitration in Georgia. Section Three reviews in detail the new Georgian Arbitration Law that came into effect in 2010 and its implementation thus far. It is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[10] While not without flaws, it delivers significant improvements over Georgia's earlier arbitration efforts. Section Four discusses recommendations for improving the law, focusing on statutory revisions and clarifications. Section Five addresses the most significant shortcomings of the arbitration regime—the use of mandatory consumer arbitration. The article proffers a comprehensive set of recommendations to address these shortcomings. The article concludes in Section Six that it is not too late for arbitration to have a positive impact in Georgia. It can serve the needs of both businesses and consumers, as long as the political will exists to undertake reforms. Although

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Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355 (2006).

There is a small number of articles on implementing arbitration in the developing world. *See* Arnoldo Wald, Patrick Schellenberg & Keith S. Rosenn, *Some Controversial Aspects of the New Brazilian Arbitration Law*, 31 U. MIAMI INTER-AM. L. REV. 223 (2000); Julio C. Barbosa, *Arbitration Law in Brazil: An Inevitable Reality*, 9 SW. J. L. & TRADE AM. 131 (2002); Hoda Atia, *Egypt's New Commercial Arbitration Framework: Problems and Prospects for the Future of Foreign Investment,* 5 INT'L. TRADE & BUS. L. ANN. 1 (2000); Abudllah Khaled Al-Sofani, *Theoretic Study in Light of the Jordanian Arbitration Law: The Problem of Arbitration Clauses*, 32 BUS. L. REV. 253 (2011); Rafael T. Boza, *Caveat Arbiter: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories - Has Peru Gone Too Far*, 17 CURRENTS: INT'L TRADE L.J. 65 (2009); Tracy S. Work, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India,* 10 TRANSNAT'L L. 217 (1997). There is a plethora of literature on international arbitration award enforcement under the New York Convention (*see* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 7 I.L.M. 1046 (1968), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Feb. 23, 2015)) and many articles on investor treaty disputes involving the developing world, but they are largely outside the scope of this article.

[9] Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General and Varied Contexts*, 2003 J. DISP. RESOL. 319, 341 (2003).

[10] *See infra* note 104.

these conclusions are country-specific, Georgia's experience and this analysis will hopefully provide some lessons for other developing countries.

II. BACKGROUND AND HISTORICAL CONTEXT

Georgia is a small country, roughly the size of South Carolina. It is located at important historical crossroads between Europe, Asia, and the Middle East. It is one of several countries located in the region known as the Caucasus. It lies on the eastern edge of the Black Sea, separating Russia from the Middle East. Georgia has nearly 5,000,000 people.[11] Its larger neighbors—Turkey and Iran/Persia to the south and Russia to the north—have long shaped its culture and history.

Periods of unity and break up have marked Georgian history.[12] In the 10th century, King Bagrat III united several principalities, and created the modern Georgian state, conquering territory and bringing wealth and power.[13] This lasted for a few hundred years before a Mongol invasion destroyed the empire.[14] At the beginning of the nineteenth century, Russia annexed most Georgian lands.[15] After the February 1917 Russian Revolution, Georgia experienced a brief period of independence[16] until Soviet troops invaded and occupied the country in 1921.[17] For the next 70 years, Georgia remained a part of the Soviet Union and produced two important Soviet leaders, Joseph Stalin (ruled from 1924 to 1953) and Eduard Shevardnadze (1980s Soviet Foreign Minister, who promoted liberal policies under *glasnost* and *perestroika*[18]).

In 1991, when the Soviet Union began to collapse, Georgia declared independence, leading to a period of instability. Opposition forces deposed the first president, Zviad Gamsakhurdia, in early 1992.[19] After constitutional changes, Eduard Shevardnadze was elected President. In 2003, he was

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[11] CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK: GEORGIA (2014), https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html (last modified Sept. 24, 2015) [hereinafter WORLD FACTBOOK].

[12] *See generally* DONALD RAYFIELD, EDGE OF EMPIRES: A HISTORY OF GEORGIA (2012).

[13] *Id.* at 74.

[14] *Id.* at 118-31.

[15] Giorgi Intskirveli, *The Constitution of Independent Georgia*, 22 REV. CENT. & E. EUR. L. 1, 1 (1996).

[16] Ferdinand Feldbrugge, *The Law of the Republic of Georgia*, 18 REV. CENT. & E. EUR. L. 367, 368-69 (1992) [hereinafter Feldbrugge, *Law*].

[17] The Georgian Constitution was formally ratified only three days before the Red Army occupied Tbilisi. Ferdinand Feldbrugge, *The New Constitution of Georgia*, 22 REV. CENT. & E. EUR. L. 9, 9-10 (1996).

[18] Russian terms for *openness* and *restructuring*, respectively.

[19] Feldbrugge, *Law, supra* note 16, at 371.

overthrown in what came to be known as the *Rose Revolution*. The following elections brought Mikheil Saakashvili and his reform-oriented United National Movement (UNM) to power. After winning re-election in 2008, Saakashvili and the UNM lost the 2012 elections to the *Georgia Dream* coalition, which was headed by billionaire Bidzina Ivanishvili. This was the country's first peaceful transfer of power.

Throughout the post-Soviet period, Georgia suffered from instability related to the breakaway regions of Abkhazia and South Ossetia. The upheaval resulted in several wars,[20] including most recently the August 2008 war between Russia and Georgia, which resulted in the *de facto* loss of these regions.[21] Both regions declared independence[22] and currently operate as semi-autonomous states, controlled by Russia.[23]

Despite this instability, Georgia made impressive progress. In the 1990s, Georgia suffered from paramilitaries, corruption, deficits, and power shortages. By the Rose Revolution in 2003, even President Shevardnadze admitted that Georgia had become a *failed state*.[24] The economy had shrunk 67% from its 1989 level, and industry was operating at 20% of capacity.[25] Despite high levels of

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[20] In South Ossetia, there were three wars, in 1991-1992, 2004, and 2008. Charles King, *The Five-Day War*, 87 FOREIGN AFF. 4 (Nov.-Dec., 2008), http://www.foreignaffairs.com/articles/64602/charles-king/the-five-day-war. In Abkhazia, wars were fought in 1992-1993 and in 2008. *See generally* David Aphrasidze & David Siroky, *Frozen Transitions and Unfrozen Conflicts, Or What Went Wrong in Georgia?*, 5 YALE J. INT'L AFF. 121 (2010).

[21] *Abkhazia Profile*, BBC NEWS, http://www.bbc.com/news/world-europe-18175030 (last modified June 3, 2014); *South Ossetia Profile,* BBC NEWS, http://www.bbc.com/news/world-europe-18269210 (last modified Oct. 17, 2013).

[22] *Abkhazia Profile*, *supra* note 21; *South Ossetia Profile*, *supra* note 21; Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 167 (2010); Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 5-6 (2009-10); Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law*, 32 FORDHAM INT'L L.J. 1990, 2023 (2008-09). South Ossetian and Abkhazian independence are recognized by only four countries: Russia, Venezuela, Nicaragua, and Nauru. Nauru's recognition likely involved a quid pro quo. *See* Ellen Barry, *Abkhazia is Recognized–by Nauru*, N.Y. TIMES (Dec. 15, 2009) http://www.nytimes.com/2009/12/16/world/europe/16georgia.html?_r=0.

[23] *See Abkhazia Profile*, *supra* note 21; *South Ossetia Profile*, *supra* note 21.

[24] RAYFIELD, *supra* note 12, at 391.

[25] Professor Stephen Jones of Mount Holyoke College provided this statement to the United States Congress:

> Between 1997 and 2000, expenditure on defense decreased from $51.9 million to $13.6 million; education from $35.6 million to $13.9 million . . . The state's inability to fund its social insurance and employment

education, Georgia's national income per capita had sunk below Swaziland's.[26] However, the Rose Revolution ushered in a period economic recovery and stability that has continued to the present day. President Saakashvili[27] and the UNM were able to dramatically reduce corruption and crime.[28] They streamlined government services by creating Public Service Halls in each community to address citizens' needs.[29] They simplified the tax regime,[30] and implemented free-market reforms[31] that helped achieve almost seven percent average annual GDP growth over the following decade.[32] By 2013, Georgia ranked eighth in the World Bank's Doing Business rankings.[33] Roughly one billion dollars in U.S. foreign

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> funds; maintain its army, education and transport; or stimulate agriculture and industry has led the majority of the population to view the state as irrelevant, unrepresentative and corrupt.

The Republic of Georgia: Democracy, Human Rights and Security: *Hearings before the U.S. on Security and Cooperation in Europe*, 107th Cong. 2 (2002) (Statement of Stephen Jones, Mount Holyoke College).

[26] Charles King, *A Rose Among Thorns*, 83 FOREIGN AFF. 13, 16 (2004) [hereinafter King, *Rose*].

[27] Educated at Columbia Law School in New York.

[28] According to the U.S. State Department, overall crime steadily decreased due to the professionalization of the police force and the general rise in living standards. GEORGIA 2014 CRIME AND SAFETY REPORT, U.S. DEP'T OF STATE, BUREAU DIPLOMATIC SEC., OVERSEAS SECURITY ADVISORY COUNCIL (OSAC), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15207 (last modified Feb. 24, 2014). In Transparency International's Corruption Perceptions Index, Georgia ranked five spots from the bottom, tied with Angola and Cameroon in 2003. Eleven years later, Georgia had risen to fiftieth place out of 174 countries, ahead of seven EU members. Transparency International, *Corruption Perceptions Index 2014,* http://www.transparency.org/cpi2014/results.

[29] PUBLIC SERVICE HALL, http://psh.gov.ge (last visited Feb. 23, 2015).

[30] Stephen P. Smith, *When More is Not Necessarily Better: A Corporate Governance Tale of Two Countries*, 10 DARTMOUTH L.J. 64, 83-84 (2012).

[31] As part of its dramatic institutional reforms, the government eliminated 84% of all licensing requirements and created a one stop shop for licenses. 2014 INVESTMENT CLIMATE STATEMENT – GEORGIA, BUREAU OF. ECON. AND BUS. AFF., DEPT. STATE REPORT, 1, 3 (2014) http://www.state.gov/documents/organization/229020.pdf (last modified June 2014) [hereinafter STATE REPORT].

[32] *Data: GDP Growth (annual %), Table: Georgia*, THE WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/GE (last visited Dec. 20, 2015). With the exception of 2009 (in the aftermath of Russian invasion and worldwide financial crisis), Georgian annual GDP growth averaged 6.91% from 2004 – 2013, according to the World Bank. For comparison, the United States averaged 2.27% and the EU averaged 1.68% annual GDP growth in the same years. *Id.*

[33] World Bank Group, *Doing Business: Economy Rankings 2014*, THE WORLD BANK, http://www.doingbusiness.org/rankings (last visited Nov. 20, 2015). Georgia was ranked 100th in 2006 and rose to 8th by 2013. The U.S. State Department reported, "Georgia has made sweeping economic reforms since the *Rose Revolution*, moving from a

aid assisted in this recovery.[34] In 2014, Georgia completed ratification of its Association Agreement with the EU, effectively consolidating its democratic market orientation.[35]

Georgia has now reached an important historical milestone. It has made the philosophical decision to become part of a community of trading nations centered on the EU. It now must prepare for the consequences. The resulting increased commercial activity, trade, and investment will require improved dispute resolution structures.[36] Despite recent progress, the judiciary still has room for improvement.[37] A survey of Georgian business leaders revealed that "ignorance of commercial law" and "slowness of legal procedures" are serious

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near-failed state in 2003 to a relatively well-functioning market economy in 2014." STATE REPORT, *supra* note 31, at 1.

[34] *Georgia: Accomplishments and Lessons Learned from Implementation of the U.S. $1 Billion Aid Package to Georgia Six Years After the Georgia-Russia Conflict*, U.S. EMBASSY TBILISI, GEORGIA (Unclassified Cable, August 5, 2014)(on file with author). According to Charles King, the United States also provided one billion dollars in democracy and development aid to Georgia from 1991 to 2004, constituting "by far Washington's largest per capita investment in any Soviet successor state." King, *Rose*, *supra* note 26, at 14.

[35] *See* GEOR. INT'L CHAMBER OF COM., *Deep and Comprehensive Free Trade Agreement: Threat or Opportunities for Georgian Entrepreneurs?,* ICCOMMERCE 18 (2d ed. 2014), http://www.icc.ge/www/download/ICCOMMERCE%20edition%202.pdf [hereinafter ICCOMMERCE] (noting that Association Agreement establishes conditions for bilateral free trade agreement with the EU). In response to the agreement, Russia cancelled its own free trade agreement with Georgia. *Russia Plans to Suspend Its Free Trade Agreement with Georgia*, ITAR-TASS NEWS AGENCY (July 30, 2014), http://tass.ru/en/economy/742973?utm_medium=rss20.

[36] The new free trade pact with the EU will lead to large increases in trade. ICCOMMERCE, *supra* note 35, at 19. From the U.S. strategic perspective, important oil and gas pipelines linking the Caspian fields to Europe (and by-passing Russia and Ukraine) run through Georgia, and include significant U.S. private sector investment. *The Republic of Georgia: Democracy, Human Rights and Security*: *Hearings before the U.S. on Security and Cooperation in Europe*, 107th Cong. 2 (2002) (Statement of Christopher H. Smith, Co-Chairman, Comm'n on Security and Cooperation in Europe).

[37] The U.S. State Department made this assessment on the judiciary in 2014:

> It is recommended that contracts between private parties include a provision for international arbitration of disputes because of ongoing judicial reforms in the Georgian court system. Litigation can take excessively long periods of time. Disputes over property rights have at times undermined confidence in the impartiality of the Georgian judicial system and rule of law, and by extension, Georgia's investment climate.

STATE REPORT, *supra* note 31, at 6.

problems.[38] As a result, only 26% of businesses are willing to take a dispute to court.[39] The general public also has low levels of trust in the courts.[40] If individuals and businesses cannot use the courts to enforce their rights, economic and social activity will suffer.[41] Given these concerns, arbitration may be a useful remedy. This paper will analyze the historical record, the current status, and the future of arbitration in Georgia.

III. ARBITRATION HISTORY

A. Russian/Communist Arbitration

Arbitration is an old concept in Georgia and has been present in various forms for centuries. Traditionally, local community leaders arbitrated many disputes relating to land or family matters.[42] When the Russian empire incorporated Georgia, arbitration was available under existing imperial laws, where the fora were known as *Treteiskii Courts* (Russian for tertiary or third-party courts).[43]

After the Russian revolution, the short-lived Georgian Republic created a *Wages Council* that was, *inter alia*, empowered to arbitrate wage disputes.[44]

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[38] Caucasus Research Resource Centers (CRRC), *Attitudes to the Judiciary in Georgia: Assessment of General Public, Legal Professionals and Business Leaders*, 29 (May 2014), http://www.crrc.ge/uploads/files/research_projects/JILEP_CRRC_Final_Report_30July2014.pdf (last visited Feb. 23, 2015) [hereinafter CRRC Georgia].

[39] *Id.*

[40] The public trusts the courts less than any other governmental institution. *Id.* at 4-5, 36.

[41] One study of transition democracies found that the courts' ability to protect property rights is more important for investment than modern laws. Katherina Pistor, et al., *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 326 (2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=214648 (last visited Feb. 23, 2015). Under these circumstances, businesses may revert to the use *private order* mechanisms. *Cf.* John McMillian & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421 (2000) (reviewing firms' substitution of social networks and informal gossip in place of formal legal system in post-communist countries).

[42] Sofia Avilova, *Attaining Democracy in Georgia: Using Mediation to Rescue Georgia's Democratic Transformation*, 17 MICH. ST. U. COLL. L. J. INT'L L. 465, 478 (2008-2009).

[43] For instance, Section 15, Article 5 of the SOBORNOE ULOZHENIE of 1649 (the general codification of Russian laws by the Land Assembly) provided parties the right to have their disputes decided by private Treteiskii Courts. Ikko Yoshida, *History of International Commercial Arbitration and its Related System in Russia*, 25 ARB. INT'L 365, 368 (2009).

[44] LAW ON WAGES COUNCIL, International Labour Office, art. 50, 1920 Leg. Ser. 1, at 6 (1920).

Around the time that the Soviet Union absorbed Georgia, the Soviets introduced two arbitration initiatives.

The first was the *Arbitrazh Courts*.[45] Starting in 1928, all domestic economic activity was to take place in state enterprises and any resulting disputes would be resolved under this new *Arbitrazh* system.[46] Moreover, the Soviet Union charged the *Arbitrazh* with regulatory authority as well as dispute resolution.[47] Because of their state-sponsored nature and jurisdiction, they were not arbitration fora at all, but more like commercial courts.

These courts developed a mixed reputation. The system was designed to serve the state first, not the disputants. Notably, many began to describe the Soviet system as one of "telephone justice,"[48] referring to a judge basing decision-making on grounds external to her assessment of law and facts.[49] As Solzhenitsyn wrote in the Gulag Archipelago, "[I]n his mind's eye the judge can always see the shiny black visage of truth—the telephone in his chambers. This oracle will never fail you, as long as you do what it says."[50] While this characterization may appear facile, telephone justice was present throughout the Soviet Union. By the 1980s, *Izvestia*, the official newspaper, openly reported telephone justice as a widespread problem.[51]

For international trade disputes, the Soviets created the Foreign Trade Arbitration Commission (FTAC) in 1932.[52] The FTAC had exclusive jurisdiction

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[45] Yoshida, *supra* note 43, at 377-78.

[46] Alexander S. Komarov, *Arbitration in Russia, Features of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation*, INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 299 (Giuditta Cordero-Moss ed., 2013).

[47] *Id.* at 300. The state *Arbitrazh* was charged with regulating all economic enterprises and had a right to initiate proceedings itself. Katharina Pistor, *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22 REV. CENT. & E. EUR. L. 55, 68 (1996). The state *Arbitrazh* even had quasi-legislative powers, such as mandating specific contract terms for institutions. *Id.* at 69.

[48] "'Telephone justice' was the defining feature of the Soviet era." Louise I. Shelley, *Corruption in the Post-Yeltsin Era*, 9 E. EUR. CONST. REV. 70, 72 (2000). There are also pre-Soviet examples of governmental influence on judicial decision making. *See, e.g.*, Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 379 (2005-2006) (describing Ministry of Justice pressure on judge presiding in celebrated nineteenth century Russian trial of Vera Zasulich).

[49] Randall T. Shepand, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 FORDHAM URB. L.J. 811, 812 (2001-2002).

[50] ALEXANDER SOLZHENITSYN, GULAG ARCHIPELAGO, VOL. III, 521 (Harper & Row ed. 1974).

[51] *See, e.g.*, *Measures to Strengthen Legality*, 25 SOVIET STAT. & DEC. 54 (Summer 1989) (citing IZVESTIIA, May 22, 1987, at 3 ("telephone justice" acknowledged as one of many shortcomings in Soviet judiciary)).

[52] Yoshida, *supra* note 43, at 381-83.

over international disputes.[53] Its rules had some arbitration-like characteristics, such as party appointment of arbitrators, no appeals, foreign counsel, and wide discretion for arbitrator decision-making.[54] Yet, it functioned under the control of the party system.[55] All arbitrators on the FTAC list were trusted Soviet citizens employed as civil servants by the communist state.[56] There was no affirmative duty for prospective arbitrators to disclose circumstances that might call their partiality or independence into question.[57] Proceedings were in Russian and the forum site was Moscow.[58] For this and other structural reasons, there were obvious doubts as to the system's impartiality.[59] In *Amtorg Trading Corp. v. Camden Fiber Mills, Inc*.,[60] a New York State Court held an arbitration agreement with a Soviet firm void due to partiality concerns.[61] One study analyzed published FTAC cases and concluded that there was statistically significant evidence of partiality in decision-making.[62]

The Soviet Union was one of the first states to accede to the New York Convention.[63] It was also an early party to the European Convention on International Commercial Arbitration (the 1961 Geneva Convention). However, the Soviets did not pass domestic implementing legislation until 1988. As a

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[53] *Id.* at 383.

[54] *Id.* at 384, 388-89.

[55] *See* Sandford B. King-Smith, *Communist Foreign Trade Arbitration*, 10 HARV. INT'L L. J. 34, 40 (1969) (arguing FTAC was a *de facto* national court for foreign cases).

[56] Yoshida, *supra* note 43, at 383. While there was no exception to this circumstance, it was curiously never formalized into a rule. Kaj Hober, *Arbitration in Moscow*, 3 ARB. INT'L 119, 158 (1987). The FTAC President once explained, "foreigners may be included . . . but this would be pointless because [FTAC] performs its functions quite well with the situation as it now is." Jonathan H. Hines, *Dispute Resolution and Choice of Law in United States–Soviet Trade*, 15 BROOK. J. INT'L L. 591, 633-34 (1989).

[57] Pat K. Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations,* 21 TEX. INT'L L.J. 291, 304 n.73 (1985-1986).

[58] *Id.* at 309.

[59] *See, e.g*., King-Smith, *supra* note 55, at 40; *see also* Hober, *supra* note 56, at 154 (noting many western businesses' concerns and commentators' criticisms); Samuel Pisar*, Soviet Conflict of Laws in International Commercial Transactions,* 70 HARV. L. REV. 593, 635 (1957) (FTAC rules may have a bias in favor of Soviet substantive law and choice of law rules).

[60] Amtorg Trading Corp. v. Camden Fiber Mills, Inc., 197 Misc. 398, 94 N.Y.S.2d 651 (Sup. Ct. 1950).

[61] *Id.* at 653. The decision was reversed on appeal because the parties accepted the conditions when contracting. The New York Court of Appeals added that its decision "does not preclude Camden from taking appropriate action should the arbitration in fact deprive it of its fundamental right to a fair and impartial determination." *In re* Arbitration Between Amtorg Trading Corp. and Camden Fiber Mills, Inc., 304 N.Y. 519, 521, 109 N.E.2d 606, 607 (1952).

[62] Chew, *supra* note 57, at 323-30.

[63] New York Convention, *supra* note 8.

result, there is no documented case where the Soviet Union enforced a foreign arbitral award—neither before nor after 1988.[64]

B. Private Arbitration

The legacy of telephone justice and partiality has cast a long shadow over post-Soviet countries, including Georgia. The U.S. State Department reported to Congress in 1993 that telephone justice continued to exist in the Georgian judiciary.[65]

In 1997, Georgia abolished its local *Arbitrazh Courts*[66] and passed its first modern arbitration law, the Law on Private Arbitration (LOPA).[67] LOPA authorized the creation of commercial entities[68] that would provide dispute resolution services.[69] LOPA provided for confidentiality but only among members of the arbitral tribunal, not parties or witnesses.[70] In the interests of efficiency, LOPA attempted to mandate short decision periods, but the rules were so draconian that the opposite could result. The tribunal had to render an award within 30 days of commencement of proceedings or else resign, leaving the parties to start over.[71]

The most controversial aspects of the law related to recognition and enforcement. An arbitral award could be directly enforceable without court supervision or review.[72] There was provision made for limited court involvement if a party wished to *change* the award, but the rules were not clear.[73] Courts could

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[64] Komarov *supra* note 46, at 301.

[65] U.S. Dep't. of State, Bureau of Democracy, HR, and Lab., Georgia Human Rights Practices, 1993 876, 880 (1994).

[66] *See* Salome Japaridze, *Interrelations Between the Annulment of the Arbitral Award and the Refusal of Recognition and Enforcement of the Arbitral Award*, 2013 ALT. DISP. RESOL. Y.B. TBILISI ST. U., 229, 230.

[67] LAW ON PRIVATE ARBITRATION, *Official Gazette of the Parliament of Georgia* [OGPG], No. 17-18, May 5, 1997 (Georgia) [hereinafter LOPA].

[68] Registered under the Entrepreneurship Law. LAW ON ENTREPRENEURSHIP, *Official Gazette of the Parliament of Georgia* [OGPG], No. 21-22, Oct. 28, 1994 (Georgia) [hereinafter LE].

[69] LOPA *supra* note 67, art. 7.

[70] *Id.* art. 27.

[71] *Id.* art. 31.

[72] *Id.* art. 42; *see also* Sophie Tkemaladze, *A New Law–A New Chance for Arbitration in Georgia,* in INTERNATIONAL SCIENTIFIC CONFERENCE: THE QUALITY OF LEGAL ACTS AND ITS IMPORTANCE IN CONTEMPORARY LEGAL SPACE (U. of Latvia Press 2012) 665, 665-66 (describing enforcement practice under LOPA) [hereinafter Tkemaladze, *New Law*].

[73] For instance, changing the award was allowed if the award violated the arbitration agreement or Georgian law. LOPA *supra* note 67, art. 43. Yet, the scope of

also *suspend* awards if they found that enforcement would cause irreparable harm to a party, regardless of the merits.[74] LOPA also suffered from significant omissions. It had no safeguards against conflicts of interest. It had virtually no provisions for interim measures.[75] And finally, it had no provision for international recognition and enforcement of foreign arbitral awards.

As a result of these deficiencies, the implementation of LOPA was disastrous. Providers engaged in arbitrations even after a different provider had rendered an award to the same parties in the same dispute.[76] Another disturbing trend was the use of arbitration to purloin the property of third parties.[77] The scheme worked as follows: two parties would fabricate a dispute over the ownership of property that was actually owned by a third person. The parties would engage an arbitration provider to resolve the contrived dispute. The provider would issue an order awarding the prevailing party the property and the Enforcement Bureau would execute that order, as legally mandated. The third party would then lose the property, without notice.[78] The Georgian courts would, on occasion, have the opportunity to review a domestic arbitration award, but even this was a fraught process. Many criticized the procedures as too cumbersome and time consuming.[79] The courts also struggled because the parameters of their power to *change* an award were unclear.[80]

LOPA also lacked provisions for the enforcement of foreign arbitral awards. This led to confusion and inconsistency when a party attempted to enforce a foreign arbitral award in Georgia. Georgia had ratified the New York Convention. But the courts tended to ignore it, relying instead upon the Minsk Convention[81] or the Georgian Law on Private International Law (PIL)[82] as

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these violations remained undefined. Tkemaladze, *New Law, supra* note 72, at 666.

[74] *Id.* art. 44. Courts had wide discretion to determine this harm, which contributed to inconsistent practices and uncertain enforcement rights.

[75] Interim measures are urgent measures, similar to preliminary injunctive relief in the United States.

[76] GIORGI TSERTSVADZE, BRIEF COMMENTARY TO THE GEORGIAN ARBITRATION LAW 2009, 18 (Universal ed. 2011) [hereinafter TSERTSVADZE, COMMENTARY]. Unfortunately, this "double arbitration" was not rare during the LOPA period. *Id.*

[77] *Id.* at 30.

[78] *Id.*

[79] *Id.* at 18.

[80] Tkemaladze, *New Law*, *supra* note 72, at 666. Courts often interpreted this power to change as including the power to set aside an award. TSERTSVADZE, COMMENTARY, *supra* note 76, at 17.

[81] The Minsk Convention of 1993 is an international agreement to regulate the recognition and enforcement of civil court judgments among member countries of the Commonwealth of Independent States (CIS). Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, Unified Register of Legal Acts and Other Documents of the Commonwealth of Independent States, Jan. 33, 1993 [hereinafter Minsk Convention]. Georgia was a member of the CIS until August 18, 2009. *Georgia's*

authority for recognition and enforcement rules.[83] This was problematic because both the Minsk Convention and the PIL only regulated recognition and enforcement of foreign *court judgments*, not arbitral awards.[84]

Although LOPA has been criticized,[85] it should be viewed in a wider context. It was passed during a prolific period of law-making that aimed to replace the inherited Soviet laws, and there was not much time for reflection.[86] As well, Georgian professionals were Soviet-trained and had no experience with private property[87] or private dispute resolution.[88] There was also a dearth of Georgian-language materials on arbitration and most professionals only had access to Russian resources.[89] Much of the corruption can also be traced to the Soviet experience. Most professionals came of age under the Soviet system where telephone justice was commonplace and few countervailing norms or examples existed.

The lack of any lawyer licensing regime or regulatory controls also contributed to the problems. In the 1990s, almost anyone could act as a lawyer in court.[90] There was no body to control for qualifications, licensing, or discipline.[91] A formal Georgian Bar Association was not established until 2005, eight years after LOPA's passage.[92] Moreover, there were no models of appropriate behavior such as lawyer or arbitrator codes of ethics.

Withdrawal from CIS, MINISTRY OF FOREIGN AFFAIRS OF GEORGIA, http://georgiamfa.blogspot.com/2008/08/georgias-withdrawal-from-cis.html (last visited Feb. 23, 2015).

[82] LAW ON PRIVATE INTERNATIONAL LAW, *Official Gazette of the Parliament of Georgia* [OGPG], No. 19-20, April 29, 1998 (Georgia) [hereinafter PIL].

[83] *See* Giorgi Tsertsvadze, Recognition and Enforcement of Foreign Arbitral Awards in Georgia, at 2-5 (Oct. 2009) (unpublished Ph.D. dissertation, Max-Planck-Institut für ausländisches und internationales Privatrecht) (on file with author).

[84] *Id.*

[85] *See, e.g.*, Japaridze, *supra* note 66, at 231.

[86] Laws on entrepreneurs, monopoly and competition, consumer protection, the judiciary, and a comprehensive Civil Code and Commercial Code were all passed during this period.

[87] In 1998, one U.S. expert recommended to the judiciary a comprehensive training program on market economics, competition, and commercial law jurisprudence. William E. Kovacic & Ben Slay, *Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia*, 43 ANTITRUST BULL. 15, 36 (1998).

[88] TSERTSVADZE, COMMENTARY, *supra* note 76, at 15.

[89] *Id.* at 16.

[90] *See* Christopher P.M. Waters, *Who Should Regulate the Baku-Tbilisi-Ceyhan Pipeline*, 16 GEO. INT'L ENVT'L. L. REV. 403, 413 (2004) (citing CHRISTOPHER P.M. WATERS, COUNSEL IN THE CAUCASUS: PROFESSIONALIZATION AND LAW IN GEORGIA (2004)).

[91] *Id.*

[92] *See* Christopher P.M. Waters, *Market Control and Lawyers in the Former Soviet Union*, 8 J. L. SOC'Y 1, 7 (2007).

In addition to its formal shortcomings, LOPA also made it easy for lawyers to establish arbitration centers, and *required* that they be profit-making enterprises.[93] The centers competed for institutional clients that could insert mandatory arbitration clauses into their consumer contracts.[94] This created an environment that was rife with conflicts. Arbitration providers had an incentive to keep their clients happy by conducting proceedings in a manner consistent with their clients' interests. While not all lawyers or arbitration centers were unethical or incompetent, the arbitral environment was a toxic mix of opportunism, lack of education, absent ethical norms, and *laissez faire* oversight.

C. Criminal Arbitration

LOPA also had competition from unlikely quarters: the Georgian criminal underworld. In Georgia's criminal arbitration system, an extensive network of neighborhood underworld members engaged in dispute resolution.[95] These *Thieves-in-Law* (TIL) and their subordinates[96] were respected members of Georgian society and were often called upon to help resolve neighborhood, family, and business disputes.[97] Their dispute resolution services were more efficient and carried the threat of more effective enforcement measures than those of the courts or arbitration institutions.[98]

A July 2014 decision by the European Court of Human Rights (ECHR) analyzed Georgia's criminal arbitration history in connection with a challenge to sections of Georgia's Criminal Code that outlawed the settlement of disputes using the authority of a TIL.[99] The applicant had been convicted of engaging in an illegal dispute resolution mechanism by settling a few neighborhood disputes.[100] As picayune as these matters may have been, they constituted criminal activity because they were evidence of the defendant's membership in a criminal network, and accordingly, he was sentenced to seven years in prison.[101] Upon appeal, the ECHR upheld the conviction and found that Georgia's laws

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93 LOPA, *supra* note 67, art. 7.

94 Tkemaladze, *New Law*, *supra* note 72, at 665.

95 *See generally* GAVIN SLADE, REORGANIZING CRIME: MAFIA AND ANTI-MAFIA IN POST-SOVIET GEORGIA, (2013) (providing detailed history of the TIL in Georgia). In some cases, they became powerful enough to nominate judges. Avilova, *supra* note 42, at 478 n. 90.

96 Subordinates were referred to as *avtoritet*. Avilova, *supra* note 42, at 478.

97 *See, e.g.*, Case of Ashlarba v. Georgia, No. 45554/08, § 4, Eur. Ct. H.R. at 7 (2014).

98 They sometimes charged a high fee for their services. Avilova, *supra* note 42, at 478.

99 *Ashlarba*, *supra* note 97.

100 *Id.* at 3.

101 *Id.* at 2.

prohibiting criminal dispute resolution were not in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (PHRFF).[102]

IV. GEORGIA'S NEW ARBITRATION LAW

In 2010, Georgia's new arbitration law, the Law of Georgia on Arbitration (LOA) went into effect.[103] The Georgian LOA largely follows the UNCITRAL Model Law on International Commercial Arbitration[104] (Model Law). As a result, Georgia's arbitration rules are, but for some interesting departures, now harmonized with almost 70 nations, including important trading partners such as Turkey, Ukraine, Armenia, Azerbaijan, Russia and Germany.[105]

The LOA provides the courts with a more useful and constructive role in the arbitration regime. For the first time, Georgian courts now have jurisdiction over enforcement. However, the new law limits court intervention in arbitration proceedings to those instances specifically prescribed in the Model Law.[106] LOA

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[102] *Id.* at 10-13. The Court also concluded that Georgia's criminal arbitration was a legacy of the Soviet system. *Id.* at 6-7. The TILs' practices likely affected the way clients expected lawyers to resolve legal disputes and probably impacted the evolution of Georgian arbitration.

[103] LAW OF GEORGIA ON ARBITRATION, No. 13, July 2, 2009, *Official Gazette of the Parliament of Georgia,* [hereinafter LOA]. According to Article 48, the law entered into effect on January 1, 2010.

[104] U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration with Amendments as Adopted in 2006, U.N. Doc. A/40/17 (2006) [hereinafter Model Law]. All UNCITRAL documents relating to the Model Law are available at http://www.uncitral.org/uncitral/en/index.html. According to UNCITRAL:

> [T]he Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Id.

[105] For the full list of countries adopting the Model Law, *see UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last modified 2015). The Explanatory Note to the draft LOA states that it was prepared in order to better harmonize Georgia's arbitration laws with Europe. EXPLANATORY NOTE TO DRAFT OF LAW ON ARBITRATION OF GEORGIA, ¶ 1 (2009) (in Georgian, on file with author) [hereinafter LOA Explanatory Note].

[106] The LOA states, "[i]n matters governed by this law, no court shall intervene in any matter except in cases expressly provided for in this law." LOA, *supra* note 103, art.

Article 9 states that a court must terminate proceedings and refer the parties to arbitration if the case includes an arbitration agreement and a party makes a timely request.[107] Judicial non-interference is an important arbitration principle that promotes efficiency[108] and the LOA strikes a reasonable balance between those goals and the need to prevent the kind of injustice that occurred under LOPA. The following sub-sections review the most important parts of the new law.

A. Scope

Under the LOA, not every matter may be arbitrated. The LOA limits arbitral tribunals to hearing "property disputes of a private character which are based on an equal treatment of the parties and that parties [sic] are able to settle between themselves."[109] The Georgian Civil Code defines *property* as "every thing [sic], as well as any intangible property benefit, which may be possessed, used and disposed of by natural and legal persons."[110] The *property* requirement probably constitutes a more expansive scope than the Model Law's requirement of disputes arising from a commercial relationship.[111] Although the Model Law drafters mandated a wide interpretation of the term *commercial*,[112] certain matters might be considered disputes relating to *property* and yet fall outside of the Model Law's scope. One example would be claims for wages under an employment contract.[113] There are no reported Georgian cases defining the boundaries of

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6(2).

[107] *Id.* art. 9(1); CIV. PROC. CODE OF GEORGIA [CPC], *Official Gazette of the Parliament of Georgia,* No. 47-48, Dec. 31, 1997, arts. 186(1)(d), 272(f) (Georgia) [hereinafter Georgia CIV. PROC. C.]. Arbitration occurs unless the court finds that the agreement is null and void. The dismissal requirement is not limited to Georgian arbitrations but rather to arbitration proceedings anywhere. This article was revised in 2015 to harmonize the LOA with the Model Law. AMENDMENTS TO LAW OF GEORGIA ON ARBITRATION, *Official Gazette of the Parliament of Georgia,* No. 3218, art. 1(3), March 26, 2015 (Georgia) [hereinafter LOA Amendments]. *See also* Model Law, *supra* note 104, art. 8(1). In order to refer a case to arbitration, the original LOA provision required the commencement of arbitral proceedings, not the mere presence of a valid arbitration agreement. LOA, *supra* note 103, art. 9(1)-(2).

[108] Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings,* 30 U. PA. J. INT'L L. 999, 999 (2008-2009).

[109] LOA, *supra* note 103, art. 1(2).

[110] CIV. CODE OF GEORGIA [CC], *Official Gazette of the Parliament of Georgia* [OGPG], No. 31, July 24, 1997, art. 147 (Georgia) [hereinafter Georgia CIV. C.].

[111] Model Law, *supra* note 104, art. 1.

[112] The term "should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." *Id.* art. 1 n.2.

[113] UNICITRAL's *Analytical Commentary* states, in connection with the Article 1 scope of *commercial*, "[n]ot covered are, for example, labour [sic] or employment disputes

property for purposes of the LOA, but it seems reasonable to conclude that it will be given an expansive interpretation.

A more significant restriction in the LOA's scope is that the dispute must be of a *private character*. This restriction is not found in the Model Law. Neither the LOA nor any reported cases clarify this requirement. One case affirmed the arbitrability of a dispute centered on real estate redemption rights but provided no parameters of the *private character* requirement.[114] Important questions remain. Is a products liability claim a dispute of *private character*? Is an employee's claim of unsafe working conditions a dispute of *private character*?[115] A reference to state agencies' capacity to sign arbitration agreements under this framework may limit the *private character* requirement.[116] If disputes involving a state agency can be considered disputes of a *private character*, then a broad interpretation may be appropriate.

This indeterminate standard may also deter international arbitration in Georgia. Courts usually decide arbitrability questions based upon their own national law, regardless of the parties' agreement.[117] Because the LOA provides an uncertain framework on arbitrability, foreign parties may be concerned that their disputes will end up in Georgian courts. For these reasons, it would be useful to have judicial or legislative clarification here.

B. Form of Arbitration Agreement

The LOA expands upon the succinct LOPA requirement that an arbitration agreement be in writing. It largely follows the Model Law's rules, with an interesting modification. Both the LOA and Model Law allow for the operative writing to be in any form, including electronic.[118] However, the LOA

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and ordinary consumer claims, despite their relation to business." U.N. Secretary-General, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, ¶ 18, U.N. Doc. A/CN. 9/264 (1985) [hereinafter Model Law, Analytical Commentary].

[114] Tbilisi Court of Appeal Case No. 2B/___11___2011 (full number and date unavailable).

[115] Recall that employment disputes, while falling outside the scope of the Model Law, might fall inside the LOA's jurisdiction over *property* disputes. Model Law, *Analytical Commentary*, *supra* note 113.

[116] LOA *supra* note 103, art. 8(8).

[117] *See* Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?,* 12 ARB. INT'L 391 (1996).

[118] Model Law, *supra* note 104, art. 7(4); LOA, *supra* note 103, art. 8(5). The LOA defines "electronic communication" in Article 2(1)(b). The arbitration agreement is considered in writing if its content is recorded in any form, "irrespective of the form of the arbitration agreement or the contract." *Id.* art. 8(4). Contract formation requirements are subject to the Civil Code of Georgia. Georgia CIV. C., *supra* note 110, arts. 319–48.

mandates that if one of the parties is a natural person or an administrative agency, then the arbitration agreement must be in writing. Here, the law requires a more restrictive definition of *writing* that must include a specific instrument signed by the parties.[119] This restriction is for the protection of consumers and is a welcome improvement.[120]

During the LOPA period, Georgian courts developed a rather strict interpretation of the writing requirements. If the parties did not clearly agree in writing, following all formal requirements, the courts may have found an agreement invalid.[121] The strict interpretation was a logical response to the perceived injustice surrounding the arbitration regime. Under the LOA, the courts continued this restrictive practice.[122] Part of the problem may have been the LOA's requirement that agreements include a specific reference to the arbitration rules of the chosen forum.[123] That requirement was problematic because it allowed a party or reviewing court to claim that a clause was insufficient even if there was a written agreement clearly identifying a particular arbitration provider but no specific reference to its rules. The 2015 LOA Amendments struck this requirement, which should lead to greater judicial acceptance of future arbitration agreements.[124]

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[119] LOA, *supra* note 103, art. 8(8).

[120] LOA Explanatory Note, *supra* note 105, ¶ 9. The LOA also included a special rule when both parties are natural persons, but the 2015 LOA Amendments struck that rule. LOA Amendments, *supra* note 107, art. 1(2).

[121] TSERTSVADZE, COMMENTARY, *supra* note 76, at 55-56 (citing Tbilisi City Court Case No. 2/8139-09, Apr. 12, 2010 (finding agreement stating "any dispute that arises out of the contract should be resolved by private arbitration" was invalid)).

[122] *Id.* at 56 (citing Tbilisi City Court Case No. 2/1263-11, Feb. 28, 2011 (finding agreement invalid that read: "[an arbitration provider] chosen by the plaintiff should resolve any dispute, arising out or in connection with [the contract between the parties] including disputes about the validity of the contract."). *See also* Tkemaladze, *New Law, supra* note 72, at 669-70 (discussing Tbilisi Court of Appeals practice of invalidating agreements on lack of clarity grounds). Interestingly, providers are willing to work with parties to re-write the arbitral agreement to improve validity. The Batumi Permanent Court of Arbitration helped parties re-draft their arbitration agreements in seventeen percent of its cases. TSERTSVADZE, COMMENTARY, *supra* note 76, at 61 n. 211.

[123] The original LOA Article 2(2) stated: "[f]or purposes of this law, the agreement of the parties shall include a reference to the rules of arbitration of the permanent arbitration institution to which the parties have referred to resolve the dispute." LOA, *supra* note 103, art. 2(2).

[124] LOA Amendments, *supra* note 107, art. 1(1)(b). The original clause was replaced with language that appears to mandate that any choice of specific arbitral forum necessarily also includes the choice to use that forum's rules. *See* LOA, *supra* note 103, art. 2(2). The amended Article 2(2) also now allows for parties to engage in *ad hoc* arbitration, with their own custom-made rules. *See* EXPLANATORY LETTER ON THE DRAFT LAW OF GEORGIA AMENDING THE LAW OF GEORGIA ON ARBITRATION, Working Group on Procedural Law of the Private Law Reform Council, Dec. 15, 2014, http://parliament.ge/

C. Composition and Jurisdiction of the Arbitral Tribunal

1. Appointment

Arbitrator appointment is one of the most important decisions in arbitration.[125] The appointment rules and process will greatly affect the perception of fairness among the parties and the general public.[126] Under the LOA, the parties are free to determine the number of arbitrators at the time of contracting. In the absence of agreement, the number is three.[127] The parties are also free to choose any selection method. In practice, parties usually follow the selection method of the chosen arbitration provider.[128] In the event that they do not choose a selection method, the LOA follows the Model Law's default rules and provides that each party shall appoint one arbitrator and the two arbitrators shall appoint the third. If any arbitrator appointments are not made within the required time periods, the Georgian courts will, upon request of one of the parties, make the appointment, which is not appealable.[129]

The LOA also follows the Model Law's prohibition on preclusion of any arbitrator by reason of nationality.[130] This should promote confidence in Georgia as a location for international arbitration because it allows foreigners to serve on panels in international arbitration.[131]

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en/law/7666/15244 [hereinafter Explanatory Letter]. This change will be useful for business to business disputes.

[125] Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 J. INT'L ARB. 247, 247 (2003). Appointment is crucial because, in many cases, the arbitrator is not bound by law or precedent but rather her own sense of justice and equity. *See* David Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. CIN. L. REV. 623, 625 (1992).

[126] The ability of both parties to equally participate in the selection of the decision maker is one of the hallmarks of a fair arbitral forum. *See* IAN MACNEIL, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 27:3 (1995 & Supp. 1997).

[127] LOA, *supra* note 103, art. 10.

[128] TSERTSVADZE, COMMENTARY, *supra* note 76, at 104. Most Georgian arbitration center rules default to one arbitrator that is chosen by the provider. *See, e.g.*, RULES OF ARBITRATION PROCEEDINGS, Dispute Resolution Center, Ltd. (DRC), R. 5.3, http://www.drc-arbitration.ge/index.php?option=com_content&view=category&id=47&Itemid=11&lang=en (last visited Sep. 11, 2015) [hereinafter DRC ARBITRATION RULES] (requiring DRC to make appointment if case has one arbitrator). The DRC is one of Georgia's largest providers, handling 1,334 arbitration cases in 2013. *Id.* (follow "About Us" hyperlink; then follow "Statistics" hyperlink).

[129] LOA, *supra* note 103, art. 11. In practice, court appointment is rare. TSERTSVADZE, COMMENTARY, *supra* note 76, at 106.

[130] Model Law, *supra* note 104, art. 11(1).

[131] Model Law, *Analytical Commentary*, *supra* note 113, at 28 ¶ 1.

2. Challenge

Challenge procedures are a necessary evil in arbitration. Although they function as an "escape valve" to help guarantee the integrity of the arbitral process, they can also be used to sabotage or impede the progress of an arbitration proceeding.[132] When considering the challenge procedures, it is important to recognize that Georgia is a small country and parties and arbitrators are likely to know each other. This provides opportunities for parties to better assess their arbitrator choices, but also entails a greater risk of conflicts or impartiality. The appointment of impartial arbitrators is one of the most important policy issues for Georgian arbitration. During the LOPA period, it was commonly suspected that arbitrators were partial.

The LOA's new challenge procedures may help mitigate this issue. Its challenge rules are similar to the Model Law's rules with one exception. In cases with a single arbitrator, the challenging party may petition the court directly, without need to submit a challenge to the tribunal.[133] This is an important change from the LOPA rules, which did not allow court supervision of the challenge process.[134] The right of appeal should provide parties with an increased measure of confidence that the panel will be impartial.[135] It may also help promote judicial support for arbitration. If judges are allowed to appoint, affirm, and reject arbitrators, they will become more invested in the panel's success.

In addition, the Georgian Arbitration Association (GAA) ratified its Code of Ethics for Arbitrators in 2014. The GAA Code of Ethics[136] is based on the 2003 American Bar Association and American Arbitration Association (ABA/AAA) Code of Ethics for Arbitrators in Commercial Disputes.[137] The first

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[132] Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. INT'L ARB. 325, 325 (2003).

[133] LOA, *supra* note 103, art. 13(3). All court decisions are final and not appealable. *Id.*; Model Law, *supra* note 104, art. 13(3); Georgia CIV. PROC. C., *supra* note 107, art. 356^{15}(6).

[134] LOPA, *supra* note 67, art. 15. The arbitration provider possessed the final decision on all challenges.

[135] LOA Article 6 does mandate that the tribunal shall be *independent* in its activities. LOA, *supra* note 103, art. 6. Although vague, this mandate might provide parties with additional court appeal rights.

[136] The GAA does not maintain a website, but it does have a Facebook page. Georgian Arbitration Association (GAA), FACEBOOK, https://www.facebook.com/GAAtbilisi?fref=ts (last visited Sept. 12, 2015) [hereinafter GAA Facebook Page]. The GAA Code of Ethics is available at http://edu.gba.ge/wp-content/uploads/2014/06/Code-of-Ethics-for-Arbitrators.pdf (last visited Sept. 12, 2015).

[137] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, American Bar Association and American Arbitration Association (2003), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 (last visited Sept. 12, 2015) [hereinafter 2003 ABA/AAA Code].

nine Canons of the ABA/AAA Code were largely adopted in the GAA Code.[138] These rules are an excellent start to the professionalization of arbitrators in Georgia and may further promote confidence in arbitration.[139]

D. Jurisdiction

The LOA envisions full acceptance of the *competence-competence* doctrine found in the Model Law.[140] The c*ompetence-competence* doctrine holds that an arbitral tribunal has the authority to determine whether it has jurisdiction over the dispute.[141] A tribunal's power to rule on its own jurisdiction is fundamental to arbitration and is regarded as one of the pillars of the Model Law.[142] Without this, a party could easily thwart an arbitration proceeding by raising jurisdictional questions in the courts.[143]

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[138] The final ABA/AAA Cannon governing exemptions for non-neutral arbitration was rejected as inapplicable. Party-appointed arbitrators on a tripartite panel in the United States were sometimes considered "non-neutrals." Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815 *passim* (2002-2003); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VII A(1) (1977). In contrast, international arbitration ethics norms include all arbitrators acting in a fully independent and impartial manner, with no exceptions. *Id.* at 1815-16, 1825. The 2003 ABA/AAA Code attempted to move U.S. standards closer to international standards by incorporating the international norms as a default presumption, but still allowing for parties to agree to employ non-neutral arbitrators, as set forth in Canon X. Similar to most other counties, Georgia does not allow non-neutral arbitrators. Clear, unequivocal standards are the most sensible approach for Georgia.

[139] The GAA is not a licensing body, but rather a voluntary professional organization. Nonetheless, the GAA is committed to publicizing and enforcing these rules. Throughout 2014, the GAA, in cooperation with the Georgian Bar Association, held workshops to inform lawyers and others about the Code. *See* GAA Facebook page, *supra* note 136. At the time of enactment, the Code was advisory in nature. The GAA plans to make it enforceable in the future.

[140] LOA, *supra* note 103, art. 16; Model Law, *supra* note 104, art. 16.

[141] C. Ryan Reetz, *The Limits of the Competence-Competence Doctrine in the United States Courts,* 5 DISP. RESOL. INT'L 5, 5 (2011).

[142] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 214 (3rd ed. 2010). Most international arbitration rules allow for the arbitral tribunal to decide on its own jurisdiction. *See, e.g.*, AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, 13 (2013) https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 [hereinafter AAA RULES]. Eight U.S. states have adopted Article 16, *inter alia*, of the Model Law and the *competence-competence* doctrine is generally accepted in the United States. Reetz, *supra* note 141, at 6.

[143] Model Law Article 8(1) and LOA Article 9(1), together with GEORGIA CIV.

The LOA also adopts the Model Law's all-important *separability* principle.[144] The *separability* principle holds that the agreement to arbitrate is actually a separate legal agreement from the underlying contract, to which it is attached. So, if the underlying agreement is found invalid, the agreement to arbitrate is not *ipso jure* invalid. The tribunal retains jurisdiction to render that decision.[145] Without *separability*, the arbitrator's ruling of underlying contractual invalidity would also eviscerate her power to make such a decision, resulting in a logically circular impasse.[146] *Separability* works together with *competence-competence* to preserve tribunal autonomy. Similar to *competence-competence*, this principle is now firmly established in international arbitration.[147] Georgian courts have been supportive of both principles.[148]

PROC. C. Article 356[16], allow the court to make a jurisdictional decision even if it has been notified that the matter is the subject of an arbitration agreement. While the articles mandate court dismissal unless the agreement is invalid, they also tend to contradict the spirit of *competence-competence* by appearing to shift decision-making power from tribunal to court. Georgia CIV. PROC. C., *supra* note 107, arts. 186, 272. The preclusion of courts from the initial jurisdiction decision is referred to as the Negative Effect of Competence-Competence. John J. Barcelo III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1124 (2003). French law is the best example of this Negative Effect. *Id.* at 1124-26 (citing, *inter alia*, Article 1458 of the French Code of Civil Procedure). Some jurisdictions go part of the way towards the Negative Effect by interpreting Article 8 as requiring merely *prima facie* judicial confirmation of the existence and validity of an agreement. *Id.* at 1128 n.54, 1129 n.61 (referring to Switzerland, Hong Kong, and Ontario). The United States rejected the Negative Effect of Competence-Competence in First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), but continues to recognize the basic or positive *competence-competence* doctrine. Reetz, *supra* note 141, at 6.

[144] LOA, *supra* note 103, art. 16(1); Model Law, *supra* note 104, art. 16(1); *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration*, ¶ 25 (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Feb. 23, 2015) [hereinafter Model Law *Explanatory Note*].

[145] *See, e.g.*, Arthur Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L. Q. REV. 609 (1939-1940) (providing an early discussion on separability doctrine).

[146] *See* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 341 (1999); Alan Scott Rau, *Everything You Really Needed to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 81-82 (2003).

[147] Kaj Hober & Annette Magnussen, *The Special Status of Agreements to Arbitrate: The Separability Doctrine; Mandatory Stay of Litigation*, 2 DISP. RESOL. INT'L 56, 56 (2008). *But see* Model Law *Explanatory Note, supra* note 105, ¶ 25 ("[a]s of 2003 the concepts are not yet generally recognized"). The separability doctrine was upheld in the United States, using different terminology, in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). The U.S. Supreme Court later doubled down on separability in Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010). David Horton, *Mass Arbitration and Democratic Legitimacy,* 85 U. COLO. L. REV. 459, 487 (2014) (reviewing MARGARET

E. Interim Measures

One of the most significant shortcomings of LOPA was the lack of provision for interim measures.[149] As a result, there was no clear remedy for parties in need of injunctive relief to preserve the status quo, to stop an ongoing harm, or to prevent asset flight. The courts had interim relief provisions,[150] but LOPA appeared to preclude court jurisdiction unless both parties agreed to waive the preclusion or the arbitration agreement was found invalid.[151] The absence of interim relief under LOPA was another disincentive for parties to choose arbitration.

The LOA provides for interim measures, partly in line with the Model Law's 2006 version of Article 17. Interim measures during Georgian arbitration are now allowed: (i) to maintain or restore the status quo, (ii) to prevent damage to a party or the arbitral process itself,[152] (iii) to preserve assets out of which an award may be satisfied, or (iv) to preserve evidence.[153] A party may petition the tribunal at any time prior to the final award for temporary relief. The rules set a high burden on the moving party. The party must show a likelihood of harm "not adequately reparable by an award of damages" if no relief is granted and that the harm will "substantially outweigh" the harm to the counterparty.[154] In addition, there must be a "reasonable possibility" that the moving party will succeed on the merits of the claim.[155] These conditions are in line with the Model Law. The Model Law drafters felt that this high standard was necessary to make the Model Law consistent with many national judicial systems.[156]

The Model Law's 2006 rules also include the availability of an *ex parte* preliminary order designed to prevent the frustration of a requested interim

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JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)).

[148] TSERTSVADZE, COMMENTARY, *supra* note 76, at 96.

[149] Notwithstanding this absence of authority, one expert states that Georgian arbitration centers would occasionally issue interim measures prior to the constitution of the arbitration tribunal. *Id.* at 140.

[150] Georgia CIV. PROC. C., *supra* note 107, art. 198.

[151] LOPA, *supra* note 67, art. 30.

[152] The language could be used to justify anti-suit injunctions. Model Law, *supra* note 104, art. 17(2)(b); U.N. Comm'n on Int'l Trade L., Rep. on the Work of its Thirty-Ninth Session, ¶ 92-95, U.N. Doc. A/61/17 (2006) [hereinafter 2006 UNCITRAL Report]. The language was meant to apply to the range of creative or dilatory tactics used by parties to obstruct the arbitral process. *Id.* ¶ 94.

[153] LOA, *supra* note 103, art. 17.

[154] *Id.* art. 18(1)(a)-(b).

[155] *Id.* art. 18(1)(c).

[156] 2006 UNCITRAL Report, *supra* note 152, ¶ 99. This is somewhat similar to the requirements for preliminary injunctive relief in U.S. federal courts. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc. 555 U.S. 7 (2008).

measure.[157] There are sound reasons why a party might need this, such as to prevent asset flight or property destruction. The LOA does not include this rule, but parties do retain the right to obtain interim relief from a Georgian court.[158] Under the Georgian Civil Procedure Code, parties may obtain a variety of interim remedies,[159] and they may even be granted on an emergency *ex parte* basis, prior to filing the formal complaint.[160] Therefore, the omission of *ex parte* preliminary orders from the LOA should not cause significant problems. In fact, the controversial nature of these powers would probably harm the reputation of arbitration in Georgia.[161]

Interestingly, the burden required for interim relief in the Georgian courts is lower than the burden at an arbitral tribunal. The Civil Procedure Code requires that parties prove "reasonable cause" for the court to believe that its decision would be frustrated in the absence of said relief.[162] This is analogous to the first element under the LOA—likelihood of harm not adequately reparable by an award of damages if no relief is granted.[163] However, the Civil Procedure Code, unlike the LOA, has no additional requirements that the harm, if not granted, substantially outweigh the harm to the counterparty or that the moving party show a reasonable possibility of success on the merits of the claim.[164] In addition, Georgian public agencies have been reluctant to enforce tribunals' interim measures.[165] Given this reluctance and the higher burden or arbitral tribunals, there is a strong incentive to circumvent the arbitral tribunal and directly petition the courts for interim relief.[166]

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[157] Model Law, *supra* note 104, art. 17 B - 17 C.

[158] LOA, *supra* note 103, art. 23.

[159] Georgia CIV. PROC. C., *supra* note 110, art. 198. Remedies include, *inter alia*, the seizure of property and the enjoining of acts. *Id.* art. 198(i)(2).

[160] *Id.* art. 192-93. The U.S. analogy is Fed. R. Civ. P. 65a (Preliminary Injunctions) and Fed. R. Civ. P. 65b (Temporary Restraining Orders without notice). The original LOA appeared to have excluded court emergency *ex parte* relief for international arbitration. LOA, *supra* note 103, art. 23(3). While not ideal, the exclusion might have leveled the playing field in international arbitration, since it is more likely that a domestic party would resort to such *ex parte* relief from a Georgian court. The 2015 LOA Amendments struck this exclusion, thereby allowing emergency *ex parte* claims in Georgian courts. LOA Amendments, *supra* note 107, art. 1(10); Explanatory Letter, *supra* note 124, § (a)(a.c.) (the amendments "authorize the court to apply interim measures, upon a party's request, even before an arbitral lawsuit is lodged.").

[161] *But cf.* Nikoloz Chomakhidze, *Provisional Measures in International Arbitration*, ALT. DISP. RESOL. Y.B. TBILISI ST. U., 108, 128 (2013).

[162] Georgia CIV. PROC. C., *supra* note 107, art. 191.

[163] LOA, *supra* note 103, art. 18(1)(a).

[164] *Id.* art. 18(1)(b)-(c).

[165] TSERTSVADZE, COMMENTARY, *supra* note 76, at 141-42.

[166] The authority to directly petition the Georgian courts is in LOA Article 23.

The LOA follows closely the Model Law's rules relating to the recognition and enforcement of interim measures. The most important development for international parties is that the law makes clear that such measures shall have binding force and be enforced by Georgian courts, irrespective of the country in which they were issued.[167] This is an important aspect of the new law and, in time, may have a significant impact.

As is the case with the Model Law, parties may prevent recognition and enforcement of interim awards under only limited circumstances.[168] These rules track the standard rules for recognition and enforcement of final awards with a few changes.[169] Under the Model Law, there is no clear placement of the burden of proof, but for most claims the LOA clearly places a burden on the party seeking refusal of recognition or enforcement.[170] This is a helpful pro-enforcement signal to the courts.[171]

F. Arbitral Proceedings

1. Equal Treatment and Opportunity to Present One's Case

The LOA follows the Model Law's guarantees of two fundamental arbitration principles: equal treatment of the parties and the opportunity to present one's case.[172] The Model Law drafters labeled these principles the *Magna Carta of Arbitral Procedure* because they regarded them as so essential to arbitration and perhaps the most important in the Model Law.[173] The reasons are self-evident. Equal treatment and the opportunity to present one's case are the essence of fairness.[174] They represent due process and the aspirations of all dispute resolution systems. While neither principle can be unconditional in practice, they

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[167] LOA, *supra* note 103; *id.* art. 21.

[168] *Id.* art. 22.

[169] *Id.* arts. 22(1)(a)-22(1)(b)(b.a.).

[170] Model Law, *supra* note 104, art. 17 I (1); LOA, *supra* note 103, art 22(1)(a). The UNCITRAL drafters purposely left this burden question for the applicable domestic law. BINDER, *supra* note 142, at 271; U.N. Comm'n on Int'l Trade L. Working Group on Arbitration and Conciliation, Rep. on the Work of Its Forty-Second Session, ¶ 73, U.N. Doc. A/CN 9/573 (2005) [hereinafter July 2005 UNCITRAL Report].

[171] A few claims have no clear burden, such as those under the public policy exception, which are considered *ex officio* grounds whereby the court must undertake its own independent review. LOA, *supra* note 103, arts. 22(1)(b).

[172] LOA, *supra* note 103, art. 3; Model Law, *supra* note 104, arts. 18-19.

[173] Model Law, *Analytical Commentary*, *supra* note 113, at 44 ¶ 1.

[174] In the United States, the Federal Arbitration Act has been interpreted as mandating basic procedural fairness. *See, e.g.*, Born, *supra* note 108, at 1021 (citing Federal Arbitration Act, 9 U.S.C. § 10 (2006)).

are necessary for arbitration to remain viable.[175]. Interestingly, the LOA moved the Model Law's equal treatment clause (Model Law Article 18) to the front of the LOA where it is now LOA Article 3. The placement of this article near the front of the law emphasizes its importance and its application to the entire arbitration enterprise, and not merely the arbitral proceedings.[176] Given LOPA's weak protections of these principles, this was a sound legislative adjustment.

2. Determination of Rules of Procedure

Both the Model Law and LOA provide for party autonomy in determining the rules of procedure.[177] This freedom of parties to select their own procedural rules is another important arbitration principle.[178] One of the main reasons for arbitration's success has been the ability of parties, in contrast to court litigation, to craft procedures most appropriate for their needs.[179] This autonomy is subject to certain limitations.[180] For instance, parties cannot contract away the protections concerning equal treatment among parties.[181]

The LOA provides that in the event there is no party agreement on procedures the "dispute shall be resolved in accordance with the rules determined by the arbitral tribunal."[182] The LOA omits the Model Law's reference to the tribunal's nearly unfettered discretion to craft appropriate rules.[183] This is unfortunate given the practical importance of arbitrators' procedural discretion.[184]

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[175] Reza Mohtashami, *The Requirement of Equal Treatment with Respect to the Conduct of Hearings and Hearing Preparation in International Arbitration*, 3 DISP. RESOL. INT'L 124 (2009). For instance, the "full opportunity to present one's case" does not mean that the party is entitled to use dilatory tactics or advance unlimited objections or new evidence on the eve of award issuance. Model Law, *Analytical Commentary*, *supra* note 104, at 46 ¶ 8.

[176] There was some initial concern among the Model Law drafters that the placement of the equal treatment provision in a sub-section of the Model Law's Chapter V (Conduct of Arbitral Proceedings) might create an inference that the principle was limited to certain parts of the proceedings. BINDER, *supra* note 142, at 277; *Summary Records of the 322nd Meeting*, [1985] 16 Y.B. Comm'n Int'l. Trade L. 466, 468 ¶ 28, U.N. Doc. A/CN.9/SER.322.; Model Law, *Analytical Commentary*, *supra* note 113, at 46 ¶ 7.

[177] Model Law, *supra* note 104, art. 19; LOA, *supra* note 103, arts. 24, 2(2).

[178] BINDER, *supra* note 142, at 281.

[179] Born, *supra* note 108, at 1003.

[180] *See, e.g.*, Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. INT'L ARB. 327 (2007).

[181] Model Law, *Analytical Commentary*, *supra* note 113, at 45 ¶ 3.

[182] LOA *supra* note 103, art. 24(2).

[183] Model Law, *supra* note 104, art 19(2).

[184] Born, *supra* note 108, at 1010-15. Most international conventions and national legal systems, including the United States, provide for substantial tribunal discretion over

3. Place of Arbitration

The place of arbitration under the LOA follows the provisions in the Model Law. Parties have the freedom to choose where to hold the arbitration, and the tribunal may exercise its own discretion for convenience reasons when appropriate.[185] In international arbitration, this can be especially important since the location determines the type of court supervision and conflicts rules.[186]

4. Representation

The LOA provides parties the right to representation at any stage of proceedings by anyone.[187] The law refers to "an attorney or other representation," which presumably opens the door to any individual that the party desires. This is important from an access to justice perspective. Many individuals in Georgia cannot afford to retain an attorney and will thus benefit from having a family member or friend, for instance, as a lay representative.[188]

5. Language and Statements of Claim and Defense

The LOA and Model Law offer the parties a choice of language, consistent with the party autonomy principle. Note that the LOA does not include a default Georgian language provision, even for domestic arbitration.[189] This is

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procedures in the absence of party agreement. *Id.*

[185] LOA, *supra* note 103, art. 25; Model Law, *supra* note 104, art. 20.

[186] While it is generally understood that the law of the host country is important in international commercial arbitration (*see also* Noah Rubins, *The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, The Place of Arbitration in International Arbitration-Its Fictitious Nature and Lex Arbitri*, 16 MEALEY'S INT. ARB. REP. 12 (2001)), some scholars have advanced a theory called "delocalization" that considers international arbitration as its own delocalized normative regime, not subject to national laws. *See* Tetsuya Nakamura, *The Place of Arbitration in International Arbitration-Its Fictitious Nature and Lex Arbitri*, 15 MEALEY'S INT. ARB. REP. 11 (2000); Jan Paulson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983).

[187] LOA, *supra* note 103, art. 28.

[188] A complication can arise if the dispute is moved to the Georgian courts for any reason. Any "capable representative," not necessarily a lawyer, can appear in the Courts of First Instance, Georgia CIV. PROC. C., *supra* note 107, art. 94(d), however only licensed attorneys (*advocates*) can appear in at the appellate levels. *Id.* arts. 93–101.

[189] LOA, *supra* note 103, art. 29; Model Law, *supra* note 104, art. 22.

encouraging given that there are some domestic communities where Georgian is not the dominant language.[190]

If the parties have chosen a local arbitration forum, then that forum's rules regarding statement of claim and defense will apply. In the absence of agreed rules, the LOA follows the Model Law's reasonable rules.[191]

6. Form of Proceedings and the Taking of Evidence

The international commercial arbitration process often, but not always, involves an oral hearing that resembles the trial in a common law court.[192] However, some international tribunals proceed with only documentary and other material records.[193] The LOA follows the Model Law's efforts to steer a middle ground between these common law and civil law traditions by allowing the tribunal to decide whether an oral hearing is necessary in the absence of a specific request for one.[194] In the event of a request, the rules mandate that an oral hearing take place.[195]

The LOA, like the Model Law, does not go into extensive detail on how the tribunal shall conduct hearings.[196] However, the LOA does go further than the Model Law in specifically authorizing some of the tribunal actions that might take place. The LOA specifically provides that the tribunal may require a party to produce evidence to another party or the tribunal.[197] The tribunal may also summon witnesses and require their questioning,[198] although this is rare in

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[190] Georgia has small minority communities where Armenian or Azeri are spoken at home and Russian is often preferred outside of the home. According to the 2002 census, the following were the largest groups in Georgia: Azeri 6.5%, Armenian 5.7%, Russian 1.5%. WORLD FACTBOOK, *supra* note 11.

[191] Model Law, *supra* note 104, arts. 23, 25; LOA, *supra* note 103, arts. 30-31, 33.

[192] In the vast majority of international commercial arbitrations, parties request an oral hearing. Mohtashami, *supra* note 175, at 128. However, the trend is moving towards more extensive written submissions and shorter hearings. *Id.*

[193] In most civil law systems, documentary evidence is preferred over witness testimony. Documentary evidence is also considered paramount in international arbitration. *See* Nathan D. O'Malley, *The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration–As Applied in Practice*, 8 LAW & PRAC. INT'L CTS. & TRIBUNALS 27, 27 (2009).

[194] LOA, *supra* note 103, art. 32(1).

[195] *Id.*

[196] As a practical matter, most arbitration forums will have their own set of applicable procedural rules.

[197] *Id.* arts. 35(2)(a), (c).

[198] *Id.* art. 35(2)(b). This tribunal-centered approach is more consistent with the civil law tradition (Georgia included) of the court taking primary responsibility for calling and examining witnesses. For a more detailed discussion of the general differences between the

Georgia.[199] Most of these procedures will be left to the parties or to the tribunal to determine.[200] Parties' adoption of the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) would be allowed.[201]

Under the LOA, proceedings are closed, and the arbitrator and other participants must keep all information confidential.[202] The law further provides that, unless otherwise agreed or provided for in law, all documents, evidence and written or oral statements shall not be published or used in other proceedings.[203] This is not found in the Model Law[204] or in the United States.[205] Confidentiality protections may help promote settlement among the parties, foster more efficient practice, encourage more honest and comprehensive discovery production, and protect participants from the harm that may arise from public disclosure of information. Although a blanket confidentiality provision does carry some costs, such as the public's diminished access to information, these protections are, on balance, justified in Georgia.

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common law and civil law traditions with respect to the taking of evidence and the emergence of a common middle road in international arbitration practice, see Mohtashami, *supra* note 175; Rolf Trittman and Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings*, 31 U.N.S.W.L.J. 330, 333 (2008).

[199] TSERTSVADZE, COMMENTARY, *supra* note 76, at 131.

[200] UNCITRAL indicates that most international arbitration rules do not specify the details of hearings, such as the witness order, examination procedures, or the availability of opening and closing statements. The UNCITRAL Notes recommend that the tribunal decide these rules in coordination with the parties early in the process. UNCITRAL, NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (2012), http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf (last modified 2012).

[201] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, International Bar Association (2010), http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC (last visited Feb. 23, 2015). The IBA Rules are non-binding but widely accepted. Georg von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised Version, adopted by the International Bar Association on 29 May 2010,* 28 ASA BULLETIN 735 (2010); *see also* Trittman & Kasolowsky, *supra* note 198, at 333 ("The IBA Rules are, in our experience, referred to in almost all international arbitration proceedings.").

[202] LOA, *supra* note 103, art. 32(4).

[203] *Id.* art. 32(5). *Contra* LOPA, *supra* note 67, arts. 24, 27. It has been argued that the qualifying language in this article provides courts an opening to pierce the confidentiality protections when in the public interest. TSERTSVADZE, COMMENTARY, *supra* note 76, at 126.

[204] Although UNCITRAL did include confidentiality protections in its model law on conciliation. UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, art. 9 (2004), http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (last visited Feb. 23, 2015) [hereinafter CONCILIATION].

[205] Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) [hereinafter Schmitz, *Privacy*].

G. The Award

1. Substantive Rules

In contrast to LOPA, which provided no guidance on the rules applicable to the substance of the dispute, the LOA follows the Model Law in providing for party freedom to choose, with tribunal discretion as a default.[206] In the event there is no choice of law, the LOA states that the tribunal shall determine the law. Unfortunately, the LOA, in contrast to the Model Law, does not contain provision for the tribunal to decide *ex aequo et bono* or as *amiable compositeur*.[207] However, it does follow the Model Law's guidance that the tribunal always takes into consideration the terms of the contract and the applicable usages and practices of the trade,[208] even if the parties' chosen substantive law does not consider industry trade and customs.[209]

2. Decision Making and Contents of the Award

In the areas of decision-making, form, and correction of the award, the LOA largely follows the Model Law standards.[210] The award must be in writing,

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[206] LOA, *supra* note 103, art. 36; Model Law, *supra* note 104, art. 28. The Model Law uses the words *rules of law* to emphasize that parties might wish to choose rules from more than one legal system. Model Law, *Analytical Commentary*, *supra* note 113, at 61-62 ¶ 4. The original LOA used the more restrictive term *law* but the 2015 LOA Amendments brought the language into conformity with the Model Law. LOA Amendments, *supra* note 107, art. 1(13); LOA, *supra* note 103, art. 36(1).

[207] Model Law, *supra* note 104, art. 28(3). Arbitration decisions made *ex aequo et bono* or as *amiable compositeur* are based upon general principles of equity and justice, without reference to any specific national or international legal provisions. Model Law *Explanatory Note*, *supra* note 144, ¶ 40; Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept,* 14 CHI. J. INT'L L. 621 (2007-2008) (analyzing *ex aequo et bono* concept); Hong-lin Yu, *Amiable Composition–A Learning Curve*, 17 J. INT'L ARB. 79 (2000) (analyzing *amiable compositeur* concept).

[208] However, in LOA arbitration there might not be any trade practice. Recall that the jurisdiction of the LOA is more expansive than the Model Law and includes any property dispute that is private. LOA, *supra* note 103, art. 1(1).

[209] This is a potential area of uncertainty—there could be a conflict between the chosen substantive law and trade practice. The Model Law contains this language because it seeks to promote international commercial business. The LOA governs a wider range of cases.

[210] Majority rule is generally required for decisions. LOA, *supra* note 103, art. 37(1); Model Law, *supra* note 104, art. 29. Unlike the Model law, arbitrator abstentions are prohibited. *Id.* art. 37(2). This is similar to the LOPA. LOPA *supra* note 67, art. 34. Georgian judges are also not allowed to abstain. Georgia CIV. PROC. C., *supra* note 107, art. 243.

signed by the majority, stating the date and place, and including the reasons on which it is based, unless otherwise agreed.[211] Interestingly, the LOA also expressly allows for dissenting opinions.[212] This represents a useful nudge in the direction of reasoned decision-making and improved transparency.

3. Settlement

The LOA provides for the possibility of a negotiated settlement.[213] The LOA allows parties to settle their dispute, inform the tribunal and, at their request, convert their settlement agreement into an award.[214] The 2015 LOA Amendments changed this conversion procedure from a party right to an option requiring tribunal approval.[215] Parties may settle at any time during the proceedings, and the law ensures that the resulting award has the same force and effect as any other arbitral award.[216] This elevates a settlement to the same level as a court judgment, which the Georgian courts can enforce. Ordinarily, a negotiated or mediated settlement between two parties in Georgia constitutes nothing more than a contract, which requires a full-fledged lawsuit to enforce.[217]

H. Recourse Against Awards, Recognition and Enforcement of Awards

The Model Law's specific approach to recourse against awards and to recognition and enforcement of awards is preserved in the LOA. These rules attempt to balance the judicial interest in supervision against the arbitral interest in limited court intervention.[218] The first section is on recourse against the award

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[211] Model Law, *supra* note 104, art. 31; LOA, *supra* note 103, art. 39.

[212] *Id.* This is consistent with the rules for Georgian courts. Georgia CIV. PROC. C., *supra* note 107, arts. 27, 243, 247

[213] This is similar to the Model Law. Model Law, *supra* note 104, art. 30.

[214] LOA, *supra* note 103, art. 38.

[215] Explanatory Letter, *supra* note 124, § (a)(a.c.). This brings the LOA into better conformity with Model Law Article 30.

[216] *Id.* art. 38(3).

[217] There is an asymmetry between settlements achieved through mediation and negotiation on the one hand, and arbitration on the other hand. Because parties settling their case after the initiation of arbitration proceedings benefit from this expedited enforcement regime, there is an incentive to engage in arbitration. The passage of a mediation law based on the UNICTRAL Model Law on International Commercial Conciliation would eliminate the incentive because that law also includes the possibility for expedited enforcement features for mediated settlements. CONCILIATION, *supra* note 204, art. 14; GUIDE TO ENACTMENT AND USE OF THE UNCITRAL MODEL LAW, 55 ¶ 87 (noting reasons for expedited enforcement).

[218] *See* BINDER, *supra* note 142, at 377-78.

(better known as "setting aside the award" or "annulment of the award") and the next section is on recognition and enforcement of awards.

1. Recourse against Award

Under the LOA, the arbitration award is not appealable except in limited circumstances. Allowing a party to easily appeal an arbitration award would take away one of the main advantages of arbitration, *i.e*., its ability to deliver fast, cost-effective dispute resolution. Consistent with this interest, the LOA provides only limited grounds for the setting aside of an arbitral award.[219] Most importantly, none of these grounds involve a substantive review of the merits.[220] The LOA provisions are a copy of the Model Law, with one interesting exception. The LOA does not declare, as the Model Law does, that this provision represents the exclusive manner in which a setting aside may be achieved.[221] As a result, Georgian courts are not as restrained in the setting aside of an award as they would be under the Model Law.

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[219] However, it is unclear what happens to a case when an award is set aside. Japaridze, *supra* note 66, at 240-41. Does the tribunal divest itself of jurisdiction?

[220] LOA, *supra* note 103, art. 42.

[221] Model Law, *supra* note 104, art. 34. The 2015 LOA Amendments did attempt to rectify this shortcoming by adding the following language to Article 42(1): "[w]ithin the framework of this Law, the only procedural remedy against an arbitral award is setting aside an award, which can take place in accordance with paragraphs 2–5 of this Article." LOA Amendments, *supra* note 107, art. 1(17)(1). The Explanatory Letter to the Amendments expresses an intention to harmonize with the Model Law but then repeats the qualifying language that this article represents the exclusive remedy *within the framework of the Law on Arbitration*. Explanatory Letter, *supra* note 124, § (a)(a.c.). Although there is no obvious remedy outside the LOA, this language does not preclude an alternative. It is also noteworthy that the Model Law's applicable title states "Application for setting aside *as exclusive recourse* against arbitral award," Model Law, *supra* note 104, art. 34 (emphasis added), while the LOA's newly renamed Article 42 is merely entitled "Setting aside an arbitral award." LOA, *supra* note 103, art. 42.

2. Recognition and Enforcement of Awards[222]

One of the most salient changes in the Georgian arbitration system is in the area of recognition and enforcement of awards. The old LOPA regime provided only limited guidance for courts reviewing a challenge to award enforcement.[223] Courts could only suspend enforcement to prevent irreparable harm, and there was no public policy empowering courts to protect the public. Moreover, there was no provision for the enforcement of foreign arbitral awards.[224]

The LOA brings Georgia into consonance with current international norms. It follows the Model Law almost word for word on the rules of recognition and enforcement of awards.[225] There are two types of grounds under which a court may refuse recognition or enforcement, those that a party must raise and those that a party or court can raise, *ex officio*. These grounds are, with one exception, the same as those found in the rules on recourse against the award. The party-dependent grounds for refusal are:

- A party to the arbitration agreement lacked legal capacity;[226]
- The agreement is not valid under the governing law;[227]

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[222] In Georgia, no distinction is made between recognition and enforcement. TSERTSVADZE, COMMENTARY, *supra* note 76, at 175. The Model Law drafters believed that the distinction was important for theoretical and practical purposes. In theory, the recognition of an award has an abstract legal effect, manifesting automatically, without a party's request. *See* U.N. Comm'n on Int'l Trade L. Working Group on Int'l Cont. Pracs., Rep. on the Work of its Seventh Session, ¶ 146, U.N. Doc A/CN.9/246 (1984). In practice, the recognition of an award might be useful for *res judicata* purposes in another forum, unrelated to enforcement. Model Law, *Analytical Commentary*, *supra* note 113, at 76 ¶ 4. Recognition is a declarative act, while enforcement requires an executory function.

[223] Japaridze, *supra* note 66, at 232.

[224] *Id.* The Georgian Supreme Court was reluctant to apply the New York Convention prior to the passage of the LOA. From 2000–2007, the Court rarely referred to the Convention. TSERTSVADZE, COMMENTARY, *supra* note 76, at 181.

[225] Model Law, *supra* note 104, arts. 35-36.

[226] Full personal legal capacity is reached at 18 years or whenever a person marries. Georgia CIV. C., *supra* note 107, art. 12. In 2004, the Georgian Supreme Court considered an institutional capacity question under the similar rules of the New York Convention, Article V(1)(a). The Court allowed recognition and enforcement of a London award holding that a Georgian company agent had valid authority to enter into the agreement despite the fact that the Georgian government had a controlling interest in the company and had not signed the agreement. R.L., Ltd. v. JSC Z. Factory, case a-204-sh-43-03 (2004), www.supremecourt.ge (unofficial translation available at http://www.newyorkconvention 1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Dec. 20, 2015).

[227] This clause preserves the court's right as the final arbiter of agreement validity,

- A party was not given proper notice of the appointment of an arbitrator or of the proceedings, or for other good reason, was unable to participate;[228]
- The award deals with a dispute not falling within the terms or scope of the arbitration agreement;[229]
- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement or, if no agreement, the LOA;[230] or
- The award has not entered into force or was set aside or was suspended by the courts of the country where the award was rendered. [231]

The party challenging recognition or enforcement must raise and prove these arguments.

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notwithstanding the *competence-competence* doctrine in the LOA. In 2009, the Georgian Supreme Court allowed recognition and enforcement of a Russian award, rejecting the Georgian respondent's claim that the agreement was invalid under the governing, Russian law. S.F.M., LLC v. Batumi City Hall, case a-471-sh-21-09 (2009), www.supremecourt.ge, (unofficial translation available at http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Feb. 23, 2015).

[228] In a Supreme Court case under the LOA, the Court held against a Georgian respondent that claimed lack of notice of a Latvian arbitration. JSC "P" v "L" LLC, case a-492-sh-11-2012 (2012), www.supremecourt.ge, (unofficial translation available at http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Dec. 20, 2015). *See also* S.F.M., LLC v. Batumi City Hall, *supra* note 227 (finding that the tribunal took all possible measures to ensure respondent's participation). In 2003, the Court rejected recognition and enforcement of a Ukrainian award on the basis of lack of notice and referenced the New York Convention Article V(1)(b), which uses the same language as the LOA. The Kiev . . . Institute v."M," Scientific-Industrial Technological Institute of Tbilisi, case 3a-17-02 (2003), official text available at www.supremecourt.ge (unofficial translation available at http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Dec. 20, 2015) (finding no documents confirming respondent was aware of proceedings).

[229] *See* JSC "P" v. "L" LLC, case a-492-sh-11-2012 (2012) (holding Latvian award was enforceable and did not include any disputes beyond the scope of the arbitral agreement).

[230] *See* R.L., Ltd. v. JSC Z. Factory, case a-204-sh-43-03 (2004) (finding respondent waived right to appoint arbitrator and thus could not complain about tribunal composition).

[231] LOA, *supra* note 103, art. 45(a). The LOA leaves open the possibility of court discretion in enforcement proceedings where the award was set aside in the country of arbitration. The LOA language states that *if* a party proves this, then the court *may* refuse recognition and enforcement.

A party or the court, *ex officio*, can raise any of the second set of grounds for refusal. There is no clear burden of proof, but if the court finds the existence of either of these conditions, the award is fatally deficient. These grounds are of fundamental importance to the institution of arbitration and the state:[232] the subject matter of the dispute is not capable of settlement by arbitration under the law of Georgia,[233] or the award is contrary to public policy.[234]

As with the setting aside procedure, the LOA omits the exclusivity language of the Model Law for recognition and enforcement. Again, it appears that the drafters wished to provide wider court discretion in reviewing these applications. This is understandable given Georgia's problematic arbitration history, as long as the courts do not abuse their discretion.

3. Confusion Between the Two Sections

The two sections above have nearly identical grounds for setting aside or refusing recognition and enforcement of awards. As a result, the setting aside section might appear superfluous.[235] However, an application for setting aside may only be made in the country where the award was rendered.[236] Setting aside allows parties to challenge the award under the law of the country in which it was rendered, regardless of where enforcement is sought.[237] On the other hand, an application for enforcement can be made in any country.[238] The Model Law was drafted specifically for international arbitration and in this context, it is logical to provide for the two separate provisions since they often take place in different countries.

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[232] BINDER, *supra* note 142, at 383.

[233] Recall here the potential problem caused by the unclear standards for arbitrability under the LOA: is the dispute of a *private character*? LOA, *supra* note 103, art. 1(2).

[234] *Id.* art. 45(1)(b).

[235] Having both present for domestic arbitration may also lead to the *double control* problem—two opportunities for judicial review under the same grounds. *See* Renaud Sorieul, *The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration*, 2 DISP. RESOL. INT'L 2735 (2008). For concerns about the setting aside procedure generally, see Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID REV. 263 (2014).

[236] Model Law *Explanatory Note*, *supra* note 144, ¶ 48.

[237] U.N. Secretary-General, *Possible Features of a Model Law on International Commercial Arbitration*, ¶ 111 (1981) U.N. Doc. A/CN.9/207 (1981) [hereinafter 1981 UNCITRAL Report].

[238] *Id.*; UNCITRAL Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards, Rep. of the U.N. Comm'n on Int'l Trade L. on Its Forty-Seventh Session, ¶ 15 (Oct. 2014), U.N. Doc. A/CN.9/814. This has also been confirmed in the United States. See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997).

In contrast, the LOA applies to both international and domestic arbitration[239] and there has been some confusion as to how these two provisions relate to each other in the domestic context. There was a case in the Tbilisi Court of Appeals where the court did not find any public policy violations and enforced the award.[240] After enforcement, the defendants submitted an application to the same court to set aside the award. The court, in considering the set-aside application, held that the award's penalty provisions were in violation of public policy and were partially stricken.[241] The defendant was effectively allowed a second bite at the apple, despite the fact that the Court's first decision on recognition and enforcement was final and not appealable.[242] This clearly undermines the finality principle.

In response to this case and others, the 2015 LOA Amendments added a special sub-section to the setting aside provisions that instructs courts to dismiss any complaints if the requested grounds for setting aside were the same grounds rejected in an earlier claim for refusal of recognition and enforcement.[243] A parallel sub-section was also added to the recognition and enforcement provisions precluding unsuccessful claims made in prior setting aside proceedings.[244] While the *res judicata* doctrine in Georgia is beyond the scope of this article, it is perhaps indicative of the level of judicial confusion that the LOA needed to be amended to provide specific issue preclusion instructions to the courts.

4. International Awards

In connection with international arbitration, the passage of the LOA has brought Georgia into full compliance with the requirements of the New York Convention.[245] The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. In Georgia, it entered into force on August 31, 1994.[246] Over 140

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[239] Almost half of the states that adopted the Model Law adopted it for both domestic and international arbitration. BINDER, *supra* note 142, at 27.

[240] Tbilisi Court of Appeal Case No. 2B/1262-11 (May 4, 2011).

[241] Tbilisi Court of Appeal Case No. 2B/1638-11 (July 12, 2011).

[242] Georgia CIV. PROC. C., *supra* note 107, art. 356[21](6); s*ee also* Japaridze, *supra* note 66, at 241-42 (discussing Georgian Supreme Court decision supporting the finality of a lower court decision on setting aside).

[243] LOA Amendments, *supra* note 107, art. 1(17); LOA, *supra* note 103, art. 42(5). The Explanatory Letter indicates that the drafters sought to prevent the Court of Appeals from continuing to issue "mutually contradictory decisions on one and the same ground [sic]." Explanatory Letter, *supra* note 124, § (a)(a.c.).

[244] LOA Amendments, *supra* note 107, art. 1(20); LOA, *supra* note 103, art. 45(2).

[245] New York Convention, *supra* note 8.

[246] *Id.*; Status, Convention on the Recognition and Enforcement of Foreign Arbitral

countries have ratified the agreement, including all of Georgia's main trading partners.

Under the New York Convention, Georgia must enforce foreign arbitral awards. However, until the new LOA was passed, there was no clear method of enforcement. Now that the LOA is entered into law, there is a clear legal framework for the enforcement process. As Article 44 states, "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and . . . shall be enforced . . . ." [247] This convention and its related international enforcement regime is one of the primary reasons why international businesses prefer arbitration to litigation.[248] In the event of a dispute, they can be assured that the award will be enforceable almost anywhere in the world. Now that Georgia is part of this enforcement regime, international businesses should be more willing to invest in Georgia. It appears that the Georgia Supreme Court is willing to enforce foreign arbitral awards under the LOA and New York Convention, although it has added a requirement (contrary to those laws) that the moving party show proof that the award was not previously enforced in the country of arbitration.[249]

Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 23, 2015).

[247] LOA, *supra* note 103, art. 44.

[248] *See* Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices–12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525, 538 (2004). In contrast, litigation awards remain very difficult to enforce internationally. The new Convention on Choice of Court Agreements does allow for the recognition and enforcement of choice of forum clauses and resulting judgments in commercial disputes among signatory countries. The Hague Convention on Choice of Court Agreements, Hague Conference on Private International Law, June 30, 2005, 44 I.L.M. 1294, http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited Oct. 19, 2015). However, the Convention's geographic reach is limited—only Mexico and recently the EU (including EU Member States except Denmark) have ratified it, and the treaty entered into force on October 1, 2015. *See* European Union Press Release, 432/15, Council of the European Union, Justice and Home Affairs (June 11, 2015), http://www.consilium.europa.eu/en/press/press-releases/2015/06/11-hague-convention/ (last reviewed July 8, 2015).

[249] *See* Sophie Tkemaladze & Inga Kacevska, *Procedure and Documents Under Articles III and IV of New York Convention on Recognition and Enforcement of Arbitral Awards: Comparative Practice of Latvia and Georgia*, 1 EURASIAN MULTIDISCIPLINARY FORUM 7 (October 24-26, 2013) [hereinafter Tkemaladze, *Procedure*] (citing Case No. a-548-sh-10-11 and Case No. a-3573-sh-73-2012, both available at www.supremecourt.ge). This extra proof or double exequatur was abolished under the New York Convention. Albert Jan van den Berg, The New York Convention of 1958: An Overview, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 17, http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited Feb. 23, 2015). Tkemaladze believes that this practice will harm Georgia's international reputation. Tkemaladze, *supra*, at 8.

5. Public Policy

A Georgian court may set aside or refuse recognition and enforcement of an award if it is contrary to public policy,[250] although that term is not defined. The Model Law drafters stated that public policy covers "fundamental principles of law and justice in substantive and procedural respects."[251] There is also consensus that the exception is to be employed sparingly in only the most egregious cases.[252]

Before the LOA, there was limited judicial experience in Georgia with public policy issues in relation to arbitration.[253] Today, this exception has become an important part of the Georgian arbitration landscape. Georgian courts frequently set aside or alter awards on public policy grounds. The most common public policy question in Georgia arises from contractual penalties in the form of high interest rates.[254] In one case, the Tbilisi Court of Appeals held that an award was contrary to public policy where it contained penalties in excess of five to six percent annually.[255] Instead of refusing recognition and enforcement, the court recognized and enforced part of the award, effectively reducing the penalty portion of the award by over 40%.[256] In another lender penalty interest case, the

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[250] LOA, *supra* note 103, arts. 42(1)(b)(b.b.); 45(1)(b)(b.b.).

[251] U.N. Comm'n on Int'l Trade L., Rep. on the Work of its Eighteenth Session, ¶ 297, U.N. Doc. A/40/17 (1985) [hereinafter 1985 UN Report]. There appears to be consensus that the public policy exception generally covers both procedural and substantive justice, following the broad civil law *ordre public* concept, rather than the narrower common law construct. *Id.* ¶ 296-97; Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 ARB. INT'L 333, 334 (2004).

[252] The most-quoted explanation is from Parsons & Whittmore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier RAKTA and Bank of America, where the court held that enforcement of a foreign arbitral award may be denied due to public policy under the New York Convention "only where enforcement would violate the forum state's most basic notions of morality and justice." 508 F. 2d 969, 974 (2d Cir. 1974).

[253] LOPA, *supra* note 67, contained no public policy exception for judicial review of arbitral awards. The Soviet system also had no real experience with judicial enforcement of arbitral awards since the Soviet enterprises voluntarily complied with most awards. *See* Vesselina Shaleva, *The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia*, 19 ARB. INT'L 67, 79-85 (2003).

[254] Tkemaladze, *New Law*, *supra* note 72, at 669.

[255] TSERTSVADZE, COMMENTARY, *supra* note 76, at 205 (citing Tbilisi Court of Appeals materials and Tbilisi Court of Appeals Case No. 2B/1452-11 (June 22, 2011)).

[256] *Id. See also* Tkemaladze, *New Law*, *supra* note 72, at 669 (citing Basis Bank v. Kapanadze, Tbilisi Court of Appeals Case No. 2B/1604-11 (May 31, 2011) (court found penalty rate of 0.1% per day excessive and reduced award to two percent per month)). *Contra* Inter Maritime Management SA v. Russin & Vecchi, Bundesgericht [BGer] [Federal Supreme Court] Jan. 8, 1995, XXII Y.B. COMM. ARB. 789 (1997)(Switz.) (concluding arbitral award containing violation of Swiss law prohibiting compound interest

Tbilisi Court of Appeals declared a high penalty contrary to public policy and proceeded to re-allocate the award among three different defendants.[257]

There are two problems with the above practice. The first is the failure to define Georgian public policy in connection with arbitration. The courts appear to assume, without any explanation, that any violation of Georgian law on penalty interest constitutes a public policy violation under the LOA. The second is the unauthorized remedies for a violation of that public policy. The authority for the current judicial practice of altering awards is, at best, unclear.[258] Under the LOA, courts are authorized to *refuse* recognition and enforcement if the award violates public policy, but not *alter* the award. One legal body has argued in favor of this kind of judicial flexibility in connection with the public policy exception.[259] However, there is no clear authority for this under the Model Law or the LOA.[260]

In the international context, the Georgian Supreme Court considered the public policy exception in connection with a petition to enforce a Latvian arbitral award. The court stated that "public policy is a fundamental principle in relations governed by the Civil Code."[261] The court analyzed whether a Civil Code provision, limiting a secured creditor's recovery to the amount realized in a sale of the debtor's property, was violated by the Latvian award. It determined that the award did not contradict the debtor protections in the Georgian Civil Code and thus allowed recognition and enforcement.[262] Although the court's dictum *was* limited, it appeared willing to accept that a violation of the Civil Code would automatically constitute a violation of Georgian public policy.

Such a stance would be contrary to international consensus that an award's effect might be in violation of national laws of the enforcement country but *not necessarily* in violation of that country's public policy under the New York Convention and the Model Law.[263] Under these international norms, the

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did not necessarily constitute *public policy* violation).

[257] TSERTSVADZE, COMMENTARY, *supra* note 76, at 206 (citing Tbilisi Court of Appeals Case No. 2B/2828-10 (Nov. 26, 2010)).

[258] Georgian law allows courts to reduce excess penalty interest in civil cases but not necessarily when reviewing arbitration awards. Georgia CIV. C., *supra* note 10710, art. 420.

[259] New Delhi Conference, FINAL REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS, Int'l L. Assoc. Rec. 1(h) (2002).

[260] Under LOPA, courts were allowed to change awards and this may be where the practice originates. LOPA, *supra* note 67, art. 43.

[261] JSC "P" v "L" LLC*,* case a-492-sh-11-2012, at 4, Supreme Court of Georgia (2012).

[262] *Id.*

[263] Giuditta Cordero-Moss, *International Arbitration is Not Only International*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 7, 21 (Giuditta Cordero-Moss ed., 2013). In Scherk v. Alberto-Culver Co., the U.S. Supreme Court recognized that there was a narrower public policy construct under the New York Convention, and enforced an international arbitral agreement acknowledging that the same

court must undertake a second-level analysis to determine whether the violation of national law rose to the level of a violation of basic morality and justice.[264] For example, a Swiss court found that a foreign award containing a violation of Swiss law prohibiting compound interest did not necessarily constitute a public policy violation.[265] The Georgian Supreme Court found no violation of Georgian law in the award so it did not have to make this second-level analysis. It is possible that that particular debtor protection provision implicates Georgian public policy but that would need to be analyzed and explained. It is important that the court understand the limits of the public policy exception and use the appropriate methodology to reach the right results.

V. STATUTORY RECOMMENDATIONS

A. Better Clarity on Scope

The LOA states that it applies to *property disputes of a private character*.[266] More clarity on these terms would improve predictability. Parties may be reluctant to engage in arbitration if there is the threat that a court will set aside or refuse to enforce an award on the basis of arbitrability. Even if these terms are clear to Georgian professionals, foreign parties may have reservations about engaging in arbitration in Georgia if the subject is not clearly a property dispute of a private character.

B. Consider *Ex Aequo Et Bono* and *Amiable Compositeur*

The LOA omits the Model Law's section allowing for the parties to decide a case on the principles of *ex aequo et bono* ("according to the right and good"), or as *amiable compositeur*. Both concepts provide for decisions based upon general principles of equity and justice, without reference to any specific

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such agreement, had it been domestic, would have been against the law. 417 U.S. 506 (1974). The public policy exception does not exist to ensure full compliance with the court's legal system. Cordero-Moss, *supra*, at 21-22.

[264] *See* ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKBY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.109, 11.111-.112 (2009); Dirk Otto & Omala Elwan, *Article V(2), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 365 (Herbert Kronke & Patricia Nacimiento eds., 2010).

[265] Inter Maritime Management SA v. Russin & Vecchi, [BGer][Federal Supreme Court] Jan. 8, 1995, XXII Y.B. COMM. ARB. 789 (1997)(Switz.).

[266] LOA, *supra* note 103, art. 1(2).

national or international legal provisions.[267] They allow for flexible and fair results that might be difficult under governing law.[268] For instance, *amiable compositeurs* can limit the effects of a contractual penalty clause and balance the financial interests of the parties.[269] Both concepts have gained acceptance internationally[270] and might be a useful tool for certain disputes where the parties have unequal bargaining power, such as employer-employee disputes,[271] or where the parties seek to preserve a relationship.[272] While these concepts may be foreign to Georgian practitioners, the idea of designing awards based on equity and fairness are not. The parties should have this as an option.

C. Alter the Requirement to Consider Industry Practices in Awards

The LOA follows the Model Law in requiring the tribunal to take into account usages and practices of trade. There are obviously sound reasons for this.[273] It is particularly relevant for international arbitration.[274] However, there may be domestic cases of unequal bargaining power where usages and practices of the trade are stacked against the individual. For instance, it may be normal practice to provide limited redemption rights or to impose penalty interest on borrowers. If the tribunal is not forced to consider industry practice, it may be able to provide a more equitable result for the individual.[275] The LOA should be amended to remove this requirement for consumer arbitration.

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[267] *See* Trakman, *supra* note 207; Yu, *supra* note 207; *see also* Laurence Kiffer, *Nature and Content of Amiable Composition*, 5 INT'L. BUS. L.J. 625 (2008).

[268] Kiffer, *supra* note 267, at 630-33.

[269] *Id.* at 631-32.

[270] The concept of *ex aequo et bono* has spread all over the world. *See* Trakman, *supra* note 207, at 631-32; Mark Hilgard & Ana Elisa Bruder, *Unauthorised Amiable Compositeur?,* 8 DISP. RES. INT'L 51 (2014).

[271] Trakman, *supra* note 207, at 623 n.8.

[272] *Id.* at 624.

[273] *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND.J.TRANSNAT'L L. 79 (2000).

[274] *Id.* at 110-32; Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic Versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 181, 181 (2004).

[275] There is a school of thought that questions the appropriateness, in general, of incorporating commercial norms into commercial law. *See, e.g.,* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1995) (arguing commercial norms for relationship preservation are inappropriate for end-game adjudication).

D. Promote the Remission Process

Georgian courts appear to be modifying and then enforcing awards under the public policy exception. This has a dubious legal foundation and encourages tribunals to be somewhat improvident in their award construction. If the court can simply modify the award to comply with any legal infirmities, there is no real consequence for the tribunal or the arbitration provider. It would be better if the tribunal were allowed to remedy its own mistakes. A more robust remission process would improve matters because it is better to remit than to have the courts modify the offending awards themselves.

The original LOA Article 44(3) allowed for the enforcement court to suspend proceedings for up to 30 days,[276] but was stricken in the 2015 LOA Amendments.[277] This could be brought back in an expanded form that includes remission powers. Under the old Article 44(3), Georgian courts occasionally acted as though this power existed.[278] This proposed change would place the courts' remission practice on firmer statutory grounds. It would promote the rule of law and respect for the tribunals, lead to improved arbitral awards and preserve arbitration autonomy.

E. Streamline Enforcement for Foreign Awards

The Georgian Supreme Court appears to have added, in practice, an extra requirement for parties seeking to enforce a foreign arbitral award. The party must show that the award was not previously enforced in the host country.[279] This is contrary to the intentions of the Model Law and Georgia's commitments under the New York Convention. Even the LOA has no such requirement.[280] Unfortunately, there is no easy remedy—one cannot lecture the Supreme Court. But an amendment to the LOA could make clear that the technical requirements for recognition and enforcement in Article 44 are exclusive and cannot be expanded.

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[276] LOA, *supra* note 103, art. 44(3). This is not found in the Model Law.

[277] LOA Amendments, *supra* note 107, art. 1(19) ("article 44(3) is deleted").

[278] *See* TSERTSVADZE, COMMENTARY, *supra* note 76, at 113 n.407.

[279] *See* Tkemaladze, *Procedure*, *supra* note 249, at 7-8.

[280] Article 44(2) sets forth the technical filing requirements. LOA *supra* note 103, art. 44(2).

F. Clarify Public Policy

An effort should be made to clarify the parameters of Georgian public policy in connection with arbitration. This could be accomplished through legislative action or a special judicial task force. Although such clarification would not be easy, more clarity on public policy would promote predictability and limit judicial incursions into the arbitration regime.

VI. SOLUTIONS TO THE MANDATORY ARBITRATION PROBLEM

Mandatory arbitration is a large part of the Georgian arbitration system. While mandatory arbitration offers potential benefits for firms, such as faster and cheaper dispute resolution,[281] it also has significant drawbacks. When a consumer waives her rights to court, she may lose important procedural safeguards, such as discovery or publicly-financed legal assistance. Moreover, the individual loses the opportunity for public vindication or retribution.[282] In addition, arbitration privacy prevents the public from learning about a party's bad actions[283] and reduces the likelihood of remedial regulatory action.[284] Arbitration privacy can limit public awareness of important social issues[285] and remove the deterrent effect of a public judgment on other entities.[286] Arbitrators themselves have limited accountability due to the private nature of their work, their immunity from judgment, and their limited court involvement. [287]

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[281] Mandatory arbitration has its defenders. *See, e.g.,* Jason Scott Johnson, *The Return of Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001); Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 MAINE L. REV. 531 (2010).

[282] George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 685 n.131 (2013).

[283] Schmitz, *Privacy*, *supra* note 205, at 1232.

[284] Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & CIV. RTS. L. REV. 123, 145 (2010).

[285] *Id.* at 146.

[286] Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 431 (1999).

[287] Although, in Georgia, arbitrators are not immune from criminal liability for willful behavior. *See* TSERTSVADZE, COMMENTARY, *supra* note 76, at 115 (citing Article 332 of the Georgian Criminal Code).

One notable issue is the *repeat player* problem. The premise is that for-profit arbitral centers[288] compete with one another for the companies' repeat dispute resolution business.[289] Because these companies are drafting the agreements, the providers have an incentive to offer products more favorable to them.[290]

The products that these providers offer to their clients may intentionally or unintentionally provide an advantage to their clients. An example of intentional bias would be the marketing of arbitral providers to businesses promising a pro-business product,[291] and the removal of individual arbitrators from the provider's list for failure to issue business-friendly awards.[292] An example of unintentional bias is the natural business and social friendships that come with a long-term, ongoing business relationship between the provider and its corporate clients.[293] Another example is the repeated use of industry insiders as arbitrators. Although neutral expertise is viewed as one of arbitration's advantages, the insider may have a general bias in favor of the industry.[294] Moreover, the expert will want to continue to receive arbitrator appointments (from the arbitration provider or the corporate party), and may consider this in her decision making.[295]

The Model Law and LOA assume that parties enter into an arbitration agreement as a product of their free will.[296] Yet, this consent is problematic when a consumer is forced to agree to arbitration as part of a standard form contract.[297]

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[288] Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L. J. 2346, 2356 (2012); Jeff Guarrera, *Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability*, 40 W. ST. U. L. REV. 89, 93 (2012).

[289] See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005). .

[290] *Id.*

[291] Farmer, *supra* note 288, at 2359.

[292] *Id.*

[293] *See, e.g.*, Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 217 (2007).

[294] *See* Guarrera, *supra* note 288, at 93-94 ("Prosecutors do not get to choose judges who worked as prosecutors.").

[295] *See* Farmer, *supra* note 288, at 2357; Guarrera, *supra* note 288, at 93-94; Satz, *supra* note 284, at 143. *See also* Alexander O. Rodriguez, *The Arbitrary Arbitrator: The Seventh Circuit Offers a Lending Hand* [Green v. U.S. Cash Advance Ill. LLC, 724 F.3d 787 (7th Cir. 2013)], 53 WASHBURN L.J. 617, 636 (2014) ("Because arbitrators compete for clients, it is imperative that they develop a strong brand and reputation in certain industries.").

[296] *See* 1981 UNCITRAL Report, *supra* note 237, at 78 ¶ 18.

[297] *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Padis, *supra* note 282, at 684. *See generally* Alan Scott Rau, *Arbitral Jurisdiction and Dimensions of 'Consent,'* 24 ARB. INT'L 199 (2008) (discussing consent in commercial arbitration).

The consumer has no bargaining power when a business presents the pre-dispute arbitration clause on a take-it-or-leave-it basis.[298] The consumer may not even be aware that she has waived her rights of access to the judicial system.[299] Moreover, most consumers do not think about future disputes when purchasing products. Even if they did, they would not fully understand the risks.[300]

The parties are also in unequal positions during the arbitration process. The repeat corporate client, unlike the one-time individual, can evaluate the relative favorability of its past arbitrators and choose accordingly.[301] This informational asymmetry is compounded by an experiential asymmetry. The corporation's attorneys, unlike the individual, choose the forum and rules, and gain practical experience, learning from mistakes.

These repeat player abuses were heavily publicized in July 2009, when the National Arbitration Forum (NAF), one of the largest providers in the United States, was forced to exit the consumer arbitration business.[302] Three days later, the American Arbitration Association voluntarily suspended all consumer debt arbitration.[303] These events help promote legislative efforts to limit mandatory consumer arbitration in the United States, similar to limitations in the European Union.[304] Despite this, the incidence of mandatory arbitration for U.S. consumers

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[298] Padis, *supra* note 282, at 684; Farmer, *supra* note 288, at 2359; David S. Swartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 57-59. *But see* Steven J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington and Haagen),* 29 MCGEORGE L. REV. 195 (1998).

[299] *See* Sternlight, *supra* note 289, at 1648. Behavioral science studies have found that consumers are "boundedly rational" and can only take a few product attributes into account when making a decision. Since arbitration is usually not among these considered attributes, corporate drafters have an incentive to include them in their standard terms. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

[300] Consumers will usually assume that events of remote likelihood will not happen to them and will thus underestimate the associated risks. Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561 (1977). This has been called "hyperbolic discounting." Benjamin A. Malin, *Hyperbolic Discounting and Uniform Savings Floors*, 92 J. PUB. ECON. 1986 (2008).

[301] Schmitz, *Privacy*, *supra* note 205, at 1232; Satz, *supra* note 284, at 143.

[302] Rob Gordon, *Binding Pre-Dispute Agreements: Arbitration's Gordian Knot*, 43 ARIZ. ST. L.J. 263, 263 (2011).

[303] Press Release, Am. Arb. Ass'n, The American Arbitration Association® Calls For Reform of Debt Collection Arbitration: Largest Arbitration Services Provider Will Decline to Administer Consumer Debt Arbitrations until Fairness Standards are Established (July 23, 2009), https://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit3.pdf (last visited Oct. 7, 2015).

[304] U.S. efforts from 2007-2015 have centered on an Arbitration Fairness Act (AFA), which has yet to pass into law. For comparisons of current U.S. and EU consumer protections in this area, see Jon Fischer, C*onsumer Protection in the United States and*

is increasing,[305] and it remains prevalent in many consumer areas.[306] Thus far, empirical studies on mandatory arbitration for U.S. consumers have yielded mixed results.[307]

In Georgia, the use of mandatory arbitration in consumer contracts appears to be widespread.[308] Georgian consumers are no more likely to consider or understand arbitration clauses or bargain them away than American consumers. Many of the repeat player effects may also be present. The Georgian arbitration providers are for-profit entities, competing for repeat business from corporate

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European Union: Are Protections Most Effective Before or After a Sale?, 32 WIS. INT'L L.J. 308 (2014); Amy Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81 (2013) [hereinafter Schmitz, *Exceptionalism*]; Tilman Niedermaier, *Arbitration Agreements Between Parties of Unequal Bargaining Power–Balancing Exercises on Either Side of the Atlantic*, 39 ZDAR 12 (2014). Some European scholars have discussed whether these arbitration provisions implicate Article 6(1) of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial by an independent and impartial tribunal. William Robinson & Boris Kasolowsky, *Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?*, 18 ARB. INT'L 453 (2002); *but see* Neil McDonald, *More Harm than Good? Human Rights Considerations in International Commercial Arbitration*, 20 J. INT'L ARB. 523, 537 (2003). Georgia ratified the ECHR in 1999. *See* GEORGIA, PRESS COUNTRY PROFILE, EUROPEAN COURT OF HUMAN RIGHTS (Jan. 2015), http://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf (last modified Jan. 2015).

[305] *Arbitration Study—Report to Congress, Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FINANCIAL PROTECTION BUREAU (March 2015), Section 2, 11-13, 15-17, 20), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (last visited Oct. 19, 2015) [hereinafter *Arbitration Study*]. The Consumer Financial Protection Bureau (CFPB) conducted the *Arbitration Study* pursuant to § 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010) [hereinafter Dodd-Frank].

[306] *Arbitration Study*, *supra* note 305, at Section 1, 9-10.

[307] For examples of studies showing repeat player and other bias in mandatory consumer arbitration, see Gordon, *supra* note 302, at 273; John O'Donnell, PUBLIC CITIZEN, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 15 (2007), http://www.citizen.org/documents/Arbitration Trap.pdf (last visited Sept. 13, 2015). For examples tending to disprove bias or argue that arbitration results are no better than litigation for consumers, *see* Jacobs, *supra* note 281, at 538-40 (reviewing empirical studies to date); SEARLE CIVIL JUSTICE INST., *Consumer Arbitration Before the American Arbitration Association* 109-13 (2009), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010205 (last visited Sep. 13, 2015) [hereinafter SEARLE Study]. *See also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study on AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010) (finding evidence of repeat player effect from better case screening of repeat players not from bias).

[308] For many of the providers, mandatory consumer arbitration represents the majority of their cases. Tkemaladze, *New Law*, *supra* note 72, at 668-69.

clients.[309] Some providers even offer discounted fees for corporate clients.[310] Most providers administer consumer arbitration with a single arbitrator, chosen by the center.[311] There is a limited pool of qualified Georgian arbitrators, which increases the likelihood of repeat player issues.[312] Most troubling, the largest numbers of cases are related to financial or insurance companies collecting debts against consumers,[313] the area of greatest abuse in the United States. While there is no evidence to suggest that Georgian arbitration providers or arbitrators are engaging in anything illegal, the incentives appear to be stacked against the consumer. One of the largest Georgian providers admitted to having a 100% win rate for its bank clients.[314] Georgian law does not provide for personal bankruptcy protection, so many of these collection awards can stay with borrowers for life.[315]

A. Arbitrability

To protect weaker parties, Georgia could limit arbitrability by legislating to exclude certain groups or types of disputes from arbitration.[316] For instance, the legislation could exclude any disputes relating to the collection of a consumer debt in connection with a credit card or bank loan. The advantage of this approach is simplicity—the public would understand that these disputes are not arbitrable. The United States took this approach in the Dodd-Frank Act, which excludes

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[309] *Id.* at 668 (noting all providers are commercial entities).

[310] A highly regarded Georgian arbitration center has this provision in its rules (its English translation):

> On the base of contract concluded between DRC and corporative client (client which considers arbitration clause in contracts concluded in the range of his business and indicates DRC as line item actual arbitration), *for disputes related to corporative client may be determined different amounts of arbitration charge and different terms of their payment other than those stipulated under these Regulations.*

DRC ARBITRATION RULES, *supra* note 128, art. 29.20 (emphasis added).

[311] TSERTSVADZE, COMMENTARY, *supra* note 76, at 104.

[312] *See* Satz, *supra* note 284, at 147-48 ("The limited obtainability of arbitrators makes it more likely that the available arbitrators have heard multiple cases within a given industry and also more likely that the arbitrators have heard multiple cases from the same company.").

[313] Michael D. Blechman, *Assessment of ADR in Georgia*, EAST WEST MANAGEMENT INSTITUTE at 4-6 (Oct. 2011), http://www.ewmi-jilep.org/images/sstories/books/assessment-of-adr-in-georgia.pdf (last visited Sept. 13, 2015).

[314] *Id.* at 4.

[315] *Id.*

[316] One Georgian scholar has recommended an arbitration ban for Georgian consumers. Tkemaladze, *New Law*, *supra* note 72, at 671.

mandatory arbitration clauses in consumer mortgage contracts,[317] and the Arbitration Fairness Acts, which ban pre-dispute arbitration agreements in employment, consumer, antitrust, and civil rights disputes.[318] France bars pre-dispute mandatory arbitration clauses in consumer contracts.[319] Germany prohibits disputes relating to residential leases and employment matters.[320] And England bans arbitration if the amount in controversy is less than £5,000.[321]

Yet, under this approach a state loses the benefits of arbitration. Businesses will likely incur increased costs, which either reduces their profitability or is passed on to consumers in the form of higher prices.[322] It also foists all these disputes back on the court system, increasing case congestion and resolution time.[323] Instead of knowledgeable experts, generalist judges would try the disputes. Moreover, as some studies indicate, it is not clear that consumer outcomes improve in litigation.[324] Collection matters constitute the majority of

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[317] Dodd-Frank, *supra* note 305, 15 U.S.C. § 1639c(e) (2010). *See also* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 907 (2013) ("Dodd-Frank bans mandatory arbitration provisions in mortgage and home equity loan contracts.").

[318] Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013-2014), C.R.S., https://www.congress.gov/bill/113th-congress/senate-bill/878 (last visited Oct. 7, 2015). *See generally* Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT. RESOL. 267 (2008); Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?,* 94 IOWA L. REV. 1075 (2008); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011).

[319] Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response,* 47 AM. BUS. L.J. 361, 391 (2010) (citing French laws); Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons From Abroad*, 65 DISP. RESOL. J., 30, 34 (2010) (citing French laws).

[320] Niedermaier, *supra* note 304, at 17 (citing Zivilproziessordnung [ZPO] [Code of Civil Procedure] Jan. 30, 1877, Reichsgesetzblatt [RGBt] 97, as amended, §§ 1025 *et seq.,* http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last visited Sept. 13, 2015)).

[321] Schmitz, *Exceptionalism*, *supra* note 304, at 98 (English Arbitration Act of 1996 bars pre and post-dispute arbitration clauses to protect individuals' access to small claims courts).

[322] *See* Ware, *supra* note 281 (arbitration lowers business costs and competition forces businesses to pass on savings to consumers). *But see Arbitration Study*, *supra* note 305, at sections 10, 16-17 ("[W]e did not find statistically significant evidence to support the hypothesis that companies realize and pass cost savings relating to their use of pre-dispute arbitration clauses to consumers in the form of lower prices").

[323] Georgian arbitration proceedings averaged one to three months compared to one year in the courts. Blechman, *supra* note 313, at 4.

[324] *See, e.g.*, SEARLE Study, *supra* note 307. Litigation may also have some of the same repeat player biases that are found in mandatory arbitration. Marc Galanter, *Why the*

the cases and success rates for these types of cases are generally high in courts, too.[325] Finally, it might deal a crippling blow to Georgian arbitration generally. It could irrevocably harm the reputation of arbitration, putting many of the providers out of business and reducing arbitration's availability in other legal matters.

B. Form Requirements and Judicial Review

Another possible solution is to introduce form requirements in consumer contracts and allow for expanded judicial review and increased consumer awareness. For instance, German consumer arbitration agreements must be isolated in a separate document that is signed by both parties.[326] In the United States, this kind of requirement is not permissible in most contracts.[327] However, the CFPB is empowered to study consumer arbitration in financial agreements and may issue form requirements, among other regulations, in the future.[328] Among the clauses the CFPB is reviewing are opt-outs,[329] carve outs,[330] fees and cost allocations,[331] and disclosures.[332]

Judicial review is the natural extension of form requirements. EU Council Directive 93/13/EEC (Council Directive 93) has played an important role in this regard.[333] Council Directive 93 declares any mandatory arbitration clause in a consumer contract presumptively unfair.[334] While these clauses are not formally excluded, subsequent European Court of Justice decisions have held this

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Haves Still Come out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974) (arguing litigation system benefits repeat players). *See also* Gordon, *supra* note 302, at 274-5 (arguing litigation has tilted playing field against consumers).

[325] *See* Gordon, *supra* note 302, at 282 (citing various empirical studies in the United States).

[326] Niedermaier, *supra* note 304, at 18; ZPO, *supra* note 320, § 1031(5).

[327] *See* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 545-47 (2005).

[328] *See Arbitration Study*, *supra* note 305.

[329] *Id.* at Section 2, 31 (consumer is given limited time to submit notice of opting out of arbitration agreement).

[330] *Id.* at Section 2, 32 (certain types of claims are "carved out," from, or not subject to, arbitration agreement).

[331] *Id.* at Section 2, 57 (attorney's fees and costs contractually allocated among parties).

[332] *Id.* at Section 2, 51 (contract discloses risks of arbitration such as limited appeals).

[333] Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29-34.

[334] *Id.* art. 3(1), Annex.

to be part of public policy and must be reviewed by the EU national courts *sua sponte*, for fairness and compliance with Council Directive 93.[335]

One problem with form requirements, and their attendant expansion of judicial review, is increased costs. Allowing expanded judicial review in each individual case would lead to longer resolution times and undermine the important arbitration principle of finality.[336] Furthermore, without the common law device of *stare decisis*, there may be inconsistent results from different Georgian judges. This would lead to uncertainty and would make it difficult for drafters to craft valid agreements. The Georgian judiciary is still adjusting to the LOA and its limited court intervention norms. Expanded judicial review would reverse that trend and cause confusion.

C. The "DAL" solution

The best solution involves a combination of measures designed to improve arbitration without excluding consumers. The solution focuses on three areas: disclosure, appointment, and licensing (DAL).

1. Disclosure

Arbitration providers should be required to disclose a limited amount of basic data regarding mandatory arbitration. Information could include: (i) the identity of the non-consumer party; (ii) the type of dispute; (iii) the identity of arbitrator(s); and (iv) the result. Ideally, providers would make this information public on websites or upon request. At a minimum, it would be submitted to the appropriate public agencies, including an Independent Appointing Authority (IAA, discussed below). California recently enacted a similar disclosure regime[337] to positive effect.[338] Although disclosure alone will not change consumer behavior, it would promote transparency and improve tribunal behavior.[339] It would allow the public to assess whether there is a systemic problem with a particular provider. It might even shame some companies into avoiding a suspect

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[335] Niedermaier, *supra* note 304, at 18.

[336] Farmer, *supra* note 288, at 2363-64.

[337] *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2015).

[338] It allowed for the public to better study how arbitration was working. *See, e.g.*, Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNS. 32 (July 2006), http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf (analyzing results of arbitration data made available due to disclosure rules).

[339] On the other hand, some may continue to proudly market their services as business-friendly.

provider. It would also provide information to the IAA about possible impartiality and help arm individuals with better information during the appointment process.

2. Appointment

The LOA follows the Model Law rules on arbitrator appointment. They are appropriate for international arbitration and domestic arbitration between commercial actors.[340] However, the appointment process needs to be modified for mandatory consumer arbitration where the sole arbitrator is appointed by the provider. Fairness demands that the sole arbitrator be truly neutral and impartial. The law should improve arbitrator impartiality by removing the provider from the appointment process. The LOA already provides a partial solution: when there is one arbitrator, the parties must try to agree on the appointment, and if they fail to agree, a party may request court appointment.[341] This is in effect unless the parties have agreed to a different process. One solution is to remove the option for parties to agree otherwise and make this the required appointment rule for consumer arbitration.[342] Court appointment does have drawbacks. Courts are not involved with arbitration on a regular basis and may not have the ability to choose the most suitable arbitrator.[343] Courts are also busy, and the wheels of justice may take a long time to effect the appointment.[344] Finally, according to one expert, Georgian courts have been reluctant to engage in the appointment process.[345]

A better default solution, if the parties cannot agree, is to direct the appointment burden to an (IAA). The IAA could be a person or an institution, such as the President of the Georgian Bar Association or the GBA itself.[346] It could be the Georgian Arbitration Association or an outside organization. Or, it could be a specially trained and designated authority appointed by the Ministry of Justice. The main point is to remove the appointment authority from the compromised institutions. The 2015 LOA Amendments expanded the appointment authorities to include not only courts but also "any institution," so the law is already moving in this direction.[347]

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[340] One local expert has recommended moving to joint-selection of Georgian arbitrators. Giorgi Narmania*, Party-Appointed Arbitrators: Past, Present and Future*, 2014 ALT. DISP. RESOL. Y.B. TBILISI ST. U., 106, 120-21.

[341] LOA, *supra* note 103, art. 11(3)(b).

[342] Gordon*, supra* note 302, at 285 (recommending court and joint approval appointment for consumer arbitration).

[343] Akseli, *supra* note 125, at 252.

[344] *Id.*

[345] *See* TSERTSVADZE, COMMENTARY, *supra* note 76, at 105-06.

[346] *See* Alan Redfern & Martin Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 200 (3d ed. 1999).

[347] *See* Explanatory Letter, *supra* note 124, § (a)(a.c.) ("another change related to

In order to preserve the party autonomy principle, the list system of appointment should be employed. The American Arbitration Association and other fora use the list system.[348] Under the UNCITRAL Model Arbitration Rules, for instance, if the parties cannot agree on a sole arbitrator, the appointing authority provides each party with an identical list of potential arbitrators.[349] Each party has a limited period of time to return the list with the names it has deleted (without cause),[350] ranking in preference the remaining names.[351] The authority then makes the appointment based on the parties' preferences.[352] If there are no common names from the two sides' returned lists, the authority makes the appointment at her discretion.[353] Although the list system is slower than direct provider appointment, it gives the parties an opportunity to express their choice and feel part of the process—an important principle that is missing from Georgian consumer arbitration.[354] The list system also guards against the actual or perceived impartiality of the IAA. It mitigates the repeat player problem because providers do not control the arbitrator list and arbitrators do not have an incentive to assist the institutional parties. It will also improve public perceptions of arbitration.

There are two disadvantages to empowering an IAA. First, it will slow down the process when compared to direct provider appointment, especially if a list system is employed.[355] But the gains in fairness, and perceptions thereof, might be worth the increased time spent on appointment. Second, it will not be popular with the providers as they will lose control of arbitrator appointment.[356]

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rules of appointment of an arbitrator(s) specifies that arbitrators may be appointed not only by a court but also by any institution (if the parties have agreed so)").

[348] *See, e.g.*, AAA RULES, *supra* note 142, at R. 12 (2013).

[349] G.A. Res. 65/22, UNCITRAL Arbitration Rules, art. 8 (2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Oct. 7, 2015) [hereinafter UNCITRAL Arb. Rules].

[350] In the United States, the striking of a name (without cause) is sometimes called a *peremptory challenge*.

[351] UNCITRAL Arb. Rules, *supra* note 349, art. 8(2). The number of peremptory challenges (not challenges for cause) could be limited so that there is a higher likelihood of at least one mutual name, thus reducing the chances of having the appointing authority step in to make the appointment. *See, e.g.*, AAA *Securities Arbitration Supplementary Procedures*, R. 3(a) (2009), https://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004107~1.pdf. (last visited Feb. 23, 2015).

[352] UNCITRAL Arb. Rules, *supra* note 349, art. 8(2).

[353] *Id.* art. 8(2)(d).

[354] MACNEIL, *supra* note 126, at § 27:3:6:1 (noting importance of parties' equal participation in selection process).

[355] Douglas Earl McLaren, *Party-Appointed vs. List-Appointed Arbitrators: A Comparison*, 20 J. INT'L ARB. 233, 236 (2003).

[356] One alternative is to allow providers to manage the appointment process but mandate a list procedure, open to all licensed arbitrators, and provide a publicly-funded

On the other hand, if these institutions want to continue to receive high-volume consumer cases, this might be the only feasible way for them to continue. The alternative may be a blanket consumer arbitration prohibition. Finally, an IAA might help improve these institutions' reputation, promoting further demand for arbitration in the future.

3. Licensing

Georgia should establish an arbitrator-licensing regime. The Georgian Arbitration Association would be a natural party to administer this program, but it could be handled by the Georgian Bar Association, the National Center for Alternative Dispute Resolution (NCADR), or another well-regarded institution.[357] The main components of this regime would be an entrance test on skills and ethics, continuing education, adherence to strict guidelines on ethics and competence, and a disciplinary procedure. A licensing regime would promote competence and professionalism as well as public confidence.[358] By educating arbitrators on basic mediation skills, the LOA's settlement provision[359] would receive more attention and parties would have better opportunities to restructure their financial relationship in mutually beneficial fashion.[360]

All three components of DAL will work in synergistic fashion. For instance, access to the disclosure information would be important for the IAA to provide parties an arbitration list that is neutral. And, licensing would be an essential quality control device for the IAA arbitrator list.

DAL is designed to improve arbitration, rather than restrict it. This is consistent with the new EU Directive on Alternative Dispute Resolution for Consumer Disputes.[361] DAL promotes public confidence in arbitration, protects consumers from bias, and maintains arbitration's important advantages:

"consumer advocate," who would be empowered to assist consumers with navigating the procedure. This might be more palatable to the providers, although less ideal for consumers.

[357] The NCADR is located at Tbilisi State University. Its website is available at http://ncadr.tsu.ge/eng/2/news/52-ncadr-initiatives-for-business-law-reform (last visited Feb. 23, 2015).

[358] *See* Blechman, *supra* note 313, at 13.

[359] LOA, *supra* note 103, art. 38.

[360] *Cf.* Teo Kvirikashvili, *Med-Arb / Arb-Med and Prospects of Their Development in Georgia*, 2014 ALT. DISP. RESOL. Y.B. TBILISI ST. U. 51 (recommending mediation with arbitration); Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 ARB. INT'L 523 (2005) (discussing windows of settlement opportunity during arbitration).

[361] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes, No. 2006/2004 and Directive 209/22 EC, 2013 O.J. (L 165) 63 (requiring Member States to develop ADR mechanisms for consumer disputes).

efficiency, cost, flexibility, and finality. The solution is less disruptive than a blanket ban or complicated form requirements with unpredictable judicial review.

But DAL is not perfect. Data disclosure entails new recordkeeping costs, although they should be minimal. Disclosure will reduce confidentiality protections, although those protections mainly serve the repeating party. Data disclosure could be coupled with supervisory powers to review and punish cases of systemic bias, however, that would add a layer of complexity to the issue and might not be worth the gains. [362] With disclosure, arbitrators and providers will alter their behavior (to the extent necessary) to avoid the perception of bias or impartiality. Shining a light on the process will have its own tangible benefits.

Taking the appointment process out of the hands of the providers will be tough medicine, but the solution is workable and should not cause significant economic harm to the providers or arbitrators. To the extent that this solution allows mandatory consumer arbitration to survive, it is a benefit to providers when compared to the draconian alternatives.[363] Licensing will also entail some additional costs to administer a gatekeeping process and disciplinary regime. These costs will mostly be paid among the arbitrators so the net effect to them should be minimal. There will be some administrative costs, but they will be worth the price for better, more just arbitration.

VII. CONCLUSION

Despite the country's problematic arbitration history, Georgians continue to look to arbitration to settle their disputes. This is a positive sign. With the recommended changes, the LOA should encourage international investment, promote domestic economic activity and help relieve crowded court dockets. The law represents a substantial improvement when compared to the previous arbitration regimes that Georgians endured, but it remains a work in progress. The law's similarities to the UNCITRAL Model Law provide a familiar framework for many actors.

Most of the law's shortcomings can be addressed through statutory revisions. If the law provides more clarity, there will be less misunderstanding, inconsistency and abuse. Significant issues relate to the role of the courts. Because of their history, Georgian courts are suspicious of arbitral awards,

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[362] *See* Farmer, *supra* note 298, at 2369-93 (recommending provider liability for systemic bias). However, systemic bias would be difficult to define and penalize. Civil liability would also achieve little for Georgian consumers. Georgian law already provides for criminal liability for arbitrators. *See* TSERTSVADZE, COMMENTARY, *supra* note 76, at 115.

[363] *See* Blechman, *supra* note 313, at 14-15 (recommending a ban on *for-profit* providers); Tkemaladze, *New Law*, *supra* note 72, at 671 (recommending restrictions on consumer arbitration).

especially those related to consumers. Some additional adjustments, such as aiding the remission process and clarifying public policy, will help the courts protect parties from abuse without damaging the development of arbitration. The Georgian Supreme Court has proven willing to enforce foreign arbitral awards against domestic firms. With further clarity on public policy, the court's practice could become an excellent example for other developing countries.

The primary threat to arbitration in Georgia and elsewhere is the use of mandatory consumer arbitration. While drastic solutions exist, such as banning the practice or forcing out for-profit providers, a more nuanced approach might make more sense. A solution that balances all stakeholder considerations, and attempts to address the root causes (repeat player and arbitrator appointment problems) is the most likely to be successful.

Other developing countries can learn from Georgia's experience. Arbitration can be a powerful tool that promotes efficiency and economic activity. It can also become a tool that denies individuals' fundamental rights. As Georgia is learning, important consumer safeguards need to be in place for domestic arbitration to meet social needs. Repeat player problems must be addressed at the design stage. The specific roles of courts must be clarified and monitored. Ethics rules should be promoted and enforced at the beginning. Widespread professional education and continuing training appears to be an essential ingredient. With some adjustments, Georgian arbitration can become a model for the developing world.

PREPARING LEGAL ENTREPRENEURS AS GLOBAL STRATEGISTS: THE CASE FOR ENTREPRENEURIAL LEGAL EDUCATION

Justin W. Evans[*] & Anthony L. Gabel[**]

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[*] International Coordinator, College of Business & Entrepreneurship, Fort Hays State University (juwevans@alumni.iu.edu). We thank those participants who provided us feedback on our presentation concerning this paper's topic at Emory Law's Fourth Biennial Conference on Transactional Education, "Educating the Transactional Lawyer of Tomorrow," in June 2014 (Atlanta, Georgia). We are indebted to our panel's moderator, Professor Brian Krumm (University of Tennessee College of Law), to Professor Andrew Godwin (Melbourne Law School, Australia) for his insightful comments, as well as to Professor Sue Payne and Ms. Edna Patterson (Emory Law School) for organizing such a valuable event. Any errors in the paper are solely ours. We thank Dr. Chris Crawford, Dr. Mark Bannister, and Dr. Gregory Weisenborn (Fort Hays State University) for the funding that enabled us to attend the conference. We are indebted as well to the many attorneys and business leaders who spoke with us in China in January 2014, and whose insights are incorporated here anonymously.

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I. INTRODUCTION

A. Overview

This article proposes that although U.S. law schools now enjoy a unique opportunity to train the type of attorney likely to be most globally in demand throughout the twenty-first century—that is, the entrepreneurial lawyer[1]—American law schools have thus far neglected this possibility and are running out of time to establish market leadership in this critical emerging area. Building on prior conceptual and empirical research, this article suggests several means by which U.S. law schools can fully capitalize on the international environment to the benefit of students and society—as well as to their own. By blending entrepreneurship pedagogy with experiential legal education in an explicitly

[1] Of course, many U.S. law schools today offer programs, including LL.M. degrees and clinics, in "law and entrepreneurship"—but these seek to train attorneys to counsel *clients* who are entrepreneurs. *See infra* notes 335-36 and accompanying text. A few programs even train attorneys to be entrepreneurial in the *business of law* (that is to say, to entrepreneurially manage law firms as business units). But no programs appear to train attorneys to take an entrepreneurial approach with respect to the *practice* of law. *See infra* notes 203-04 and accompanying text (discussing these distinctions). In light of America's legal culture and institutions, this sense of legal entrepreneurship may seem far-fetched or unduly risky—but this article endeavors to demonstrate its absolute necessity in the cross-jurisdictional context of today's globalized world. *See generally infra* Part II.

global and cross-cultural context, American law schools can remain at the forefront of their hyper-competitive industry. Although we recommend some reforms to the J.D., our proposals are centered on a new LL.M. degree in Global Legal Entrepreneurship. If U.S. law schools intend for American law to retain its distinguished posture in global business—and if American legal education is to remain relevant even in the United States—we must adapt our law schools to the realities of a globalized, multi-cultural world.

Our recent work argues that entrepreneurial lawyers will be highly valued in the globalized market of the 21st century.[2] Business executives need attorneys who can make significant, proactive contributions to the firm's strategy, particularly in "lower rule of law" jurisdictions permeated by legal flexibilities and uncertainties.[3] Entrepreneurial lawyers approach the legal market as the classical entrepreneur approaches the economic market.[4] In so doing, the entrepreneurial lawyer creates sustainable competitive advantages for the firm.[5] The law itself, then, can serve as a source of competitive advantage in business.[6] The entrepreneurial lawyer seeks out and harnesses the three forms of legal flexibility that exist to one degree or another in every legal system to create these advantages.[7] The exact nature of the opportunities for strategic legal advantage will vary by country and can be described under a business-centric "rule of law" rubric—that is, the extent to which legal flexibilities reallocate business opportunities away from the jurisdiction's economic realm and into its legal realm.[8] Traditionally, lower rule of law environments (which by definition entail higher potential degrees of legal uncertainties, risks, and costs) have been viewed by Western businesspeople and their attorneys in an exclusively negative light. But this type of blanket inference is in error: lower rule of law jurisdictions can in fact be more profitable venues in which to do business *precisely because* legal flexibilities allow for the legitimate utilization of the law to the individual firm's

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[2] *See generally* Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N.C. J. INT'L L. & COM. REG. 333 (2014).

[3] *Id.*; *see also infra* Part II.C. More generally still, there is an increasing recognition among U.S. law schools that graduates must be capable of thinking like business people, and this has led some law schools to incorporate business training into their curricula. *See*, *e.g.*, Natalie Kitroeff, *Lawyers Don't Know Enough about Business*, BLOOMBERG BUSINESS (May 12, 2015, 9:25 AM), http://www.bloomberg.com/news/articles/2015-05-12/law-schools-teach-business-to-make-graduates-more-employable.

[4] *See generally* Evans & Gabel, *supra* note 2. Entrepreneurial lawyers apply their entrepreneurial skills not to the business of running a law firm, but rather to their *practice* of law. *Id*. at 400-01 (discussing this distinction).

[5] *See generally* Evans & Gabel, *supra* note 2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

distinctive competitive advantage.[9] Additionally, a new qualitative data set collected on-the-ground in China appears to corroborate empirically what our previous work posits from the conceptual vantage.[10]

Larry Downes correctly noted that "[l]aw is the last great untapped source of competitive advantage."[11] Significantly, he also observed that "[t]o extract [competitive advantage through the law] … the cultures of law schools and business schools … will have to evolve mighty fast."[12] Yet in the decade since Downes's observation, despite such traumas as the Great Recession, the culture of American law schools has been slow to evolve.[13] This is particularly true with respect to globalization.[14] Though some observers urge that the complexities of the global economy will not increase the demand for new U.S.-trained attorneys even if the overall demand for legal services rises,[15] others have specifically addressed the distinctive value that American-trained lawyers can contribute to clients in other countries armed with "globalized" legal training.[16] This article does not assume that globalization will automatically represent expanded opportunities for American lawyers; indeed, we argue that U.S. attorneys and the law schools that educate them will invariably forego these opportunities unless American legal training is soon reformed.[17] Although the U.S. legal education

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[9] *Id.* Still, the actual realization of the law as a source of competitive advantage requires a skilled legal entrepreneur. This paper's chief concern is how U.S. law schools can train legal entrepreneurs.

[10] *See infra* Part II.C. (discussing empirical evidence of opportunities for legal entrepreneurship in China).

[11] Larry Downes, *First, Empower All the Lawyers*, 82 HARV. BUS. REV. 19, 19 (2004).

[12] *Id.*

[13] *See infra* Part III.

[14] *See* Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL'Y REV. 457, 457-59 (2013) [hereinafter Silver, *Getting Real*] (noting that although globalization now permeates business and the law, law schools have attempted to control its impact to the detriment of both students and the legal education industry).

[15] *See*, *e.g.*, Paul Campos, *The Crisis of the American Law School*, 46 MICH. J. L. REF. 177, 215 n.144 (2012).

[16] *See generally*, *e.g.*, Justin W. Evans, *The Magic Confluence: American Attorneys, China's Rise, and the Global Value Chain*, 18 IND. INT'L & COMP. L. REV. 277 (2008) (arguing that while U.S. attorneys will not automatically benefit from global ties between China and the United States, enterprising U.S. attorneys can benefit if they approach the Chinese market strategically). If there are relatively few U.S. attorneys in global practice it is not for a lack of demand for such lawyers, but rather for the want of a *supply* of such lawyers. U.S. legal education is thus at the very crux of this paper's subject.

[17] Contrary to the fatalistic implication that it is impossible for U.S. attorneys to benefit from globalization in large numbers, we argue that it is indeed possible—probable even—*if* law schools prepare attorneys effectively. This article begins to develop concrete

industry faces one of the most challenging environments in its history[18] and the U.S. legal profession risks the erosion of its stature internationally,[19] the looming consequences of these trends are not inevitable. By better preparing their graduates for the demands of the twenty-first century, American law schools can largely ameliorate or even reverse these trends. One of the key avenues by which this can be accomplished is to prepare lawyers as global and cross-cultural strategists—that is, by preparing entrepreneurial lawyers.

If U.S. law schools are going to continue to thrive, they must offer prospective students greater value. To accomplish this, law schools must train attorneys in nascent areas of opportunity. Cross-border practice is now a widely acknowledged source of opportunity, but another emerging area has garnered less attention: the role of attorneys as business strategists, particularly in cross-jurisdictional and cross-cultural settings. Attorneys who can craft sustainable competitive advantages for clients across cultures and jurisdictions will be among the most successful and highly demanded lawyers anywhere. And the law schools that train these lawyers will be similarly well-suited to the competitive demands of *their* environment. Professor Larry Ribstein has noted that "tomorrow's practitioners may be earning money from academic subjects imported into the law-school curriculum such as philosophy, jurisprudence, psychology, history, linguistics, computer science, and empirical analysis."[20] This article agrees, but proposes that the most significant of these imported areas will be *entrepreneurship*.

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strategies for making preparation of this sort a reality.

[18] *See infra* Part III.

[19] The preeminence of U.S. law schools in attracting the best foreign students is now being challenged, particularly by European and Australian universities. Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 172-75 (2006); *see also* International Section, *Exorbitant Privilege*, THE ECONOMIST, May 10, 2014, at 59 (noting that the dominance of U.S. and English law and lawyers in cross-border business is eroding, particularly with respect to issues concerning choice of law and means of dispute resolution).

[20] Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1666 (2011). Law schools have embraced interdisciplinary initiatives to a relatively high degree for some time; this has enabled law schools to better "help young lawyers identify appropriate roles for themselves within the profession now, and in the future," and "by better making students aware of the array of applications of their law degree in the workforce, law schools will be better able to attract students during both good times and bad." Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47, 56 (1999).

B. Rethinking the Core Functions of Law Schools

"Legal education has traditionally focused on instructing students how to 'think like lawyers' . . . ."[21] Understandably, with few exceptions, this focus has so far been directed almost exclusively toward teaching students to "think like lawyers" within the U.S. context. Counselors in the twenty-first century must indeed "think like lawyers"—but in the context of the cross-cultural, multi-jurisdictional domains of a highly globalized environment.[22]

Professor Hoffman notes that "there has been a long-running internecine war within legal education between those who believe the purpose of law school is to train students in the theory of the law and those who [favor] preparing students for the practice of law," and that theory-advocates have thus far carried the day.[23] Yet "teaching theory" in the law really amounts to training students in a particular method of analysis—an important skill, to be sure, but hardly the only skill that lawyers use.[24] Employers and clients are increasingly expecting new law graduates to possess the practical skills that will enable them "to work in partnership with other professionals and have insights into areas other than law, in order to properly service clients with multilayered and complex issues."[25]

Institutions of higher education now vie for students in a very competitive environment.[26] "Providing students with the analytical skills

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[21] Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699, 700 (2012); *accord* Peter Toll Hoffman, *Teaching Theory Versus Practice: Are We Training Lawyers or Plumbers?*, 2012 MICH. ST. L. REV. 625 (2012).

[22] James R. Maxeiner, *Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 FORDHAM INT'L L. J. 32, 34-35 (2008) ("Our foreign law experts need to know what it means to think like a lawyer in different foreign systems.").

[23] Hoffman, *supra* note 21, at 625.

[24] *Id.* at 626-28. Hoffman notes the Garth-Martin survey of legal skills, in which legal reasoning was one of the top skills used by lawyers in practice, but also that "there were a number of other skills lawyers also considered important and believed they could have been, but were not, taught in law school." *Id.* at 644.

[25] Ross Hyams, *Multidisciplinary Clinical Legal Education*, 37 ALT. L. J. 103, 103 (2012); *accord* Deanell Reece Tacha, *Training the Whole Lawyer*, 96 IOWA L. REV. 1699, 1701 (2012) ("[L]aw schools must do more to prepare students for the actual practice of law").

[26] Robin Anderson, Brooke R. Envick & Prasad Padmanabhan, *A Practical Framework for the Continuous Advancement of Entrepreneurship Education*, 4 AM. J. ECON. & BUS. ADMIN. 65, 65 (2012) (noting that students increasingly must demonstrate complex problem-solving abilities as a condition for stable employment and that universities must respond accordingly to distinguish themselves from their own increasingly sophisticated competitors).

necessary to 'think like lawyers' by teaching them to read and dissect appellate decisions may no longer be sufficient to meet the demands of the legal marketplace,"[27] Professor Cassidy has noted, and yet "[a]lthough all signals presently point toward preparing more 'practice ready' lawyers, how exactly this will be accomplished remains to be seen."[28] We think very highly of Professor Cassidy's proposals, but offer one more: training lawyers to be entrepreneurial, which will involve both theoretical and experiential elements.[29] Significantly, those in favor of empowering law students with practical skills are not arguing against theory, but rather support the merger of "learning to think like a lawyer" with an understanding of how that thought is applied in the service of actual clients.[30] The proposal for entrepreneurial legal training offered in this paper is no less cerebral than the prevailing trends in legal education, as there still is no teacher like experience.

C. The Practical Global Element's Emergence (and Future) in Legal Education

Shortly after World War II, Harvard Law professor David Cavers effectively forecast the rise of entrepreneurial lawyers in the international law realm. "Ordinarily," he observed,

> [I]n discharging [the] counseling function, the lawyer has many avenues to explore, a variety of competing interests to identify and appraise, a number of alternatives to assess in working out ways for the accommodation of these interests. Within limits set by the law and using the instrumentalities it provides, [the lawyer] can seek to establish new patterns of relationships, new processes for preventing or resolving conflicts, new ways of

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[27] R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1516 (2012).

[28] *Id.* at 1517.

[29] *See infra* Part III.

[30] Hoffman, *supra* note 21, at 645. A similar debate has played out in entrepreneurship education. *See generally infra* Part III.D (discussing general precepts of entrepreneurship education). Although some in the entrepreneurship academy have resisted action learning because of its perceived hostility to theory, action learning in fact does not separate theory from practice. Thus, in neither field are proponents of practical education hostile to theory. *See* Claire M. Leitch & Richard T. Harrison, *A Process Model for Entrepreneurship Education and Development*, 5 INT'L J. ENTREPRENEURSHIP BEHAV. & RES. 83, 92 (1999).

> order for his client and for those with whom his client deals. In this work there is much room for lawyer-made law.[31]

Significantly, Cavers also noted that "[i]n international legal studies, these considerations have special force" because

> The 'law' is likely to be uncertain; the range of alternatives wide; and the opportunities for resort to lawyer-made law many. Whether [he or she] is an adviser to a government office or to a private business concern, the lawyer is likely to have a creative function to perform which will oblige [him or her] to reckon with many factors that fall outside the traditional compartments of International Law and Comparative Law.[32]

The global environment, like the domestic environments of many jurisdictions, is favorable to entrepreneurship—including, as Cavers implied, to entrepreneurship in the law.[33]

In his 1953 comments, Cavers also noted that a "willingness to recognize [the creative] functions of the lawyer as relevant to legal education gives rise to difficulties no law school has fully solved, and the processes of change thus inspired have in the main been molecular and interstitial."[34] By the 1970s, it was clear that global attorneys "should be competent to give advice on the laws of more than one country and must be able to evaluate the relative legal advantages of particular business decisions as they are affected by the laws of one country or

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[31] David F. Cavers, *The Developing Field of International Legal Studies*, 47 AM. POL. SCI. REV. 1058, 1063-64 (1953). Cavers' arguments concerning the lawyer's creation of new patterns, processes, and ways of order are intrinsically entrepreneurial—*see infra* Part II (arguing that attorneys must be entrepreneurial to realize their full potential as business strategists)—and also arguably imply that the lawyer reduces transaction costs in the process—*see*, *e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239 (1984) (arguing, *inter alia*, that attorneys add value to any transaction in which they reduce the transaction costs that are assumed away as a conceptual matter for purposes of the capital asset pricing model).

[32] Cavers, *supra* note 31, at 1064.

[33] *Cf.* Evans & Gabel, *supra* note 2.

[34] Cavers, *supra* note 31, at 1064. Though law schools have proven highly resistant to modifying their operations on the basis of external needs (*see infra* Part III), the advancement of international law as an academic discipline has often been driven by changing conditions in the world. *See*, *e.g.*, *id.* at 1072 n.25 ("The development of international legal studies in the United States in [the 1940s and 50s] owes much to the reinforcement of our faculties by European law teachers who came here to escape Nazi aggression."). Today, of course, much more so than in Cavers' time, globalization moves people and ideas across boundaries as a matter of course.

another."[35] Yet along many crucial dimensions, little has changed in the academy since Cavers' time. U.S. law schools today still teach globalization "as an intellectual matter rather than as an experiential matter."[36] This is disquieting, since today's globalized economy demands lawyers who are creative and entrepreneurial to their cores. The market's needs have created a new value proposition for American law schools.[37]

Still, contemporary sources from academic commentaries to the popular press have noted the ongoing need for—*and lack of*—creative lawyers.[38] "If you thought that law schools would be immune from the impact of the [Great Recession]," notes one such source, "think again. As the legal profession scraps for work among increasingly demanding clients who want to hire experienced lawyers, law firms want to recruit graduates who are already fully equipped for practice."[39] Very simply, "[t]he role of the lawyer is to deliver solutions for their client, not to focus too much on the law itself."[40] Employers and clients prize three particular attributes in new law graduates: applied legal experiences (such as clinics),[41] the interdisciplinary ability to work with others outside of the law—particularly with businesspeople[42]—and innovativeness.[43]

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[35] *See* M. Sean McMillan, Remarks, *Practicing Transnational Law: The Nature of the Business, Opportunities for Entry, and the Relevance of Contemporary Legal Education*, 67 AM. SOC'Y INT'L L. PROC. 245, 256 (1973).

[36] Silver, *Getting Real*, *supra* note 14, at 469.

[37] *See generally*, *e.g.*, Rosalyn Higgins, *Teaching and Practicing International Law in a Global Environment: Toward a Common Language of International Law*, 104 PROC. OF THE ANN. MEETING OF THE SOC. OF INT'L L. 196 (2010). "In all professions, those who are just beginning need educating in the intellectual life ahead of them, and those who are practitioners need . . . to be exposed to continuing education." *Id.* at 196. International law and the subjects it governs develop at a furious rate; international lawyers can become set in their ways of thinking; the tools of international law change rapidly; and international law governs much more than it once did. For all of these reasons, the legal education industry must account for changes in the world's major trends. *Id.*

[38] *See generally* Adam Palin, *Innovative Law Schools: Listing Analysis*, FINANCIAL TIMES, Nov. 11, 2013.

[39] Adam Palin, *Innovative Law Schools, Firms Clamour for Law Graduates with Practitioner Skills*, FINANCIAL TIMES, Nov. 15, 2013, at 2.

[40] *Id.* (quoting Nigel Savage).

[41] *Id.*

[42] *Id.*; *see also* Sarah Murray, *North American Innovative Lawyers: Learn from Experience*, FINANCIAL TIMES, Nov. 21, 2013, at 11. The ability to work with and to lead businesspeople is particularly important for Western attorneys advising Western executives. *See* Schumpeter, *Bumpkin Bosses*, THE ECONOMIST, May 10, 2014, at 70 (contending that the leaders of Western companies are, in at least some respects, more parochial and less globally minded than is commonly assumed); *see also* RICHARD SUSSKIND, TOMORROW'S LAWYERS 113 (2013) (noting that "[l]awyers of the future will need to diversify to stay in business . . . by becoming increasingly multidisciplinary," and

Examples of the legal applications of entrepreneurial skills are available in both the domestic context of the United States[44] as well as abroad,[45] but continue to be scarcer and less comprehensive and systematic than one would expect in light of clients' global needs.[46] While "law schools need to align legal education more closely with the realities of law practice or the gap will be closed by other institutions," it is also apparent that "[t]hose law schools that are able to take this step, particularly those other than the elite schools, will gain a competitive edge in attracting students and placing them in good jobs."[47] Curricular reform will be necessary at most law schools in order to render students more practice-ready[48] and prepared for the global economy.[49] This paper thus adopts Professor William Reynolds's premises as its core assumptions: "law

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that this multidisciplinary breed of lawyer must be supported by appropriate training); Evans & Gabel, *supra* note 2, at 397-98 (noting that legal entrepreneurship on the global or cross-border scope is intrinsically a multidisciplinary exercise).

[43] Palin, *supra* note 39, at 3 (quoting Timothy Endicott). *See also* Reena Sen Gupta, *Firms Take the Lead on Ideas*, FINANCIAL TIMES, Nov. 21, 2013, at 4 (noting that the best lawyers are "becoming an intrinsic part of the creative process"); Reena Sen Gupta, *Central to Enterprise*, FINANCIAL TIMES, Nov. 21, 2013, at 16 (noting that creative companies are hiring attorneys "who are less defined by the traditional parameters of the legal profession. In effect, they are less risk averse and themselves more willing to innovate."); Richard Waters, *Cracking the Case*, FINANCIAL TIMES, Nov. 21, 2013, at 18 ("[B]usiness as usual is no longer enough. It takes creative thinking to fit new opportunities into old legal, regulatory and business norms.").

[44] *See, e.g.*, Ed Hammond, *Ensuring a Done Deal*, FINANCIAL TIMES, Nov. 21, 2013, at 6 (illustrating how U.S. attorneys can help foreign clients to navigate the U.S. legal system and marketplace).

[45] *E.g.*, Jude Webber, *Pioneer Spirit Across Borders*, FINANCIAL TIMES, Nov. 21, 2013, at 22 (reporting on the application of U.S. legal skills and innovations to very complex transactions in Latin America).

[46] *See*, *e.g.*, Nora V. Demleitner, *Stratification, Expansion, and Retrenchment: International Legal Education in U.S. Law Schools*, 43 INT'L L. NEWS 1 (Spring 2014) (noting that in the international law context, the profession demands that law schools produce "practice-ready lawyers," and that this requires interdisciplinary competencies); James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 429-30 (2013) (urging that the skills taught by law schools must expand beyond their historical scope, as creativity is a required core competence for lawyers today).

[47] Stephen J. Friedman, *Why Can't Law Students Be More Like Lawyers?*, 37 U. TOL. L. REV. 81, 81-82 (2005).

[48] *Id.* at 87.

[49] Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 640 (1997) ("The paradigm shift that is occurring in the legal profession due to globalization should be the impetus for a concomitant paradigm shift in legal education.").

schools should train students to solve problems for clients,"[50] and, consequently, changes in the legal profession and in the academy's external environment should motivate corresponding changes to legal education.[51]

D. The Paper's Organization

The preceding discussion intimates the ideas to which this paper transitions in Part II: as many previous observers have urged, American law schools must better prepare graduates for the realities of practice—but such preparation must reflect and integrate globalization at its core. Law schools must train lawyers to be entrepreneurial. What this requires pedagogically is addressed in Part III. Part IV considers the form that these goals would assume in law schools by discussing specific reforms to the conventional J.D. degree, as well as a new, specialized LL.M. degree focused on the training of legal entrepreneurs. Part V considers the administrative and logistical issues surrounding our proposal, while Part VI examines the implications of such reforms for accreditation and the bar exam. Part VII concludes the paper.

II. LEGAL ENTREPRENEURSHIP AS A REFLECTION OF THE GLOBAL ENVIRONMENT

Academe now widely accepts (or at least begrudgingly acknowledges) that the forces of globalization exercise a significant impact on graduates and the institutions that educate them.[52] Numerous observers have commented on the need for practical global exposure among students, including law students.[53]

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[50] William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 453 (2011).

[51] *Id.* at 457.

[52] A few scholars in the post-World War II era foresaw the emerging global environment. *See*, *e.g.*, Joseph L. Kunz, *A Plea for More Study of International Law in American Law Schools*, 40 AM. J. INT'L L. 624 (1946) (urging, in the aftermath of World War II, that international law was a vital subject for law curricula, and noting numerous challenges, including few qualified faculty to teach in the area, that few students were taking international law, and that international law was an elective). "We need practitioners of international law, attorneys who are experts in international law . . . . But the study of international law at [l]aw [s]chools will have even deeper significance. It will give the law students a more complete legal education than was thought possible, hitherto, under the 'pressure of practicality.'" *Id.* at 626.

[53] *See*, *e.g.*, William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 493 (2013) ("[T]he types of education that will attain the highest valuation are complex problem-solving skills that enable law school graduates to communicate and collaborate in

Although globalization has been characterized in a variety of ways, this paper proposes a set of reforms to legal education partly on the basis of our previous conceptual and empirical studies. Thus, in describing the legal profession's external environment, the demand for legal entrepreneurs, and the skills required of attorneys, this paper will employ our prior work[54] as the principal frame of reference.

A. The Environment into Which Law Students Now Graduate

We have heretofore noted certain characteristics of "the external environment," but only with respect to law graduates' general job prospects and the competition underway in the legal education industry. In contrast, this section of the paper is concerned with arriving at an understanding of the external environment with respect to the opportunities and demands that confront attorneys globally. Before we can articulate a sensible program of legal study for today's law graduate, we will need to know what sorts of skills are in demand and why.

Since its inception, the era of globalization has brought forth a tremendous (and still growing) volume of business across national boundaries and across cultures. Unsurprisingly, considerable differences persist throughout the world's legal systems with respect to substantive legal rules and generalizable legal principles, and there exists an even more profound divergence among legal systems' basic institutional features and the legal cultures that shape and influence

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a highly complex, globalized environment"); Silver, *Getting Real*, *supra* note 14 at 457-59, 467-68 (noting that law schools have resisted globalization's reach despite the fact that globalization's impact is not limited to lawyers who practice in large multi-national firms); Cassidy, *supra* note 27, at 1522-23 (arguing that "[o]ur graduates increasingly will be practicing in a global environment," and thus, "[t]he social, political, economic, and legal consequences of globalization must be better understood and addressed in legal education," and, moreover, America's current legal education system inadequately prepares lawyers for cross-jurisdictional practice); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449, 452 (2012) ("Globalization is also a primary force behind curricular reforms that seek to prepare students to function as lawyers in a transnational legal world"); Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 57-62 (2000) (noting that global "developments have inevitable implications for the evolution of the practice of law, for legal education in general, and for clinical legal education in particular" and arguing that clinical legal education has a great opportunity to help prepare students to meet the needs of global practice); Sanchez, *supra* note 49, at 635 (noting that "[t]he globalization process has given rise to the development of transnational law practice").

[54] *See generally* Evans & Gabel, *supra* note 2.

them.[55] This reality prompts the question of how the international executive or the chief legal counsel of a global firm is to make strategic sense of these differences. Otherwise stated—which features across and within the world's legal systems are the most important to the individual firm's pursuit of competitive advantage, and why?

The oft-cited notion of "the rule of law" is our starting point in answering these questions. Many definitions of "the rule of law" have been proposed over time, but virtually none approaches the concept directly from the businessperson's perspective.[56] For a firm, one of the most strategically impactful features of a legal system is the nature of its flexibilities.[57] Three forms of flexibility are present to some degree in every legal system: "substantive ambiguities, which exist in the language of the laws themselves; enforcement ambiguities, which result from finite resources, imperfect information, and discretion; and systemic ambiguities, which are kindled in the dynamic interrelationships of the constituent parts of the rule of law process."[58] An inverse relationship exists between the degree to which a country observes the rule of law and the degree to which its laws and legal system are characterized by flexibility.[59] Thus, "high rule of law" countries are characterized by relatively low degrees of legal flexibility (that is, the legal systems of high rule of law places supply greater certainties and guarantees).[60] "Low rule of law" countries are the opposite, exhibiting relatively substantial degrees of these legal flexibilities.[61]

For the business executive's purposes, the rule of law is best viewed as the process whereby a jurisdiction's legal system interacts with the other forces of its environment (namely, the jurisdiction's economic, political and cultural institutions) in the pursuit of the goals defined for it by the society it endeavors to govern.[62] More particularly, the rule of law "is the degree to which state institutions supply, or fail to supply, certainties in the rules governing economic

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[55] *See id.* at 340-42 (discussing the law and its relevance to international business); *id.* at 347 (arguing against the position that globalization will result in the convergence of laws, legal systems, and cultures).

[56] *Id.* at 365-67 (discussing competing conceptions of the rule of law).

[57] Of course, a legal system's flexibility is by no means its only dimension. Most legal systems in the world today are extraordinarily complex. Our model does not assume away the myriad other features of the legal system; rather, we focus on flexibility because it is the single overriding feature that most strongly drives the potential for sustainable competitive advantage through the law. *See generally* Evans & Gabel, *supra* note 2.

[58] *Id.* at 382; *see also id.* at 372-82 (discussing these three forms of flexibility in detail).

[59] *Id.* at 383-84.

[60] *Id.* at 384-85.

[61] *Id.* at 385-86.

[62] Evans & Gabel, *supra* note 2, at 367-71 (discussing the nature of the rule of law).

activity."[63] Significantly, while the "rule of law reveals the [average] extent to which the firm must allocate resources to legal activities in the pursuit of economic opportunities . . . it also represents a range of opportunities for value creation unique to the individual firm."[64]

Not all firms will be impacted equally by the legal flexibilities that are pervasive in lower rule of law jurisdictions. Some firms will hire legal counsel capable of harnessing the three forms of legal flexibility to create advantages that are distinctive or altogether unique to the firm.[65] In contrast to most scenarios in higher rule of law environments, the advantages culled from legal flexibilities in lower rule of law places typically are shrouded in causal ambiguity, and are therefore far more likely to be sustainable.[66] The skill of the attorney in a low rule of law place thus extends beyond the operational effectiveness that ordinarily drives legal strategy and legal superiority in high rule of law places.[67] Attorneys in low rule of law places effectively act as institutional entrepreneurs, such that their utilization of legal flexibilities readily translates into competitive advantages for the client.[68]

Harnessing the law for sustainable competitive advantages is not easy, however, and is unlikely to result solely from the application of today's conventional U.S. legal education. Instead, a new breed of attorney is needed to meet the demands of the global environment described here: the entrepreneurial lawyer.[69] Legal entrepreneurs approach the law (of any jurisdiction) as though it is a marketplace, akin to the manner in which the classical business entrepreneur approaches the economic marketplace.[70] Legal entrepreneurship is an inherently multi-disciplinary exercise that moves beyond the classical lawyer's perceived boundaries.[71] All other things equal, the firm has greater potential latitude in lower rule of law places to define its position within the jurisdiction's legal

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[63] *Id.* at 394.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 413-15.

[67] In high rule of law places, legal advantages achieved through operational effectiveness can seldom be converted into sustainable competitive advantages. Evans & Gabel, *supra* note 2, at 373, 413-15.

[68] *Id.* at 404-08 (discussing the entrepreneurial lawyer as an institutional entrepreneur). What it means to exploit a given legal opportunity will depend upon the nature of the particular opportunity. *Id.* at 403.

[69] *See generally id.*

[70] *Id.* at 397.

[71] Evans & Gabel, *supra*, note 2, at 397. Of particular importance is the entrepreneurial lawyer's ability to function as a strategist for the firm, bridging the traditional lawyer's training, predisposition, priorities, vocabulary and worldview with those of the traditional executive. *Id.* at 335, 363-64.

nebula.[72] Seeking out this competitive position "is the purpose of legal entrepreneurship and is the driver of legal competitive advantage."[73] "Legal entrepreneurship" is thus "best viewed as the process of achieving a distinctive, sustainable position in the economic market (that is, a competitive advantage) by the deliberate and innovative exploitation of one or more legal flexibilities."[74] Legal entrepreneurs add value to the firm by managing legal transaction costs,[75] lowering the legal risks and costs of doing business in a given jurisdiction (particularly in lower rule of law places, where the average risks and costs imposed by legal flexibilities are higher in proportion to the greater scope and frequency of the flexibilities),[76] and by enabling the firm to act with a greater degree of "legal confidence" in the presence of legal ambiguity and uncertainty than can the firm's competitors.[77] By fulfilling these functions, the legal entrepreneur enlarges the expected value of the firm's economic activities relative to the expected value of the same activities for the firm's competitors, most of whom will lack entrepreneurial lawyers.[78] This is the core essence of legal competitive advantage.[79]

B. The Skills Needed of Entrepreneurial Lawyers

Entrepreneurial lawyers apply many of the classical entrepreneur's skills[80] to the legal context. Thus, for example, legal entrepreneurs create and pursue new opportunities[81] "by assuming the risks associated with uncertainty."[82] Legal entrepreneurs, like classical entrepreneurs, are defined by uncertainty and innovativeness.[83] Legal entrepreneurs must be capable of cross-cultural

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72 *Id.* at 399.

73 *Id.* at 399.

74 *Id.* at 401.

75 Evans & Gabel*, supra*, note 2, at 418-21; *see also generally* Gilson, *supra* note 31.

76 Evans & Gabel, *supra* note 2, at 418-21.

77 *Id.* at 418-21.

78 *Id.* at 420.

79 *Id.* at 420-21.

80 No universal agreement exists among scholars as to a single, precise definition of entrepreneurship. The academic entrepreneurship literature thus identifies and debates a wide range of skills and characteristics that may define entrepreneurship. Still, many dominant themes are identifiable, and our understanding of legal entrepreneurship comports with most of these major strands within the entrepreneurship literature, although many of these strands assume distinctive forms in the legal context. *Id.* at 395.

81 Evans & Gabel, *supra* note 2, at 395-96.

82 *Id.* at 395.

83 *Id.* at 395-96.

lawyering, working effectively in teams, and managing risk well.[84] They embrace persistent problem-solving, ambiguity and failure, opportunity orientation, creativity, and calculated risk-taking.[85] Of course, the entrepreneurial lawyer is talented at recognizing opportunities in the law for legitimate advantage.[86]

Legal entrepreneurs are culturally astute, or "globally literate."[87] The best entrepreneurial lawyers also possess the most important skills related to cultural literacy: they are capable social actors who build relationships with legal decision-makers.[88] Entrepreneurial lawyers are capable of acquiring and interpreting information.[89] They are skilled risk managers and operate with a mindset of purposeful innovation.[90] The entrepreneurial lawyer is both flexible and adaptive,[91] both patient and aggressive.[92]

Few if any people in the world can be said to possess all of these features at a functional level at any given time. Thus, the preceding paragraphs offer a brief description of the idealized entrepreneurial lawyer. To the extent that legal education can impart these skills and mindsets, together with an appreciation for their distinctive application to the legal context and their unique applications in specific cultural and institutional environments, law schools will fill a major void in the market and will reap considerable advantages.

Before turning to the pedagogical ramifications of this framework, we first briefly consider the important question of whether any empirical evidence exists to corroborate what we have thus far said concerning the nature of legal entrepreneurship. As it turns out, at least one representative lower rule of law country—the People's Republic of China—offers important qualitative evidence in support.

C. Empirical Support for Legal Entrepreneurship: The Case of China

In January 2014, the authors traveled to China and conducted nearly 30 in-person interviews of expatriate and People's Republic of China (P.R.C.)

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[84] *Id.* at 408.

[85] *Id.* The executives for whom legal entrepreneurs work must also be willing to take sensible risks. Evans & Gabel, *supra* note 2, at 421.

[86] *Id.* at 408-09.

[87] *Id.* at 409.

[88] *Id.* at 409-10.

[89] While not the only way, this is one major avenue by which legal entrepreneurs lower legal costs and legal risks. *Id.* at 410-11.

[90] Evans & Gabel, *supra* note 2, at 411.

[91] *Id.*

[92] *Id.* at 417.

attorneys and business leaders.[93] The purpose of these interviews was to begin to assess the empirical validity of our prior conceptual research[94] and, in particular, its applicability to the Chinese market.[95] In sum, we found substantial evidence in support of our conceptual model.[96] The participants were particularly supportive of the notion of legal entrepreneurship in China and of the positive aspects of legal flexibilities.[97]

Numerous participants confirmed that in China, legal flexibilities need not be wholly negative but instead can afford attorneys the opportunity to pursue creative (though still legitimate) ends for the client.[98] The attorney's judgment is important, however, because the mere existence of legal flexibility does not legitimize every conceivable activity.[99] Thus, one of the most important attributes in an entrepreneurial lawyer is *discretion*—the ability to discern which flexibilities can be used, in which ways, and under which circumstances.[100] Firms *must* be flexible to succeed in China, but not to the point of abandoning principles or engaging in corrupt or other illegitimate behaviors.[101] For attorneys new to China,

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[93] We employed open-ended interview questions, beginning with the same basic set of questions, one of which was for attorneys, and the other of which was for managers and executives. *See generally* HERBERT J. RUBIN & IRENE S. RUBIN, QUALITATIVE INTERVIEWING: THE ART OF HEARING DATA (1995) (providing advice on the parameters of effective interviewing for purposes of collecting data).

[94] *See generally* Evans & Gabel, *supra* note 2.

[95] China was selected as a start to validating our conceptual model for a few reasons. First, China is universally acknowledged as an extremely important player in the global economy of today. As a starting point in verifying our previous research, China represents an important marketplace. Second, China's is a highly flexible legal system and is in many respects representative of low rule of law jurisdictions. And third, the authors have some familiarity with China's culture, history, political apparatus, and legal system. This familiarity afforded us the ability to ask more precise and (we believe) revealing questions of those we interviewed.

[96] *See generally* Evans interview notes (on file with author).

[97] *See generally* Evans interview notes (on file with author).

[98] Evans Interview No. 1, Jan. 6, 2014; *accord* Evans & Gabel, *supra* note 2, at 336, 393, 418-22. The parameters set by our Institutional Review Board require that we not disclose the identities of interviewees unless specifically authorized by the interviewee to do so. We neither sought nor received such approvals, and so we are reporting the outcomes from these conversations anonymously.

[99] Evans Interview No. 2, Jan. 7, 2014; *see also* Evans & Gabel, *supra* note 2, at 336-37 (confining the scope of our conceptual model of legal entrepreneurship to legitimate activities).

[100] Evans Interview No. 4, Jan. 7, 2014; *see also* Evans & Gabel, *supra* note 2, at 403, 408-09.

[101] Evans Interview No. 2, Jan. 7, 2014. Indeed, one very long-standing expatriate attorney in China expressly told us that those firms and attorneys who lack flexibility and adaptability will not last long in China; the ability to be flexible and to use flexibilities in

one must try to learn how Chinese institutions function as quickly as possible, taking care not to assume that a Western-style continuity will prevail across time.[102] Ironically, although non-Chinese attorneys may be limited in the extent to which they can effectively engage in legal entrepreneurship when they are new to China (on account of their lack of experience), P.R.C. attorneys often fail to engage in effective legal entrepreneurship because Chinese law schools typically do not teach students how to think critically or creatively.[103] This clearly suggests a gap that Western-trained expatriate attorneys, including American lawyers, could fill,[104] particularly in collaboration with P.R.C. experts.

One corollary to these ideas is that the entrepreneurial lawyer must be able to analyze the "gray zone," knowing "how far" in the utilization of a legal flexibility is "too far."[105] In a legally flexible environment such as China, this is tantamount to being able to assess accurately the risks attendant to legal flexibilities.[106] Beyond flexibilities and information asymmetries, the dynamism and volume of Chinese law also contribute to the considerable level of complexity of legal matters in China.[107] The best attorneys, and particularly in-house counsel, help the firm to navigate and reconcile these issues.[108]

One experienced P.R.C. attorney opined that Westerners tend to achieve higher levels of comfort with Chinese institutions as they gain exposure and experience.[109] Flexibilities are often deliberately built into the law so that officials

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the law for the client is absolutely indispensable. Evans Interview No. 4, Jan. 7, 2014. Other commentators corroborated this from the managerial perspective. *E.g.*, Evans Interview No. 6, Jan. 8, 2014. One business executive noted that the legal and institutional environments in China are highly flexible and that a firm's strategy must to some extent be aligned with the environment if it is to have any hope of succeeding. Evans Interview No. 9, Jan. 10, 2014. *See also* Evans & Gabel, *supra* note 2, at 336-37 (confining the scope of our conceptual model of legal entrepreneurship to legitimate activities).

[102] Evans Interview No. 3, Jan. 7, 2014.

[103] Evans Interview No. 13, Jan. 14, 2014. This interviewee is a Chinese attorney, educated in China, with many years of law practice experience in China.

[104] *See generally* Evans, *The Magic Confluence*, *supra* note 16 (suggesting myriad functions through which U.S. attorneys can add value to transactions in China).

[105] Evans Interview No. 4, Jan. 7, 2014.

[106] Numerous interviewees offered strategies for legal and strategic risk management in China. *E.g.*, Evans Interview No. 4, Jan. 7, 2014; Evans Interview No. 7, Jan. 8, 2014; Evans Interview No. 9, Jan. 10, 2014. Although a full assessment of legal risk management is beyond the scope of this article (and will be addressed in our future work), it is clear that the entrepreneurial lawyer must be capable of accurately assessing and coping with legal risks. *Accord* Evans & Gabel, *supra* note 2, at 411 (discussing the entrepreneurial lawyer as a risk manager).

[107] Evans Interview No. 8, Jan. 9, 2014.

[108] *Id.*; *see also* Evans & Gabel, *supra* note 2, at 418-21 (discussing the means by which entrepreneurial lawyers add value to the firm).

[109] Evans Interview No. 10, Jan. 13, 2014.

enjoy some latitude in their interpretation and enforcement.[110] In this particular interviewee's experience, most officials want to do justice to the spirit of the law or regulation in question.[111] This suggests another important function of the entrepreneurial lawyer in China: public relations.[112] The entrepreneurial lawyer must be capable of speaking with officials and business partners in the right way, of helping the official to understand the benefits that the client's business brings to the locality, and of understanding the official's concerns.[113] Effective communication with officials can also aid the lawyer in forecasting new policy directions.[114]

The entrepreneurial lawyer must not only understand but also *accept* the local culture in order to provide sound counsel under legally flexible conditions,[115] since legal flexibilities tend to amplify the impact that culture exerts on legal outcomes.[116] Cultural competence is as important a driver of business and legal success in China as any skill.[117] In particular, the ability to collaborate with experts who are native to localities within China is crucial.[118] Thinking "like a lawyer" remains important in China—but the attorney must remain open-minded, be less risk averse than in the West, and be willing to actively embrace flexibility.[119] In China, the best attorneys' advice accounts for the law but is as much business-oriented as it is shaped by the law itself.[120] The old saying about

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*; *accord* Evans & Gabel, *supra* note 2, at 408-10. One consultant with whom we spoke urged that expatriate lawyers in China must really "do their homework" in determining how to interpret a given law, and that this investigation very often involves talking with individuals who are both expert in the substantive area of regulation as well as in the locality at issue. Evans Interview No. 16, Jan. 15, 2014. *See also* Evans & Gabel, *supra* note 2, at 408-09.

[114] Evans Interview No. 12, Jan. 13, 2014.

[115] *Id.*

[116] *See* Evans & Gabel, *supra* note 2, at 380-82 (discussing systemic flexibilities).

[117] Evans Interview No. 12, Jan. 13, 2014; *see also infra* Part III.F. (discussing the teaching of soft skills such as cultural competence); *see generally* Evans & Gabel, *supra* note 2 (noting the numerous ways in which culture impacts legal entrepreneurship and the importance for the entrepreneurial lawyer to be culturally competent).

[118] Evans Interview No. 9, Jan. 10, 2014.

[119] Evans Interview No. 1, Jan. 6, 2014; *accord* Evans & Gabel, *supra* note 2, at 417, 421. Another interviewee expressed the same idea somewhat differently: expatriate attorneys should not measure foreign countries by their own standard or worldview; instead, the expatriate attorney must have a strong sense of curiosity and open-mindedness—a willingness to understand another culture by seeing the world through the eyes of that culture. Evans Interview No. 7, Jan. 8, 2014; *accord* Evans Interview No. 15, Jan. 14, 2014.

[120] Evans Interview No. 7, Jan. 8, 2014. This was one of the most eloquent

China—that nothing is easy, but nothing is impossible, either—holds as true today as it has in the past.[121] The entrepreneurial lawyer combines these considerations across the law, business, and culture to offer the best and most innovative counsel possible.[122]

Of course, we recognize that not all jurisdictions that might be labeled "low rule of law" are the same: every jurisdiction will boast a certain set of characteristics that is, to some degree, distinct from every other jurisdiction in the world. Nevertheless, these data confirm the basic validity of our prior conceptual research with respect to at least one of the world's most important flexible legal jurisdictions, and it seems likely that most or all other jurisdictions in the world that are characterized by similar flexibility would invite consonant opportunities for legal entrepreneurship, subject to the vicissitudes of the locality and its institutions.

III. THE PEDAGOGICAL IMPERATIVES OF LEGAL ENTREPRENEURSHIP

We now have some idea of the skills required to become an entrepreneurial lawyer and why those skills are crucial in the cross-jurisdictional context. Law schools have a clear strategic opportunity to meet an emerging market demand in the training of entrepreneurial lawyers. The question now becomes—how should law schools respond? More particularly, Part III explores how law schools can successfully blend an updated legal pedagogy and curriculum (particularly with respect to its international, experiential, and cultural elements) with entrepreneurship pedagogy, which has traditionally fallen within the prerogative of business schools.

A. General Considerations on "Teaching Law" and the Legal Education Industry's Woes

The notion that law schools should produce practice-ready graduates is not new, as Austin Abbott argued in 1893, even before the Socratic Method took root in law schools as a means for instructing the theory of law.[123] Other

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expressions we heard of the notion of legal entrepreneurship.

[121] Evans Interview No. 3, Jan. 7, 2014.

[122] *See* Evans & Gabel, *supra* note 2, at 397-98 (characterizing legal entrepreneurship as an inherently interdisciplinary exercise).

[123] "It appears to me that in a professional school we should adopt as far as practicable professional methods of study, rather than academic methods." Austin Abbott, *Existing Questions on Legal Education*, 3 YALE L. J. 1, 14 (1893).

commentators over time have similarly argued for some measure of practical skill development in the law curriculum.[124] By extension, law faculty must have at least some measure of practical experience in the law to teach effectively, for "[l]aw, as it looks to the theorist in his study and law as it looks to the lawyer in consultation or the court room, are often radically different things."[125] One early observer declared that "[t]he law schools of this country have never faced their problems. Like most institutions coming down from generation to generation, they have been slow to inquire into the original justification of their plans and programs, or to seek to learn whether what was once justified still retained its reason for being."[126] Consequently, legal education soon evolved largely without regard to key stakeholders: "Our law teaching is too much a teaching of . . . fixed conceptions with inadequate consideration of whether the reasons behind the conceptions still exist as applicable to modern conditions of social and economic life."[127] Even before the era of globalization, the question for law schools was "entirely the practical one of what body of principles and rules should the student familiarize himself with in order to become an effective practitioner," with the recognition that "[t]hese may be different in different jurisdictions and at different times in the same jurisdiction."[128]

Undoubtedly, the legal academy has progressed along many dimensions since these observers' time.[129] Moreover, these concerns are wide-spread throughout higher education and are not limited solely to legal education.[130] Yet

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[124] *See, e.g.*, James B. Brooks, *Legal Ethics*, 19 YALE L. J. 441, 442 (1910) (arguing that law schools must prepare practice-ready lawyers).

[125] Floyd R. Mechem, *The Opportunities and Responsibilities of American Law Schools*, 5 MICH. L. REV. 344, 348 (1907). Mechem's observation holds even for high rule of law places like the United States, of which he was writing. *Cf.* Evans & Gabel, *supra* note 2, at 372 (noting that the formal law, or law in theory, is often very different from the law in practice, and that this is especially true in lower rule of law jurisdictions).

[126] William Carey Jones, *The Problem of the Law School*, 1 CAL. L. REV. 1, 1 (1912); *cf.* Notes, 11 HARV. L. REV.114 (1897) (asserting "the permanence of the methods of legal education instituted" in that early era).

[127] Eugene A. Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227, 227 (1921). This concern appears equally true today as well: U.S. law schools focus so narrowly on training students to think theoretically and only for the U.S. context that their graduates are not prepared to add value as strategic thinkers in the global context.

[128] Albert M. Kales, *An Unsolicited Report on Legal Education*, 18 COLUM. L. REV. 21, 24 (1918).

[129] *See, e.g.*, Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L. J. 187, 217-31 (2012) (reviewing the academic discourse concerning transactional skills education and noting advances in transactional legal education).

[130] *See, e.g.*, Andrew Czuchry, Mahmoud Yasin & Maria Gonzales, *Effective Entrepreneurial Education: A Framework for Innovation and Implementation*, 7 J.

many of the present troubles in the legal practice and legal education industries are directly (and are often almost exclusively) attributable to law schools' own failure to adapt to the dynamics of their environment.[131]

ENTREPRENEURSHIP EDUC. 39 (2004) (noting that higher education in general lacks the flexibility that private businesses use to compete worldwide by better adapting to uncertainty and change).

[131] Various commentators have predicted (correctly, it would seem) a period of painful readjustment for law schools, although various causes are identified, and various prescriptions for the legal education industry's responses are recommended. *See*, *e.g.*, SUSSKIND, *supra* note 42, at 136 ("[W]e are training young lawyers to become 20th-century lawyers and not 21st-century lawyers."); Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651 (2012) (arguing that law schools are undermined when their universities redirect their tuition revenues to non-law-school ends, but that law schools must still extricate themselves from the present crisis, and prescribing fixes); Campos, *supra* note 15 (arguing that the present law school model is unsustainable due to the factors enumerated); Cassidy, *supra* note 27 (acknowledging the charge that legal academics have long overemphasized the theoretical at the expense of the practical, and suggesting proposed reforms); Gregory M. Duhl, *Equipping Our Lawyers: Mitchell's Outcomes-Based Approach to Legal Education*, 38 WM. MITCHELL L. REV. 906, 907-08 (2012) (noting the tenuous and uncertain circumstances confronting the U.S. legal education industry); Gantt, *supra* note 21, at 706-07 (noting the numerous complaints over time "that law schools do not adequately prepare students for the daily realities of law practice" and that law schools must teach critical thinking and cognitive skills); Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U.L. REV. 643, 643 (2013) (noting failed attempts by law schools to address their challenges); Michael Kelly, *A Gaping Hole in American Legal Education*, 70 MD. L. REV. 440, 446 (2011) (urging that law schools are obligated to educate applicants on the conditions prevailing in the legal industry); Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1580, 1589 (2011) (arguing, *inter alia*, that legal education must be judged on the basis of the quality of its outputs, not its inputs); Kyle P. McEntee, Patrick J. Lynch & Derek M. Tokaz, *The Crisis in Legal Education: Dabbling in Disaster Planning*, 46 MICH. J. L. REFORM 225, 225 (2012) (noting the baleful state of affairs in the legal industry and urging that legal education must be reformed without delay); John McKay, *Un-apologizing for Context and Experience in Legal Education*, 45 CREIGHTON L. REV. 853, 854-56 (2012) (noting the many recent criticisms of legal education and that most law schools continue to produce lawyers unequipped for practice); Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS 367 (2013) (contending that law schools are on an unsustainable track that can be remedied only by bona fide competition); James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423 (2013) (noting the myriad negative consequences of the legal profession's unresponsiveness and that "[l]egal education has not been much better than the profession itself at innovation"); Deanell Reece Tacha, *The Lawyer of the Future*, 40 PEPP. L. REV. 337 (2013) (noting, *inter alia*, that "[i]ntrospection is the order of the day for legal education and the legal profession" due to the conditions now prevailing in

Significantly, employers and clients "increasingly look to law schools to do the initial [practical] training that once occurred in the [law] firms themselves," and, thus, "[l]aw schools that continue to focus on training students in legal analysis and skills work will be in demand, because the schools will be performing a role that employers will likely find useful for the future."[132] For law schools, "[e]xpenditures on skills training and clinics will provide real educational value to students, not just a fancy brand name or high school ranking. If schools spend money on the educational needs of students rather than on status seeking, the schools will have a real chance at prospering, even in today's cramped marketplace."[133] "Intensive opportunities for real-life practice" produce the type of law graduates who are now in demand.[134] "If law schools cannot educate and produce competent attorneys, then we have no place educating them at all. . . . [T]he idea that we need to graduate students who can function as practicing attorneys clearly deserves a place at the table," Professor Jennison writes.[135]

Despite these calls,[136] however, most law schools have committed relatively few resources to experiential and practical-skills initiatives, though most

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the legal industry); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 4 J. LEGAL EDUC. 598, 599 (2010) (noting that the present environment is "causing legal employers to put a premium on job candidates with practical skills," and that law schools must produce such lawyers to survive in the future); Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. PITT. L. REV. 335 (2000) (arguing that law schools generally fail to prepare law students for transactional practice, and that "[l]aw schools should correct this curricular failure"); Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499 (2011) (noting numerous accounts of new law graduates' woeful unpreparedness for law practice and that "among jurisdictions related to the common-law tradition, the United States is almost unique in not requiring rigorous practice preparation between the law degree and bar admission"). *See generally* the recent book-length critiques of the legal education industry—*e.g.*, STEVEN J. HARPER, THE LAWYER BUBBLE (2013); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012). *But see* Bryant G. Garth, *Crisis, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503 (2013) (expressing doubt that the shifts underway in the legal industry and legal education are as substantial as other commentators perceive). *Compare* Garth, *supra*, *with* William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013) (predicting dire consequences for the legal education industry absent substantial reforms).

[132] Bourne, *supra* note 131, at 696.

[133] *Id.*

[134] Tacha, *Training the Whole Lawyer*, supra note 25, at 1702.

[135] Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643, 670 (2013).

[136] For more on the need to better connect legal education with practical skills and employers' needs, see generally Neil J. Dilloff, *Law School Training: Bridging the Gap*

are spending nominally in these areas.[137] Disturbingly, "[a]lthough administrators often acknowledge these gaps, they view correctives as luxuries that students can ill afford."[138] Still, "[m]uch can be accomplished with existing resources through case histories, problems, simulations, cooperative projects, and interdisciplinary collaboration. The problem is less that these approaches are unaffordable than that *they are unrewarded*."[139]

In the meantime, the globalized economy has wrought negative consequences on U.S. law schools as a result of their inflexibility and immobility. U.S. law schools are facing increasingly intense competition from global rivals in other regions, most notably the European Union.[140] The need for reform remains compelling, as "[p]aralysis in a dynamic environment is as dangerous as unreflective change."[141]

Most advocates of augmenting the practical training in today's law curriculum are not hostile to theory. Globalized markets "are making new demands on and offering new options to law graduates. As once-reliable Big Law and other traditional law jobs disappear, law schools must figure out how to serve the legal-services market from which they have been insulated for so long,"[142] Professor Larry Ribstein argued:

> [L]aw schools do not face a choice between theory and practice. Rather, they face for the first time the need to provide the type of education the market demands instead of serving . . . law professors' preferences. Legal education must respond to these demands by providing not just practice skills suited to the existing market for legal services, but also the knowledge and skills that enable law graduates to function in the new legal-information market. Ironically, this calls for the application of many theories now developing in law schools.[143]

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between Legal Education and the Practice of Law, 24 STAN. L. & POL'Y REV. 425 (2013).

[137] This is true, for example, in clinical legal education. *See generally* Barry, Dubin & Joy, *supra* note 53 (examining the academy's resistance to experiential learning).

[138] Deborah L. Rhode, *Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 449 (2013).

[139] *Id.* (emphasis added); *see also id.* at 454 (noting that the most influential voices in legal education today lack a consensus on what to do about the legal education industry's problems—or that a problem even exists).

[140] Claudio Grossman, *Raising the Bar: US Legal Education in an International Setting*, 32 HARV. INT'L REV. 16, 16-17 (Fall 2010).

[141] *Id.* at 18.

[142] Ribstein, *supra* note 20, at 1652.

[143] *Id.*

B. Teaching International Law and Globalization

Most law schools now offer some measure of global exposure—most often, international and comparative course offerings and study abroad options.[144] On the whole, however, international and comparative law programs have not prepared students for transnational practice.[145] Although the global environment has changed dramatically since World War II, many of the old explanations for international law's slow curricular evolution still command traction today.[146] Effectively preparing students for global practice will require that law schools "change their focus and perspective from national to global. . . . Educational efforts themselves have to be internationalized."[147] Like the area of

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[144] Diane Penneys Edelman, *Educating and Qualifying Transnational Lawyers: A U.S. Perspective*, 46 INT'L L. 635, 635 (2012). *See also* Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449, 452-54 (2012) (noting survey that indicates multiple efforts to prepare students across U.S. law schools, but that few of these are coordinated within law schools or with the profession). Law schools offer summer study programs abroad, expanded curricula, professorial and student exchanges, and the use of technologies; a few offer internships, clinics, seminars, case studies, and skills courses. *Id.*

[145] *See* Sanchez, *supra* note 49, at 637. For an explanation on why law schools have offered few foreign law courses, see *id.* at 638. *See also* Charles Stevens and B. Ko-Yung Tung, Remarks, *in* AM. SOC'Y INT'L L. PROC., *supra* note 35, at 254-55 (commenting that law school courses in international and comparative law were unhelpful in practice, and that the most useful law school courses for international practice are those that are practical and that teach culture).

[146] *See*, *e.g.*, Carl M. Franklin, *The Teaching of International Law in American Law Schools*, 46 AM. J. INT'L L. 140, 140-43 (1952) (noting that many law schools considered international law a "luxury" subject, lacked the time and qualified faculty to teach international law, and discounted international law because it was not on any bar exam); *see also* John M. Raymond & Barbara J. Frischholz, *Lawyers who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L L. 802, 815-18, 823-25, 827 (1982) (providing an overview of the early evolution of international law as an academic subject in the United States). Others considered international law too much of an abstraction having too little impact on lawyers. *E.g.*, James B. Scott, *International Law in Legal Education*, 4 COLUM. L. REV. 409, 417-19 (1904) (likening international law to constitutional law and contending that both subjects should be taught in law schools because both "have a great historical as well as legal value"). The issue of the bar exam is considered at further length in Part VI, *infra*.

[147] Edelman, *supra* note 144, at 635. Professor Edelman also urges that "[w]e should . . . continue to develop the already sizeable body of scholarship on the internationalization/transnationalization/globalization of legal education, and continue our professional and pedagogical dialogue about how to train and qualify our students to practice law transnationally." *Id.* This article seeks to contribute to this dialogue.

entrepreneurship,[148] international law is an inherently interdisciplinary area[149] and merits such an approach in law schools.

While it may not be possible for U.S. legal education to prepare students to sit for the bar of any nation,[150] it is not altogether clear that preparing students for admission in other countries ought to be a goal for American law schools.[151] Perhaps the greatest value-add that American law schools can contribute to students' preparation for cross-border and cross-cultural practice is the core set of skills needed in these areas. Chief among these is the ability to contribute strategically to global clients and employers through legal entrepreneurship.

The basic questions surrounding the internationalization of legal curricula are reducible to two core issues: whether international education should be required of students or elective, and whether international education should be experiential or academic.[152] Questions particular to international law are also pertinent: whether the discipline should focus on foreign or international law; whether individual courses should be internationalized; and, most significantly for our purposes, whether internationalization should be concerned only with solutions to legal problems in the global and foreign contexts or whether students should be trained to think like lawyers.[153] As Part IV will discuss, this paper

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[148] *See infra* Parts III.D and III.E (discussing entrepreneurship's interdisciplinary nature).

[149] *See*, *e.g.*, Cavers, *supra* note 31, at 1064 (noting that the global environment increasingly "requires that the law teacher and student take into account a wider range of phenomena than was once thought germane to their studies. Political pressures, psychological factors, business practices, sociological and economic data and theory, all are likely from time to time to become pertinent and important."); Kunz, *supra* note 52, at 627 ("Naturally the jurist who devotes his life to the study of international law must know and understand many things, such as history, politics, languages, and so on, in order to be fully equipped for [the] task. . . .").

[150] *See* Maxeiner, *supra* note 22, at 35 (ruling out such instruction in the United States but acknowledging programs in other nations involving this sort of instruction). Although this article does not contend that such instruction is impractical in the United States, the curricular reforms proposed here do not touch upon this issue directly.

[151] *Id.* at 34. Some countries, for example, permit foreign lawyers to undertake transactional work even while forbidding foreigners from formal admission to the country's bar. *See*, *e.g.*, Brad Alexander, Caroline Berube & Justin Evans, *China (People's Republic of China)*, *in* THE ABA GUIDE TO INT'L B. ADMISSIONS 49 (Russell W. Dombrow & Nancy A. Matos eds., 2012) (noting that foreign lawyers cannot be admitted to the P.R.C. Bar, but nevertheless can conduct transactional work in China, which represents the bulk of legal work to be done).

[152] Maxeiner, *supra* note 22, at 36. Professor Maxeiner notes that "practical versus academic" is a false dichotomy, as legal education can and must deliver both dimensions. *Id.*; *see also supra* Part II.A (arguing that theory and practicality are reconcilable and that law schools must afford both to their students).

[153] "Thinking like a lawyer" in the foreign and global contexts now requires the

contends that basic substantive doctrine in international and comparative law should be required of all U.S. law students, as should basic cross-cultural and interdisciplinary training—most significantly, in entrepreneurship. Part IV also proposes a new specialized LL.M. degree in legal entrepreneurship, designed to train cross-border attorneys in the most important facets of global, twenty-first century law practice. Both proposals will involve integrative and immersive dimensions in the curriculum.[154] This paper echoes Professor Maxeiner's view on the subject: it is almost beyond belief that the necessity of and advantages to internationalizing American legal education are still questioned.[155] "*Of course* we should prepare our students to deal with lawyers and clients from foreign legal systems."[156] Ultimately, "[w]hat we need is an appreciation of how much we can learn from foreign law. That is how we will inoculate ourselves from today's 'globalization' frenzy becoming tomorrow's fad of yesterday."[157] This appreciation, combined with entrepreneurial prowess, will enable American law schools to produce the world's next generation of top global attorneys.

C. Experiential Education in the Law

Because experiential education lays at the heart of the reforms proposed in Part IV, *infra*, we take brief note of what many commentators have already observed: today's market demands and rewards law graduates capable of combining conceptual learning with real-world skills, and it is incumbent upon law schools to produce such candidates.[158] To this end, experiential elements, including clinics, are key assets in the preparation of global lawyers.[159] Still, like

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attorney to be entrepreneurial. Thus, our contention that attorneys must be trained to "think like lawyers" is simply to say that lawyers should think entrepreneurially as a matter of course in today's environment.

[154] *See* Maxeiner, *supra* note 22, at 37-44 (discussing the additive, integrative, and immersion approaches to internationalization in law schools).

[155] *Id.* at 46.

[156] *Id.* (emphasis added). *See also infra* Part II.F (contending that law schools must teach culture in the broader sense in order to prepare practice-ready lawyers).

[157] Maxeiner, *supra* note 22, at 47.

[158] Some law schools heavily integrate skills courses, workshops, simulations, and experiential learning (including clinics) into their curricula with good results. *See, e.g.,* Gregory M. Duhl, *Equipping Our Lawyers: Mitchell's Outcomes-Based Approach to Legal Education*, 38 WM. MITCHELL L. REV. 906 (2012).

[159] Silver, *Getting Real*, *supra* note 14, at 461 ("While distinctions among legal systems and in substantive law can be learned from reading and more traditional approaches to cognitive learning, in order to acquire the sensitivity necessary to function with expertise in a global environment, experiential learning activities may take precedence."). *See also* Ross Hyams, *Multidisciplinary Clinical Legal Education: The*

many of the areas our proposals seek to combine, experiential learning is underutilized in American legal education today.[160] "As we enter the new millennium, the movement beyond the casebook method to the wider integration of clinical methodology throughout the curriculum stands on a solid intellectual foundation. Yet . . . too often clinical teaching and clinical programs remain at the periphery of law school curricula."[161]

Most global practices, and expatriate practices in foreign countries, are predominantly transactional[162] in nature. The reforms proposed here are aimed principally at preparing strategic, entrepreneurial lawyers—many of whom will be primarily or exclusively transactional. All three major avenues for teaching transactional law—substantive courses, simulations, and clinics[163]—are incorporated into the proposals of Part IV, *infra*. Irrespective of the precise mode of instruction, the end goal of an experiential legal education is the development of students' critical abilities through experience and frequent feedback that enables further development.[164]

Clinics play a featured role in experiential legal education. "[T]he primary goal of clinical legal education should be to teach students how to learn from experience. . . . Clinical education is first and foremost a method of

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Future of the Profession, 37 ALT. L. J. 103, 105-06 (2012) (advocating the integration of multidisciplinary legal clinics into the law curriculum and noting that such clinics address many of the skills that commentators frequently identify as necessary for twenty-first century lawyers).

[160] "Learning-by-doing has been a part of legal education since its very beginning. Yet, today's legal education is often sorely lacking in this area." John T. Gaubatz, *Of Moots, Legal Process, and Learning to Learn the Law*, 37 U. MIAMI L. REV. 473, 490 (1983). Experiential learning tends to foster greater enthusiasm for the material, gives students a much more powerful understanding of why the skills they are learning are important in practice, and illustrates the importance of the law to the client. *See generally id. See also* Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 478 (2002) (arguing that today's legal education does not adequately train transactional lawyers, since "thinking like a lawyer" is only one skill of many that lawyers need).

[161] Barry, Dubin & Joy, *supra* note 53, at 32.

[162] "'Transactional law' refers to the various substantive legal rules that influence or constrain planning, negotiating, and document drafting in connection with business transactions, as well as the 'law of the deal' (i.e., the negotiated contracts) produced by the parties to those transactions." Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J. L. & POL'Y 85, 90 n.27 (2013).

[163] *Id.* at 90 n.24 (noting these three major forms for teaching transactional law); *see also* Dilloff, *supra* note 136, at 448-51 (recommending role-playing, simulations, and getting out of the classroom as some of the most productive experiential learning methods).

[164] *See* Gantt, *supra* note 21, at 751-56.

teaching."[165] Such a teaching method requires that students are confronted with the types of challenges that practicing attorneys encounter, that students interact with others to solve the challenge, and that the students' performance is subjected to intensive review.[166] "The clinical method allows students to confront the uncertainties and challenges of problem solving for clients in fora that often challenge precepts regarding the rule of law and justice. . . . [T]he best learning takes place when the broad range of abilities we possess is engaged."[167] So long as clinical courses are taken for credit (to properly incentivize students and faculty),[168] experiential programs can produce significant results.[169] Simulations[170] and workshops[171] can also be helpful in advancing experiential legal education. In terms of scope, clinics can and should address transnational legal issues.[172]

Some scholars are embracing innovation in experiential learning.[173] Professor Jennison advocates for a combination of "instructional innovation, problem-solving innovation, and experiential education innovation" in order to "transform the landscape of the legal academy."[174] These innovations, like experiential education generally, help the student to bridge the law learned in books with "the complex and variegated world of the law in action."[175] The proposals in Part IV, *infra*, endeavor to incorporate these many insights concerning experiential learning.

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[165] Barry, Dubin & Joy, *supra* note 53, at 17-18.

[166] *Id.* at 17-18.

[167] *Id.* at 38.

[168] *Id.* at 10.

[169] *Id.* at 72 (reviewing the many productive results that clinical legal education can produce).

[170] *See, e.g.*, Shawn Marie Boyne, *Crisis in the Classroom: Using Simulations to Enhance Decision-Making Skills*, 62 J. LEGAL EDUC. 311 (2012); *see generally* Robert C. Illig, Therese H. Maynard, Cherie O. Taylor & Irene Kosturakis, *Teaching Transactional Skills through Simulations in Upper-Level Courses: Three Exemplars*, 10 TENN. J. BUS. L. 15 (2009) (detailing, *inter alia*, the use of labs associated with traditional doctrinal courses); Carol R. Goforth, *Preparing the Corporate Lawyer: Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851 (2000) (advancing multiple reasons for the use of client-based simulation exercises in law courses).

[171] *See generally* Jennison, *supra* note 131, at 665-66.

[172] Barry, Dubin & Joy, *supra* note 53, at 57.

[173] *See generally* Jennison, *supra* note 131.

[174] *Id.* at 670-73.

[175] Katherine R. Kruse, *Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education*, 56 N.Y.L. SCH. L. REV. 659, 660 (2011). "[C]linical pedagogy is ideally suited to overcome the seemingly intractable problem of how to integrate social science insights into law teaching. . . . In clinics, students are immersed in the heart of the law in action. . . ." *Id.* at 681. *See also* Evans & Gabel, *supra* notes 2, 125 (noting divergence between the law in theory and the law in practice).

D. General Considerations on Teaching Entrepreneurship

Entrepreneurship, though widely thought of exclusively in terms of "starting a new business," exists in many contexts.[176] Among these is the context of interest to us—entrepreneurship in the law.[177] Legal entrepreneurship is, however, an idea largely unexplored in the academic literature.[178] Thus, the next logical step in determining how law schools might produce legal entrepreneurs is to understand how entrepreneurship education functions within its traditional academic home: business schools.

Entrepreneurship has been conceived of in many ways.[179] For our purposes, entrepreneurship "is about identifying opportunities, creatively breaking patterns, taking and managing risk, and organising and co-ordinating resources."[180] Thus, "[e]ntrepreneurship is about entrepreneurial individuals interacting with their environment, thus discovering, evaluating and exploiting opportunities."[181]

We adopt Fayolle and Klandt's broad definition of "entrepreneurship education" as "any pedagogical programme or process of education for entrepreneurial attitudes and skills, which involves developing certain personal qualities. It is therefore not exclusively focused on the immediate creation of new businesses. Hence this definition covers a wide variety of situations, aims,

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[176] Evans & Gabel, *supra* note 2, at 396-97; *accord* Mark Griffiths, Jill Kickul, Sophie Bacq & Siri Terjesen, *A Dialogue with William J. Baumol: Insights on Entrepreneurship Theory and Education*, 36 ENTREPRENEURSHIP THEORY & PRAC. 611, 611-12 (2012) (stating that entrepreneurship is "no longer . . . synonymous with new, small, or owner-managed firms"). Some of the literature reserves the term "entrepreneurship" only for the traditional function of starting new businesses, employing such terms as "enterprising behavior" to describe individuals who apply entrepreneurial skills outside the context of starting a new business. *See*, *e.g.*, Per Blenker, Poul Dreisler, Helle Meibom Faergemann & John Kjeldsen, *A Framework for Developing Entrepreneurship Education in a University Context*, 5 INT'L J. ENTREPRENEURSHIP & SMALL BUS. 45, 56-57 (2008).

[177] *See generally supra* Part II.

[178] *See* Evans & Gabel, *supra* note 2, at 400.

[179] Entrepreneurship is a distinctive, unique discipline, and not merely an amalgamation of other business disciplines. *See*, *e.g.*, Michael H. Morris, Justin W. Webb, Jun Fu & Sujata Singhal, *A Competency-Based Perspective on Entrepreneurship Education: Conceptual and Empirical Insights*, 51 J. SMALL BUS. MGMT. 352, 365 (2013).

[180] Jarna Heinonen & Sari-Anne Poikkijoki, *An Entrepreneurial-Directed Approach to Entrepreneurship Education: Mission Impossible?*, 25 J. MGMT. DEV. 80, 82 (2006).

[181] *Id.*; *accord* Francisco Liñán, *The Role of Entrepreneurship Education in the Entrepreneurial Process*, 1 HANDBOOK OF RES. IN ENTREPRENEURSHIP EDUC. 230, 234-35 (Alain Fayolle ed., 2007) (contending that the entrepreneurial process consists of the interactions between the entrepreneur, the environment, and the opportunity; and, thus, entrepreneurship education develops creativity and opportunity recognition skills, intention, specific knowledge, and other facets crucial to this process).

methods and teaching approaches."[182] Entrepreneurship and entrepreneurship education can thus be perceived at different levels: as a matter of culture, behaviors, and specific situations.[183] Regardless of the particular paradigm or theoretical framework in which entrepreneurship is taught,[184] the fundamental goal "is that learning objectives and learning activities enhance the students' entrepreneurial behavior. . . ."[185]

Entrepreneurship as an academic discipline is relatively new; as such, the discipline's foundations are still evolving, and entrepreneurship courses often embrace divergent learning objectives.[186] Some scholars question whether entrepreneurship can be taught,[187] but that question appears to have been resolved affirmatively.[188] Numerous approaches to teaching entrepreneurship exist;[189] the

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[182] Alain Fayolle & Heinz Klandt, *Issues and Newness in the Field of Entrepreneurship Education: New Lenses for New Practical and Academic Questions*, *in* INT'L ENTREPRENEURSHIP EDUC. 1, 1 (Alain Fayolle & Heinz Klandt eds., 2006).

[183] *Id.* at 2.

[184] Per Blenker, Steffen Korsgaard, Helle Neergaard & Claus Thrane, *The Questions We Care About: Paradigms and Progression in Entrepreneurship Education*, 25 INDUS. & HIGHER EDUC. 417, 419-22 (2011) (discussing the four paradigms in entrepreneurship education).

[185] *Id.* at 425; *accord* Earl C. Meyer, *A Philosophy of Entrepreneurship Education*, 46 BUS. EDUC. F. 8 (1992) ("The primary purpose of entrepreneurship education should be to prepare students for entrepreneurial opportunities."). Other scholars are more specific. "The aim of our entrepreneurship education," for example, can be "to integrate the skills and attributes of an entrepreneurial individual with the entrepreneurial process and related behavior." Heinonen & Poikkijoki, *supra* note 180, at 83-84.

[186] Nathalie Duval-Couetil, *Assessing the Impact of Entrepreneurship Education Programs: Challenges and Approaches*, 51 J. SMALL BUS. MGMT. 394, 397 (2013). *See also* Heinonen & Poikkijoki, *supra* note 180, at 81-82 (offering an excellent synopsis of the recent evolution of the discipline and noting that academic work in the field has touched upon a wide variety of themes).

[187] *See*, *e.g.*, Duval-Couetil, *supra* note 186, at 397.

[188] *See*, *e.g.*, Dean Elmuti, Grace Khoury & Omar Omran, *Does Entrepreneurship Education Have a Role in Developing Entrepreneurial Skills and Ventures' Effectiveness?*, 15 J. ENTREPRENEURSHIP EDUC. 83 (2012) (noting studies indicating that entrepreneurship education is indeed effective at training students); Carlos A. Albornoz, *Toward a Set of Trainable Content on Entrepreneurship Education: A Review of Entrepreneurship Research from an Educational Perspective*, 3 J. TECH. MGMT. & INNOVATION 86 (2008) (knowledge, skills, and attitudes can be taught within the context of entrepreneurship); Bruce C. Martin, Jeffrey J. McNally & Michael J. Kay, *Examining the Formation of Human Capital in Entrepreneurship: A Meta-Analysis of Entrepreneurship Education Outcomes*, 28 J. BUS. VENTURING 211 (2013) (finding evidence from the human capital context that entrepreneurship education delivers value to students); Alain Fayolle, *Entrepreneurship Education at a Crossroads: Towards a More Mature Teaching Field*, 16 J. ENT. CULTURE 325 (2008) (stating that entrepreneurship can be taught); Saskia J.M. Harkema & Henk Schout, *Incorporating Student-Centered Learning in Innovation and*

most fundamental debate is whether education should be *about* entrepreneurship ("[c]ourses that explain entrepreneurship and its importance to the economy, where students remain at a distance from the subject"), or *for* entrepreneurship ("courses with an experiential component that train students in the skills necessary to develop their own businesses").[190] Some academics add a third category of education *through* enterprise, which involves "using the new venture creation process to help students acquire a range of both business understanding and transferable skills or competencies."[191] The proposals in Part IV, *infra*, aspire to produce entrepreneurial lawyers by positively contributing to students' mindsets and experiences in and beyond the traditional classroom; thus, our proposal is one that is both "for" and "through" entrepreneurship. The extent to which entrepreneurship programs have moved beyond the "about" approach is questionable.[192] In any event, tradeoffs exist in the choice of entrepreneurship pedagogy, and programs must manage these tradeoffs.[193]

Entrepreneurship Education, 43 EUR. J. EDUC. 513, 514 (2008) (stating that although entrepreneurship can be taught, the pedagogy and context of learning are important); Colette Henry, Frances Hill & Claire Leitch, *Entrepreneurship Education and Training: Can Entrepreneurship be Taught? Part I*, 47 EDUC. & TRAINING 98 (2005); Colette Henry, Frances Hill & Claire Leitch, *Entrepreneurship Education and Training: Can Entrepreneurship be Taught? Part II*, 47 EDUC. & TRAINING 158 (2005) (noting that most commentators believe that at least some aspects of entrepreneurship can be taught, although many approaches to teaching are possible because of the many disciplinary perspectives from which the subject can be approached); Donald F. Kuratko, *The Emergence of Entrepreneurship Education: Development, Trends, and Challenges*, 29 ENTREPRENEURSHIP THEORY AND PRAC. 577 (2005) (contending that at least some aspects of entrepreneurship, including "entrepreneurial perspective," can be taught); Jeff Vanevenhoven, *Advances and Challenges in Entrepreneurship Education*, 51 J. SMALL BUS. MGMT. 466, 467 (2013) ("Entrepreneurship is a domain of traits that can be learned and thus can be taught."). *But see* Trish Boyles, *21st Century Knowledge, Skills, and Abilities and Entrepreneurial Competencies: A Model for Undergraduate Research Education*, 15 J. ENTREPRENEURSHIP EDUC. 41, 41-50 (2012) (questioning whether sufficient evidence exists for this conclusion and suggesting new ways in which entrepreneurship programs might be assessed).

[189] Some commentators view this negatively, reflecting a lack of theoretical consensus in the field. *See* Henry, Hill & Leitch, *Part I*, *supra* note 188, at 103. For a concise synopsis on why there remains such little agreement on the elements and methods to be used in teaching entrepreneurship, *see* Vanevenhoven, *supra* note 188, at 467.

[190] Duval-Couetil, *supra* note 186, at 397-98 (reviewing the various approaches to teaching entrepreneurship, as well as the "about" versus "for" debate); Blenker, Dreisler, Faergemann & Kjeldsen, *supra* note 176, at 55.

[191] Fayolle, *supra* note 188, at 327; *see also* Henry, Hill & Leitch, *Part I*, *supra* note 188, at 101-02 (discussing three-category framework by which to organize entrepreneurship education).

[192] Some scholars find that "despite a widespread desire to promote and develop

Stemming from the lack of consensus on its core objectives, entrepreneurship education often entails a variety of assessment instruments.[194] The various forms of entrepreneurship education detailed above diverge significantly in their modes of assessment.[195] "'About' forms of entrepreneurship education are much less likely to engage other stakeholders, are much more likely to seek 'objective' assessment methods and are more likely to apply 'summative' assessment methods."[196] In the other forms of entrepreneurship education, "assessment practice tends to be more reflective, more engaging of other stakeholders, more accepting of ambiguity and more formative in nature."[197] In sum, Pittaway and Edwards urge that entrepreneurship educators "do more to engage stakeholders particularly via peer assessment and the engagement of entrepreneurs and other professionals. Assessment practice needs to be more innovative."[198]

Entrepreneurship is an inherently multidisciplinary area.[199] Thus, collaboration across disciplines and even across institutions of higher education can be productive means by which to deliver entrepreneurship education,[200]

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innovative forms of entrepreneurship education it is quite evident . . . that current educational practice remains fairly traditional." Luke Pittaway & Corina Edwards, *Assessment: Examining Practice in Entrepreneurship Education*, 54 EDUC. & TRAINING 778, 792 (2012). In particular, a sizeable proportion of entrepreneurship education remains "focused on helping students understand the phenomenon rather than preparing them for genuine entrepreneurial activity." *Id.* at 793.

[193] *See generally* Benjamin C. Powell, *Dilemmas in Entrepreneurship Pedagogy*, 16 J. ENTREPRENEURSHIP EDUC. 99 (2013) (discussing major dilemmas and tradeoffs involved in the selection of entrepreneurship pedagogy).

[194] Duval-Couetil, *supra* note 186, at 398 (describing assessment instruments). *See also id.* at 401-05 (discussing what an entrepreneurship program must do to promote assessment); Boyles, *supra* note 188, at 49-50 (suggesting possible assessment instruments for entrepreneurship); Fayolle, *supra* note 188, at 329 (noting the "wide range of pedagogical methods, approaches and modalities" that have been tested and used in entrepreneurship education). *See generally* Morris, Webb, Fu & Singhal, *supra* note 179 (identifying key entrepreneurial competencies, the challenges associated with assessing them, and proposing means for doing so).

[195] Pittaway & Edwards, *supra* note 192, at 793.

[196] *Id.* "Given the dominance of this form of entrepreneurship education in [their] sample," the authors add, "this is a somewhat disheartening finding." *Id.*

[197] *Id.*

[198] *Id.*

[199] Duval-Couetil, *supra* note 186, at 398, 406 (discussing the need for entrepreneurship education programs to appeal to key stakeholders because as inherently interdisciplinary programs, these run the risk of being left without a clear champion across the disciplines).

[200] *See*, *e.g.*, Paul F. Buller & Todd A. Finkle, *The Hogan Entrepreneurial Leadership Program: An Innovative Model of Entrepreneurship Education*, 16 J.

especially in light of the expansive content coverage embraced in many entrepreneurship courses.[201] Indeed, "[h]aving established the entrepreneurship field in business schools (and in the eyes of [other stakeholders]) the next challenge for the entrepreneurship education movement is into non-business school arenas."[202] Although "law" and "entrepreneurship" have been blended in many legal curricula, these programs almost universally prepare attorneys to advise *clients* who are entrepreneurs, within the traditional Western perceptions of the lawyer's functions, and only within the U.S. context.[203] We propose something more: "attorneys can apply the entrepreneur's fundamental skills to the unique circumstances of the legal market, harnessing legal flexibilities and the linkages between law and strategy to craft competitive advantages."[204]

Some commentators have attempted to enumerate the individual skills required of, or most commonly commanded by, entrepreneurs[205]—for example, the wherewithal to communicate effectively.[206] Alternatively, entrepreneurial competencies can be grouped into three major categories: cognitive, social, and action-oriented.[207] The cognitive aspects of entrepreneurship are concerned with the "entrepreneurial mindset"—that is, "the distinct[ive] ways of thinking which increase [entrepreneurs'] likelihood of identifying opportunities and [taking action] to exploit those opportunities."[208] The cognitive dimension of

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ENTREPRENEURSHIP EDUC. 113 (2013) (describing the Entrepreneurship Education Consortium). Significantly, the "Hogan Program" discussed in this article involves more than just coursework: students complete an internship, participate in a "new venture lab" and in the "regional business plan competition," and take part in other co-curricular activities. *Id.* at 117-19.

[201] Heidi M. Neck & Patricia G. Greene, *Entrepreneurship Education: Known Worlds and New Frontiers*, 49 J. SMALL BUS. MGMT. 55, 56 (2011).

[202] Debra Johnson, Justin B.L. Craig & Ryan Hildebrand, *Entrepreneurship Education: Towards a Discipline-Based Framework*, 25 J. MGMT. DEV. 40, 41 (2006).

[203] *See infra* Part IV (discussing existing "law and entrepreneurship" programs in U.S. law schools).

[204] Evans & Gabel, *supra* note 2, at 401.

[205] Hisrich and Peters, for example, "categorize the various skills required by entrepreneurs as follows. Technical skills: includes written and oral communication, technical management and organizing skills. Business management skills: includes planning, decision-making, marketing and accounting skills. Personal entrepreneurial skills: includes inner control, innovation, risk taking and innovation." Henry, Hill & Leitch, *Part I*, *supra* note 188, at 104.

[206] Effective communication has been shown to increase an entrepreneur's prospects for success greatly. *See* Pia Ulvenblad, Eva Berggren & Joakim Winborg, *The Role of Entrepreneurship Education and Start-Up Experience for Handling Communication and Liability of Newness*, 19 INT'L J. ENTREPRENEURSHIP BEHAV. & RES. 187 (2013).

[207] *See generally* Boyles, *supra* note 188.

[208] *Id.* at 44.

entrepreneurship is learnable and can be developed through practice.[209] Entrepreneurial cognitions also involve the manner in which entrepreneurs process information and approach problems; these skills, too, can be learned.[210] Entrepreneurs actively search for information, remain alert, and embrace inventive thinking as part of their cognition.[211]

Entrepreneurs' social skills are also ordinarily well-developed.[212] An individual's relationships with other people "are the basis of [the] entrepreneur's social capital; an intangible resource created through social relationships that creates access to both tangible and intangible resources through knowing others."[213] Relationships can connect entrepreneurs to crucial resources and opportunities.[214] Entrepreneurship education can encourage the development of social skills through a greater emphasis on social processes and social behaviors.[215] The ability to accurately assess others, adapt to changing social situations, and to persuade others are learnable social skills and can be taught.[216]

Finally, entrepreneurs are action-oriented. "Entrepreneurship simply does not exist without actions on the part of the entrepreneur to manifest and exploit a recognized opportunity."[217] Entrepreneurship is "a conscious process of establishing goals, planning for goal achievement, monitoring execution, and adjusting for success."[218] Clearly, "knowledge, problem-solving skills and an attitude conducive to change seem to be important" for entrepreneurs,[219] and thus, these aptitudes should be encouraged through entrepreneurship education.

Notwithstanding their many differences, U.S. entrepreneurship programs appear to share at least two goals in common: increasing students' awareness and understanding of entrepreneurship as a process, and increasing students' awareness of entrepreneurship as a career goal.[220] In other words, U.S. programs seek first to raise students' entrepreneurial *intentions*.[221] While the programs that we propose endeavor to raise students' entrepreneurial intentions (no other dimension of entrepreneurship training is likely to be effective if students have no

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[209] *Id.*
[210] *Id.* at 45.
[211] *Id.* at 45-46.
[212] Boyles, *supra* note 188, at 48.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] Boyles, *supra* note 188, at 48.
[218] *Id.*
[219] Harkema & Schout, *supra* note 188, at 514.
[220] Daniel Yar Hamidi, Karl Wennberg & Henrik Berglund, *Creativity in Entrepreneurship Education*, 15 J. SMALL BUS. AND ENTERPRISE DEV. 304, 306 (2008).
[221] *See id.*

intention of using the training), our programs also emphasize the development of concrete skills.[222]

Sophisticated entrepreneurship programs develop students' abilities with respect to opportunity recognition.[223] Students must become capable of recognizing and assessing the sources of entrepreneurial opportunity. Among these sources of opportunity are non-market activities,[224] and in particular, those enabled by changes in government policy.[225] While we fully appreciate this insight, it represents the traditional Western perception of the relationship between public policy and business: namely, that policy impacts business in a variety of ways, and that changes to policy can create new business opportunities in the *economic* marketplace.[226] Our prior work's core argument is somewhat different: attorneys can generate competitive advantages for the client in the economic realm through the application of entrepreneurial initiative in the legal realm.[227] The creation of legal competitive advantage thus entails more than merely reacting to changes in policy;[228] it also involves more than seeking to influence the content of policy.[229] "For a business venture to survive, and to succeed, it is not

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[222] *See generally infra* Part IV (discussing proposed reforms). "Intention is a necessary but not sufficient condition for entrepreneurship . . . ." Heinonen & Poikkijoki, *supra* note 180, at 86.

[223] Albornoz, *supra* note 188, at 89-90 (discussing opportunity recognition in entrepreneurship education).

[224] The "process of opportunity creation can include significant non-market activities." Greg Clydesdale, *Entrepreneurial Opportunity: A Framework for Teaching*, 15 J. ENTREPRENEURSHIP EDUC. 19, 23 (2012). "Opportunities emerge from a complex pattern of changing conditions including technological, economic, political, social, and demographic conditions . . . . It is the juxtaposition or confluence of conditions at a given point of time that determine the existence of an opportunity." *Id.* The role of non-market activities in opportunity recognition, discovery, and creation is often neglected in the academic literature. *Id.* at 21.

[225] *Id.* at 24-25.

[226] The traditional Western view of the relationship between public policy and business is deeply engrained in the relevant literature. *See* Evans & Gabel, *supra* note 2, at 335, 344-49 (observing that the little prior research to address the law as a source of competitive advantage almost uniformly assumes the presence and correctness of Western institutions, and that this assumption is poorly-suited on the global scope since "the character and prevalence of strategic legal opportunities depend upon the nature of the legal system").

[227] *Id.* at 401.

[228] *See* Clydesdale, *supra* note 224, at 25 (discussing Weidenbaum's work, which argues that businesses have three primary options for approaching public policy, one of which is "passive reaction").

[229] *See id.* (discussing the "public policy shaping" option). Neither reacting to policy nor seeking to change policy is necessarily inconsistent with legal entrepreneurship. *See* Evans & Gabel, *supra* note 2, at 406-07. However, legal entrepreneurship does not require

enough that the entrepreneur be 'in the right place at the right time,'" Dafna Kariv notes.[230] "Entrepreneurs also have to develop the ability to stay on top of the trends, largely by adapting to them and making adjustments in the plans on which the business was originally founded."[231] These principles certainly apply to the practice of legal entrepreneurship, where attorneys must stay ahead of and capitalize upon trends in culture and public policy.[232]

For the classical entrepreneur, "an opportunity means meeting (or creating) a market need or interest and turning it into superior value through a variety of resource and ability combinations."[233] Thus, "[e]ntrepreneurs who transform their new ideas or solutions into market and commercial potential have performed a successful opportunity-recognition process."[234] Opportunities can be created or exploited, but in either event,[235] opportunity recognition can and should be taught.[236]

Sound entrepreneurship programs also develop students' skills and attitudes toward risk and risk assessment.[237] This can be accomplished by several means, including the use of realistic risk assessments, developing business plans (and conferring with advisors while doing so), and simulations.[238] While these methods have been suggested in the traditional (business school) context of

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either and, indeed, opportunities for legal entrepreneurship often (counterintuitively) require that changes to flexible legal institutions must be avoided or even affirmatively resisted. *See id.* at 406-08.

[230] DAFNA KARIV, ENTREPRENEURSHIP: AN INTERNATIONAL INTRODUCTION 90 (2011).

[231] *Id.*

[232] *See supra* Part II.C (discussing empirical evidence of legal entrepreneurship in China).

[233] KARIV, *supra* note 230, at 90.

[234] *Id.* at 91.

[235] *Id.* "[E]xploiting opportunities focuses on using existing resources or combining them to gain economic returns from the potential entrepreneurial opportunity, while creating an opportunity means to form new, innovative possibilities to be used for the new idea." *Id.*

[236] *See generally* Dawn R. DeTienne & Gaylen N. Chandler, *Opportunity Identification and Its Role in the Entrepreneurial Classroom: A Pedagogical Approach and Empirical Test*, *in* ENTREPRENEURSHIP EDUC. 333 (Patricia G. Greene & Mark P. Rice eds., 2007).

[237] *See generally*, *e.g.*, Saulo D. Barbosa, Jill Kickul & Brett R. Smith, *The Road Less Intended: Integrating Entrepreneurial Cognition and Risk in Entrepreneurship Education*, 16 J. ENTERPRISING CULTURE 411 (2008) (arguing, *inter alia*, that a holistic sequence of entrepreneurship education experiences can develop students' risk-taking skills).

[238] *See generally* David F. Robinson, *Planting the Seeds of Effective Entrepreneurship by Teaching Risk, Advising, and Design through Growth*, 3 J. TECH. MGMT. AND INNOVATION 29 (2008).

entrepreneurship education, the LL.M. degree proposed here[239] will incorporate analogous exercises for teaching entrepreneurship in the context of the legal marketplace.

Many entrepreneurship programs now include some degree of practical skills courses to better prepare students for the realities of the competitive marketplace,[240] fully embracing experiential learning methods as a foundational component of their curricula.[241] "Perhaps the most powerful learning situation [in entrepreneurship education] is achieved when experiential learning, through active involvement with an entrepreneurial company, enables students to acquire

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[239] *See infra* Part IV.

[240] *See*, *e.g.*, Henry, Hill & Leitch, *Part I*, *supra* note 188, at 105 (reviewing the numerous learning methods employed in entrepreneurship education, including lectures, presentations, handouts, video and case study-based learning, group work and role-plays). Significantly, student surveys reveal that courses based on the project method "were perceived to develop and enhance knowledge and understanding . . . as well as the ability to evaluate" more effectively than the traditional case method in entrepreneurship courses. *Id.* at 105-06. *See also* Vesa P. Taatila, *Learning Entrepreneurship in Higher Education*, 52 EDUC. & TRAINING 48, 55-56 (2010) ("The most effective methods used so far for learning [entrepreneurial] skills have been very practical entrepreneurial projects conducted in a real environment and with real customers."); George Gendron & Patricia Greene, *Practitioners' Perspectives on Entrepreneurship Education: An Interview with Steve Case, Matt Goldman, Tom Golisano, Geraldine Laybourne, Jeff Taylor, and Alan Webber*, *in* ENTREPRENEURSHIP EDUC. 88, 89 (Patricia G. Greene & Mark P. Rice eds., 2007). Nevertheless, at least one survey has found that the development of entrepreneurial skills is the least frequently stated major objective of entrepreneurship education in the literature. Ernest Samwel Mwasalwiba, *Entrepreneurship Education: A Review of its Objectives, Teaching Methods, and Impact Indicators*, 52 EDUC. & TRAINING 20, 26 (2010).

[241] Robin Anderson, Brooke R. Envick & Prasad Padmanabhan, *A Practical Framework for the Continuous Advancement of Entrepreneurship Education*, 4 AM. J. ECON. & BUS. ADMIN. 65, 66 (2012); Briga Hynes, Yvonne Costin & Naomi Birdthistle, *Practice-Based Learning in Entrepreneurship Education*, 1 HIGHER EDUC., SKILLS AND WORK-BASED LEARNING 16 (2011) (describing an experiential entrepreneurship program); Blenker, Dreisler, Faergemann & Kjeldsen, *supra* note 176, at 58 (discussing experiential learning in entrepreneurship education); Fayolle, *supra* note 188, at 329 (noting the use of "real-life or virtual cases, role plays and problems" in entrepreneurship education); Heinonen & Poikkijoki, *supra* note 180, at 83 (noting that the multi-faceted nature of entrepreneurship "suggests the need for a shift from teaching to learning in an environment as close to real life as possible. Concrete experience gained through the active participation of students should be part of the [entrepreneurship] curriculum."); Colin Jones & Jack English, *A Contemporary Approach to Entrepreneurship Education*, 46 EDUC. & TRAINING 416, 422 (2004) (urging that entrepreneurial education is most effectively delivered by a teaching style "that is action-oriented, supportive of experiential learning, problem-solving, project based, creative, and involves peer evaluation"); Leitch & Harrison, *supra* note 30, at 92-94 (discussing action learning in entrepreneurship, which "emphasizes learning by doing").

knowledge about the business environment and to develop questioning and problem-solving skills in a real-life setting."[242] Experiential learning in the entrepreneurship context can take a variety of forms,[243] including synergistic learning formats in which nascent entrepreneurs (students), established entrepreneurs, and facilitators are brought together and learn from one another collaboratively.[244] Students' involvement with professionals should benefit both parties, and will do so when the experiential program is well-designed.[245] Experiential learning projects that include non-business majors can yield numerous benefits to students.[246]

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[242] Sarah Cooper, Colin Bottomley & Jillian Gordon, *Stepping Out of the Classroom and Up the Ladder of Learning*, 18 INDUS. & HIGHER EDUC. 11, 15 (2004).

[243] Mwasalwiba, *supra* note 240, at 31 (noting that these forms include business simulations, videos and filming, real venture setting up, games and competitions, role models and guest speakers, projects, workshops, presentations, discussions and group work, study visits, case studies, business plan creation, and theory-based lectures). For a helpful discussion on ideas for experiential learning in entrepreneurship, *see generally* Neck & Greene, *supra* note 201 (proposing that entrepreneurship should be taught as a method rather than as a process). Some scholars advance a holistic approach to learning because such an approach is similar to the demands of actually being an entrepreneur. Taatila, *supra* note 240, at 55. "The reason for the importance of a holistic view of learning instead of the more traditional academic approach of atomizing the subject and then teaching it 'atom by atom' may be that the key to entrepreneurship is not so much in the mastering of the individual skills involved but in being able to control the ligaments between them." *Id.*; *accord* Siok San Tan & C. K. Frank Ng, *A Problem-Based Learning Approach to Entrepreneurship Education*, 48 EDUC. & TRAINING 416 (2006) (urging that entrepreneurship education should "adopt an integrative and holistic approach" since the discipline is multi-faceted and seeks to promote creativity, cross-functional thinking, and ambiguity tolerance).

[244] *See generally* Lorna A. Collins, Alison J. Smith & Paul D. Hannon, *Applying a Synergistic Learning Approach in Entrepreneurship Education*, 37 MGMT. LEARNING 335 (2006). Although the project profiled by Collins et al. achieved positive results, synergistic learning programs can be challenging to manage—particularly with respect to involving professionals outside of the university. *See id.* at 352. Other similar formats, such as the "entrepreneurial-directed approach," call for co-learning between teachers and students, wherein the teacher acts as a supporter and facilitator. "The task of the teacher is to develop the students' abilities to reflect on their own experiences and put them in a wider context, and to give them the opportunity to make their own theoretical interpretations." Heinonen & Poikkijoki, *supra* note 180, at 85. Students assume new perspectives as role-playing encourages people to view situations from novel angles. "The basic idea is that anyone is capable of entrepreneurial activity once she/he has given her/himself permission to be brave, creative, and innovative." *Id.* at 87. Circles of experiential learning are employed such that new activities produce new experiences and new thinking through reflection. *Id.*

[245] Cooper, Bottomley & Gordon, *supra* note 242, at 15.

[246] *See generally* Christina Hartshorn & Paul D. Hannon, *Paradoxes in*

Some entrepreneurship programs are making headway in the international context.[247] "[G]lobal entrepreneurship courses have become increasingly common. . . . In these courses, students may even have the opportunity to travel and test out their ideas in a foreign environment."[248] Still, like legal education,[249] entrepreneurship education has often focused exclusively on the domestic context at the expense of the global.[250] Entrepreneurship programs can inculcate an international entrepreneurship culture, developing many traits desirable in global entrepreneurs. Among these are knowledge acquisition, the development of hard, soft, and cross-cultural skills, and international entrepreneurial competencies.[251] A "focus on improving students' awareness, knowledge and understanding of global market environments is fundamental to greater international orientation."[252] Ideally, programs will integrate foreign market immersion as a fundamental experiential element, but where constraints make this impossible, technologies can be employed to mitigate students' lack of first-hand experience.[253] "[E]xposing students to international entrepreneurs and their firms is critical," and, in general, "applied practical projects are preferable to academic exercises or case-study approaches."[254] Entrepreneurship instructors should therefore develop expansive networks with international entrepreneurs, investigate sources of possible funding for the exploration of international opportunities, carefully screen firms participating in

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Entrepreneurship Education: Chalk and Talk or Chalk and Cheese?, 47 EDUC. & TRAINING 616 (2005). These scholars discuss a project created for bioscience students in a European university. Some faculty co-taught with others, and students reported numerous benefits including elevated personal confidence and communication skills, an improved understanding of and ability to make decisions and work with others, and a helpful experience to discuss in job interviews. *Id.* at 624.

[247] Globalization and changes at the societal level are inducing greater complexity and uncertainty in most countries; thus, "at all levels, there will be a greater need for people to have entrepreneurial skills and abilities." Henry, Hill & Leitch, *Part I*, *supra* note 188, at 100-01.

[248] Anderson, Envick & Padmanabhan, *supra* note 26, at 66.

[249] *See supra* Part III.B.

[250] Jim Bell, Ian Callaghan, Dave Demick & Fred Scharf, *Internationalising Entrepreneurship Education*, 2 J. INT'L ENTREPRENEURSHIP 109, 110 (2004).

[251] *Id.* at 113-19.

[252] *Id.* at 119.

[253] *Id.*; *accord* Popescu Cristian-Aurelian & Simion Petronela Cristina, *Entrepreneurship Education and E-learning: A Perfect Match*, 5 J. ELECTRICAL AND ELECTRONICS ENG'G 203, 203-04 (2012) (illustrating that distance learning can contribute to entrepreneurship education, particularly in rural areas and in such varied national settings as rural Romania).

[254] Bell, Callaghan, Demick & Scharf, *supra* note 250, at 120.

the educational process, and carefully select student teams to balance the team members' experiences and backgrounds.[255]

E. Teaching Entrepreneurship Outside of the Traditional Context

In addition to the general principles of entrepreneurship pedagogy discussed in Part III.D, *supra*, it will behoove us briefly to consider the challenges and opportunities associated with teaching entrepreneurship outside of its traditional academic context. Entrepreneurship lends itself with relative ease to interdisciplinary inquiries because it is intrinsically an interdisciplinary field.[256] In the undergraduate context, campus-wide entrepreneurship offerings can yield productive learning opportunities.[257]

Conners and Ruth have found support for the hypothesis that students who take introductory-level entrepreneurship courses later in their studies tend to perform better in those courses.[258] Curiously (and encouragingly), however, business students and non-business students have been found to perform equally well in introductory entrepreneurship courses.[259] Knowledge "spillovers" from other business courses were not found to result in higher performance in

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[255] *Id.* at 121.

[256] Frank Janssen & Sophie Bacq, *Cultural and Outcomes-Related Issues in Implementing an Interdisciplinary Cross-Campus Entrepreneurship Education Program*, 23 J. SMALL BUS. AND ENTREPRENEURSHIP 733, 735 (2010). Entrepreneurship should thus be taught in an interdisciplinary way, *id,* though this can raise challenges within the university's culture., *id.* at 743. *See also* Briga Hynes, *Entrepreneurship Education and Training – Introducing Entrepreneurship into Non-Business Disciplines*, 20 J. EUR. INDUS. TRAINING 10 (1996) (providing a very helpful overview of moving entrepreneurship into non-business disciplines); Susan E. Conners & Derek Ruth, *Factors Influencing Success in an Introductory Entrepreneurship Course*, 15 J. ENTREPRENEURSHIP EDUC. 63, 64 (2012) (noting entrepreneurship tends to be a field of interdisciplinary study).

[257] Some academic observers are in accord. "Entrepreneurship as an academic discipline must push beyond the cozy walls of the college of business in order to connect with a broader population of students interested in entrepreneurship." Doan Winkel, Jeff Vanevenhoven, William A. Drago & Christine Clements, *The Structure and Scope of Entrepreneurship Programs in Higher Education around the World*, 16 J. ENTREPRENEURSHIP EDUC. 15, 26 (2013).

[258] Conners & Ruth, *supra* note 256, at 69.

[259] *Id.* at 69-70. This is consistent with prior anecdotal evidence. Some business faculty have attested that business majors outperform non-business majors in business courses generally, whereas other business faculty have reported that some of their strongest students in business courses hail from outside of the business majors. *Id.* at 66-67.

introductory-level entrepreneurship offerings.[260] "Taken together," Conners and Ruth concluded,

> [T]hese results bolster the idea that students can get a solid grounding in [e]ntrepreneurship without the need to take an extensive group of additional business courses. As well, and in contrast with some other business programs, these results argue against the necessity of creating a separate curriculum for non-business students.[261]

Administrators and faculty thus enjoy a relatively high degree of flexibility in designing entrepreneurship curricula.[262] Inquiry-based learning is an effective instructional method for teaching entrepreneurial ideas to non-business students.[263] Interdisciplinary teamwork is also helpful for students of all backgrounds.[264] Even in the case of non-business students, the best entrepreneurial learning outcomes result when theoretical knowledge and experiential opportunities are afforded to students together.[265] In the entrepreneurship context, as in the legal education context,[266] the inclusion of experiential learning is not hostile to theory.[267] Indeed, a sizeable body of evidence now supports the

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[260] *Id.* at 69-70.

[261] *Id.* at 71. Other factors unrelated to students' performance may still motivate specialized entrepreneurship offerings. *Id.* at 71-72.

[262] *Id.* at 72.

[263] *See*, *e.g.*, Luke Pittaway, *The Role of Inquiry-Based Learning in Entrepreneurship Education*, 23 INDUS. & HIGHER EDUC. 153, 153 (2009) (illustrating the application of one inquiry-based learning pedagogy for science students). Inquiry-based learning involves the posing of questions that require students to conduct research in order to answer—it is, in other words, the pursuit of "open questions." *Id.* at 154.

[264] *See generally* Francisco J. García-Rodríguez, Esperanza Gil-Soto & Inés Ruiz-Rosa, *New Methods in University Entrepreneurship Education: A Multidisciplinary Teams Approach*, 3 CREATIVE EDUC. 878, 880 (2012); *see also* Hynes, *supra* note 256, at 17 (endorsing interdisciplinary teamwork as a means for including entrepreneurship in non-business disciplines).

[265] Vijay Vij & Steve Ball, *Exploring the Impact of Entrepreneurship Education on University Nonbusiness Undergraduates*, 9 INT'L J. ENTREPRENEURSHIP AND SMALL BUS. 86, 100 (2010).

[266] *See supra* Part III.A.

[267] Vij & Ball, *supra* note 265, at 100 (describing the use and necessity of theory in an experiential learning program); *accord* James O. Fiet, *The Pedagogical Side of Entrepreneurship Theory*, *in* ENTREPRENEURSHIP EDUC. 292, 292 (Patricia G. Greene & Mark P. Rice eds., 2007) (discussing the value of theory in entrepreneurship education). Specifically, Professor Fiet advises that faculty can become irrelevant "when we fail to apply theory as a tool to answer student questions." *Id.* at 297. The use of theory can thus

combination of cross-disciplinary theoretical and experiential learning elements as the optimal approach to entrepreneurship education.[268]

The application of entrepreneurship pedagogy in the legal context, then, is a natural pairing of academic pursuits.[269] "There is no single, universally correct disciplinary location for entrepreneurship education. Within the university, entrepreneurship belongs wherever you want to put it. . . . You teach it wherever the right mindset prevails. In actual university practice, there is a healthy proliferation of locations emerging."[270] As a pedagogical matter, training lawyers as entrepreneurial strategists appears not only possible, but quite plausible.

F. Teaching Soft Skills: The Example of Teaching Culture

Scholars have long acknowledged the relevance and importance of culture to business.[271] The importance of culture to law practice has also been recognized: "If law schools are to prepare students for the reality of practice, it is useful to help students become aware of cultural issues that can affect client

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promote student learning by answering students' inquiries and by informing observations obtained through experiential learning opportunities.

[268] *See*, *e.g.*, Qingbin Wang, Kenneth Bauer & Kathleen Liang, *Toward a Multidisciplinary Entrepreneurship Education: A Case Study of the Community Entrepreneurship Program at the University of Vermont*, 2 INT'L J. INNOVATION AND REG'L DEV. 84, 84 (2010).

[269] Some institutions have developed clinics specifically to bring together students from law and others from entrepreneurship. In one such program, LL.B. and M.B.A. students jointly ran a clinic focused on providing solutions to start-up business owners. *See* Peter Robinson & Sandra Malach, *Multi-Disciplinary Entrepreneurship Clinic: Experiential Education in Theory and Practice*, *in* HANDBOOK OF RES. IN ENTREPRENEURSHIP EDUC., at 173, 176-78 (Alain Fayolle ed., 2007). Similar clinics and programs geared toward the law student/business student combination are fairly common in law schools throughout the United States. *See*, e.g., *Duke Law, LLM in Law & Entrepreneurship* (describing courses that bring together law students and entrepreneurs, and courses involving frameworks imported from MBA curricula), https://law.duke.edu/llmle/llm/ (last visited Oct. 7, 2015).

[270] Kevin Hindle, *Teaching Entrepreneurship at University: From the Wrong Building to the Right Philosophy*, *in* ENTREPRENEURSHIP EDUC. 135, 145 (Patricia G. Greene & Mark P. Rice eds., 2007).

[271] *See generally*, *e.g.*, MARY O'HARA-DEVEREAUX & ROBERT JOHANSEN, GLOBALWORK (1994); RICHARD D. LEWIS, WHEN CULTURES COLLIDE (1996); *see also* ROBERT ROSEN, GLOBAL LITERACIES (2000).

representation by examining the culture that the law school creates."[272] Understanding the client's language and culture are key aspects of both professional competency and ethical law practice.[273] Yet legal education arguably has underemphasized the role of language and culture.[274]

A voluminous body of academic literature has evolved on how best to teach university students about culture. A comprehensive review of this literature is beyond the scope of this article. Instead, we consider selections that appear particularly relevant to our context. Like many of the concepts discussed in this article, "[c]ultural knowledge, awareness, and skills can be taught and learned in a clinical program using a variety of methods. . . ."[275] Some scholars have developed methodologies for teaching culture in the legal education context.[276] "Many clinical teachers have recognized the importance of teaching diversity issues in the clinic."[277] Significantly, "cross-cultural competence is a skill that can be taught. . . . [E]veryone has the capacity to become more proficient at cross-cultural interaction and communication skills."[278] Even in a purely domestic practice, cultural differences can "result in negative judgments and misunderstanding."[279] "By teaching students how to recognize the influence of culture in their work and to understand, if not accept, the viewpoint of others, we provide students with skills that are necessary to communicate and work positively with future clients and colleagues."[280]

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[272] Antoinette Sedillo Lopez, *Reflections on Cultural Awareness – Exploring the Issues in Creating a Law School and Classroom Culture*, 38 WM. MITCHELL L. REV. 1176, 1178 (2012).

[273] Sanchez, *supra* note 49, at 640-41, 669.

[274] *Id.* at 645.

[275] Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J. L. & POL'Y 37, 38 (2008).

[276] *See generally*, *e.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33-34 (2001).

[277] *Id.* at 35. "One of my jobs as a clinical professor is to create a space where it is safe to talk about [racial, cultural, and class differences] without judging each other for the positions and ideas we bring to the discussion," explains Professor Paulette Williams. "Cultural differences are not generally the first explanation for [miscommunications that clinical law students have with their clients] and may not, in fact, be the cause. However, our individual perspectives shape our responses to situations, and it can be fruitful to consider whether there are some cross-cultural barriers in play." Paulette J. Williams, *Cross-Cultural Teaching in the Business Law Clinic*, 76 TENN. L. REV. 437, 439 (2009).

[278] Bryant, *supra* note 276, at 38.

[279] *Id.* at 39-40; *see also* Susan S. Kuo, *Teaching Cultural Defenses in the Criminal Law Classroom*, 48 ST. LOUIS L.J. 1297, 1297 (2004) (arguing that culture is highly relevant to both legal outcomes and to the proper study of U.S. law).

[280] Bryant, *supra* note 276, at 40.

The first step in cross-cultural lawyering is to become aware of the effect that culture has on oneself.[281] Though it is mostly invisible, culture "is the logic by which we give order to the world."[282] Teaching cross-cultural skills enables students to "make the invisible more visible and thus help students understand the reactions that they and the legal system may have towards clients and that clients may have towards them."[283] The law and legal system constitute a culture in themselves,[284] "with strong professional norms that gives [sic] meaning to and reinforces [sic] behavior."[285] Naturally, on the global scope, cultural competence is at least as crucial. Identical legal issues with identical facts may experience profoundly different results, and may be subject to different potential outcomes, depending upon the contexts in which the cases occur. In other words, the same case may be treated very differently across different countries—and the cultures of the jurisdictions in question are likely key explanatory drivers of these differences.[286]

The notion of global literacy can be defined as "a state of seeing, thinking, acting, and mobilizing in culturally mindful ways."[287] Similarly, "[c]ross-cultural lawyering occurs when lawyers and clients have different ethnic or cultural heritages and when they are socialized by different subsets within

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[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] "While the study of law within its larger culture is emerging, recognition of law *as* culture is still generally nascent within legal studies and pre-professional programs. In fact, the greater recognition of law's social and political role may have impeded a consideration of law's role as culturally specific," Kerstin Carlson notes. "Yet as law practice becomes more globalized, such awareness is an increasingly necessary element of any practitioner's toolkit." Kerstin Carlson, *Found in Translation: The Value of Teaching Law as Culture*, 5 DREXEL L. REV. 407, 408 (2013). Thus, "[i]n both domestic and international legal practice, an awareness of the cultural relevance . . . of legal norms and practices can increase lawyers' efficacy." *Id.* at 421.

[285] Bryant, *supra* note 276, at 40; *accord* Lopez, *Reflections on Cultural Awareness*, *supra* note 272 (noting that law schools create a culture unique to the legal industry).

[286] *See* Evans & Gabel, *supra* note 2, at 337 (noting the impact of culture on the firm's legitimacy); *id.* at 347 (noting that cultural differences will remain "highly influential in international business" in the era of globalization); *id.* at 361 (noting that "every legal system is based on social and cultural institutions," and that these institutions can drive legal risks and legal costs); *id.* at 369-71 (defining the jurisdiction's socio-cultural background as one of the four key "realms" within the rule of law process); *id.* at 380-82 (noting that culture drives several sources of systemic flexibility); *id.* at 398 (contending that the firm's "legal market" should be defined to include the jurisdiction's cultural realm); *id.* at 408-09 (noting that "[m]odern global counsel are most effective when they possess fluency in cross-cultural lawyering. . . .").

[287] ROSEN, *supra* note 271, at 57.

ethnic groups."[288] When lawyers and clients hail from different cultures, several dimensions of their relationship are likely to be impacted.[289] Students can learn how to anticipate and cope with these increasingly common situations.[290] As with many of the other ideas discussed in Part III, cross-cultural *theory* must be taught in conjunction with cross-cultural *skills*—both the theoretical and practical or applied aspects of culture must be taught in order for effective learning to take place.[291]

Professor Bryant proposes five habits of cross-cultural lawyering: (1) degrees of separation and connection (students "list and diagram similarities and differences between themselves and their clients and then . . . explore the significance of these similarities and differences");[292] (2) the three rings (in which students "identify and analyze the possible effects of similarities and differences on the interaction between the client, the legal decision-maker and the lawyer—the three rings");[293] (3) parallel universes (this is "a method for exploring alternative explanations for clients' behaviors" that "invites students to look for multiple interpretations, especially at times when the student is judging the client negatively," the ultimate purpose of which "is to become accustomed to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap, on insufficient information");[294] (4) pitfalls, red flags and remedies (which "focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be particularly problematic in cross-cultural encounters as well as alerting students to signs of communication problems");[295] and (5) the camel's back (which "[e]ncourages the student to create settings in which bias and stereotype are less likely to govern" and the habit "[p]romotes reflection and change of perspectives with a goal of eliminating bias").[296] If students are able to master (or at least internalize) these habits, they will be far more effective in cross-cultural situations. Faculty, then, must (1) develop students' motivation to learn about cross-cultural competence,

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[288] Bryant, *supra* note 276, at 40-41.

[289] *Id.* at 41-42.

[290] *Id.* at 41.

[291] *Id.* at 50; *see also* Marjorie Florestal, *A Tale of Two Compadres: Teaching International Trade and Development Across Cultures*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L. J. 33, 58-59 (2013) (reaffirming "that students approach the course with enthusiasm when they can see how to translate classroom knowledge to the 'real world'" and noting that the author's "course is more successful to the extent that it incorporates the social context in which the rules play out").

[292] Bryant, *supra* note 276, at 64-67.

[293] *Id.* at 68-70.

[294] *Id.* at 70-72.

[295] *Id.* at 72-76.

[296] *Id.* at 76-78.

(2) raise awareness of the significance of culture, (3) develop their own knowledge, and (4) develop their own cross-cultural skills.[297]

In the legal education setting, students should learn about the cultural context of clients and others, become self-aware, and develop inter-cultural practice skills.[298] In developing these competencies in students (where the clinical setting is particularly helpful), certain "best practices" have been suggested for effective cross-cultural representation.[299] Among these, attorneys should approach clients with humility and respect, guard against making assumptions and acting on stereotypes, and should try to learn about culture through research.[300] Attorneys must treat clients as individuals, and not merely as a member of a culture; they must think creatively about the client's issues, and must carefully consider how best to communicate with the client.[301] Ideally, the attorney will speak more than one language, since "[t]he cultural knowledge and understanding that comes with speaking another language is invaluable."[302] Attorneys involved in cross-border and cross-cultural transactions in the pre-globalization era foretold many of these best practices.[303] The importance of these insights is only heightened in today's globalized environment.

In addition to understanding culture's influence on law practice, students ideally will come to understand culture's impact on the law itself. For example, "'soft law' is an important aspect of legal culture," particularly in developing nations.[304] Soft law often serves as a barometer of how the jurisdiction's formal, written law will evolve; soft law also indicates how things really work in a legal culture.[305] Significantly, soft law supplies an element of flexibility within the legal system.[306] To the extent that law schools can help students to appreciate

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[297] Bryant, *supra* note 276, at 78-79.

[298] Lopez, *Making and Breaking Habits*, *supra* note 275, at 45-49; *see also* Sanchez, *supra* note 49, at 652 (noting that unless attorneys are consciously aware of their cultural context and its impact on human affairs, "[t]heir understanding of others' cultural knowledge, including foreign legal systems, will be severely limited").

[299] *See* Lopez, *Making and Breaking Habits*, *supra* note 275, at 66-67.

[300] *Id.* at 66.

[301] *Id.* at 67.

[302] *Id.*

[303] *See*, *e.g.*, Charles Stevens, Remarks, *in* AM. SOC'Y INT'L L. PROC., *supra* note 35, at 253 (referencing his experiences with contract negotiations in Japan, Stevens noted that cross-cultural negotiations often involve misunderstandings, that lawyers need a good law background, cultural understanding, and language skills across the cultures involved, and that lawyers must be willing to adapt to the other culture's practices, at least to a degree, in order to be effective).

[304] Sanchez, *supra* note 49, at 656-57.

[305] *Id.* at 657.

[306] *Id. See also* Evans & Gabel, *supra* note 2, at 380-82 (discussing systemic flexibilities, including the impact of culture and informal rules on legal outcomes).

these many differences stemming from culture, students will be far more sophisticated and practice-ready upon graduation than they would otherwise be.

G. Concluding Thoughts on the Pedagogical Imperatives of Legal Entrepreneurship

Whereas Part II developed the case for entrepreneurial legal education by examining the skills that clients now need in their legal advisors, Part III has revealed the major parameters along which such a legal education should take shape. Law schools, to their detriment, have remained mostly out-of-touch with their external environment.[307] This is attributable to many factors, among which is the general aversion among faculty to including substantial practical or experiential elements in the law school curriculum.[308] Yet law schools should teach practical skills *for their own self-interest*, as practical law programs will be in high demand.[309] As we have seen, advocates of practicality in the law curriculum are not hostile to theory.[310] Most clinical faculty recognize that they need theory to inform experiential learning, and that experiences can inform theory.[311] The question is not whether to do away with theory (few if any advocate such a route). The question is instead whether practicality will occupy *any* meaningful proportion of the curriculum *together with* theory (thereby positioning the law school competitively), or whether practical strands of the curriculum will continue to be marginal or non-existent (thereby inviting the market to define the law school's brand as obsolete and of little value in light of the skills that lawyers must now possess to respond to clients' and employers' needs). The curricular elements proposed here would contribute significant strategic value to law schools competing for students in a receding market.[312]

International law and globalization, like practical skills, are now at least nominally represented in most law curricula; but like practical skills, global issues

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[307] *See supra* Part III.A.

[308] *See supra* Part III.A; *see also* Barry, Dubin & Joy, *supra* note 53, at 35-37 ("In the typical law school classroom, the world of practice is often regarded with suspicion and sometimes even disdain.").

[309] *See supra* Part III.A.

[310] *See supra* Part III.A.

[311] *See supra* Part III.A; *Cf. supra* Part III.D. (acknowledging the importance of mutual aid between theoretical and experimental learning within the entrepreneurship clinical setting).

[312] *See*, *e.g.*, Roland J. Kushner, *Curriculum as Strategy: The Scope and Organization of Business Education in Liberal Arts Colleges*, 70 J. HIGHER EDUC. 413 (1999) (contending that curricula are strategic in nature). "The essence of strategic management is that organizations are engaged in continual adaptation to changing environmental conditions and circumstances." *Id.* at 413.

are woefully underrepresented as a function of their relative importance in today's globalized environment.[313] Most law schools have embraced international, comparative, and foreign law in two respects: doctrinal courses in the traditional Socratic format (with no experiential element), and short-term studies abroad.[314] While a sound first step, these initiatives alone will not prepare global legal entrepreneurs.[315] Contemporary global and cross-cultural topics should be treated largely by experiential means, and should be a mandatory part of the J.D. experience.[316]

Most global attorneys are primarily transactional in nature.[317] We have seen that well-designed experiential education significantly augments the value that students receive for their tuition dollars.[318] Thus, the reforms proposed in Part IV, *infra*, draw liberally upon the many clinical opportunities available for teaching transactional law.

Entrepreneurship is an inherently interdisciplinary field; as such, many of the basic principles of entrepreneurship education are transferrable to the legal context.[319] The ultimate goal of entrepreneurship education is to increase students' entrepreneurial behavior,[320] and the ultimate goal of a program in legal entrepreneurship is the production of lawyers who are entrepreneurial in their *practice of law*.[321] These goals can best be accomplished through practical, experiential learning opportunities, and ideally with students, faculty and external participants from varying disciplinary backgrounds.[322]

Certain key skills must be developed in entrepreneurship students.[323] In general, entrepreneurs have strong cognitive skills (such as the ability to seek out, recognize and even create opportunities, and the ability to process information), social skills (such as the ability to work with others, adapt to changing situations, and persuade others), and are action-oriented (they can set goals and follow through).[324] Entrepreneurs can assess risk and are willing to take sensible,

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313 *See supra* Part III.B.
314 *See supra* Part III.B.
315 *See supra* Part III.B.
316 *See supra* Part III.B.
317 *See supra* Part III.C.
318 *See supra* Part III.C.
319 *See supra* Part III.E.
320 *See supra* Part III.D.
321 *See supra* Part III.D. This is distinguishable from existing programs in "law and entrepreneurship" and clinics in "business law," as existing programs are geared toward preparing lawyers to provide counsel where the *client* is the entrepreneur. *See infra* notes 335-36; *see also* Evans & Gabel, *supra* note 2, at 400 (discussing this distinction).
322 *See supra* Part III.D.
323 *See supra* Part III.D.
324 *See supra* Part III.D.

calculated risks.[325] All of these skills are learnable, and therefore can be taught.[326] Moreover, entrepreneurship can be applied to the global context,[327] and it can and should be applied outside of the traditional business context.[328]

Legal entrepreneurs must understand the legal market well and must discern where and how opportunities for legitimate legal competitive advantages may exist.[329] An understanding of culture is vitally important to law practice today, even in a purely domestic setting, and especially in the cross-border context.[330] Cultural competence, like most of the other soft skills described here, is learnable and can be taught.[331]

We turn now to consider the form that these principles might assume as constituents within an integrated law curriculum.

IV. CURRICULAR PROPOSALS: THE LL.M. IN GLOBAL LEGAL ENTREPRENEURSHIP AND REFORMS TO THE J.D. CURRICULUM

A. Guiding Precepts of the Legal Entrepreneurship Curriculum

Irrespective of whether the baleful conditions now burdening the legal industry continue indefinitely (but particularly if they do), the question arises whether individual law schools can buck these trends by offering distinctive value to prospective students.[332] We think the answer is "yes," and one key to such a value proposition is found in preparing students, in concrete and measurable ways, for the practical aspects of the twenty-first century marketplace. Of greatest importance, students must be trained to be entrepreneurial in their approach to the practice of law, as well as intercultural in outlook.

We have noted that the entrepreneurial lawyer's two most important general tasks are to (1) harness the law to the client's competitive advantage (acting as much as a strategist and entrepreneur as a traditional counselor) and to (2) function as the "bridge" between management and the jurisdiction's regulatory

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325 *See supra* Part III.D; *see also* Evans & Gabel, *supra* note 2, at 421.
326 *See supra* Part III.D.
327 *See supra* Part III.D.
328 *See supra* Part III.E.
329 *See supra* Part II.A.
330 *See supra* Part III.F.
331 *See supra* Part III.F.
332 *See supra* Parts I.A-B. (noting both commentators who doubt that globalization will increase the value of the U.S. law degree, those who think the opposite, and still others who urge that "self-help" is the best remedy for law schools whose faculty and administrators do not want to bog down reforms in bureaucratic and political maneuvering).

apparatus (requiring an understanding of both the client's strategic needs and the external environment—that is, the jurisdiction's rule of law process).[333] These two basic functions form the foundation for the reforms proposed here; they comprise the most crucial learning outcomes for an education in legal entrepreneurship.

We agree with Professor Susskind's assessment that the foundational courses of the J.D. degree are core legal subjects that ought not to be jettisoned. Thus, "the time and place to train law students" in any substantial new areas "is not law school but in post-graduate courses."[334] For this reason, Part IV.B proposes a new LL.M. degree as the primary vehicle by which legal entrepreneurs should be trained. Nevertheless, some fundamental skills of the global legal entrepreneur are now so foundational and universal that their inclusion is warranted in the J.D. degree. Part IV.C addresses those items. The J.D. is still primarily a U.S.-based degree for the purpose of gaining admission to U.S. jurisdictions and to prepare for U.S.-based practice. A slightly modified J.D. could prepare attorneys for a cross-cultural practice that is strictly limited to the United States. To prepare students for cross-border or international practice, a specialized LL.M. degree is needed. Our proposal bears in mind the parameters necessary for the effective delivery of legal education today: namely, the program must balance quality and cost, satisfy the demands of the legal profession of the future (particularly with respect to globalization), and primarily benefit students and clients.[335]

The LL.M. proposed here is distinguished from existing programs in "law and entrepreneurship." Many U.S. law schools today offer programs, including clinics, in "law and entrepreneurship"—but these seek to train attorneys to counsel *clients* who are entrepreneurs.[336] A few programs even train attorneys to be entrepreneurial in the *business of law* (that is to say, to entrepreneurially

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[333] *See generally supra* Part II.

[334] SUSSKIND, *supra* note 42, at 137-38.

[335] McEntee, Lynch & Tokaz, *supra* note 131, at 229.

[336] *See*, *e.g.*, University of Michigan School of Law, "Zell Entrepreneurship and Law," http://www.law.umich.edu/centersandprograms/zeal/ Pages/default.aspx (last visited Oct. 7, 2015) (detailing a program wherein "students will learn how to think like a businessperson, an entrepreneur, and an attorney who serves clients that are pursuing entrepreneurial activities"); Northwestern Law, "Entrepreneurship Law Center," http://www.law.northwestern.edu/legalclinic/elc/ (last visited Oct. 7, 2015) (describing a program "to provide intensive, hands-on training for students who want to be transactional lawyers or founders of start-up companies" and in which "law and business students work together to represent start-up companies, entrepreneurs, and nonprofit organizations"); University of Washington School of Law, "Entrepreneurial Law Clinic," http://www.law.washington.edu/clinics/entrepreneurial/ (last visited Oct. 7, 2015) (noting "an innovative clinic serving entrepreneurs" wherein law and business students "provide critical early stage legal and business counseling").

manage law firms as business units). But no programs appear to train attorneys to take an entrepreneurial approach with respect to their *practice* of law.[337]

B. The LL.M. in Global Legal Entrepreneurship

There exist relatively high barriers to entry into law practice on the cross-jurisdictional scope.[338] Thus, to the extent that a specialized, skills-focused legal education could lower these barriers, such an education would add real value from the student's perspective.

The LL.M. in Global Legal Entrepreneurship would be principally (though not exclusively) experiential in design.[339] Experiential learning is vitally important to learning entrepreneurship because experience is a major driver of opportunity recognition, evaluation, and exploitation.[340] Clinical education undoubtedly has a key role to play in preparing students for the globalized environment.[341] The "inevitable move towards globalization will require that lawyers acquire the skills needed for these new practice settings," and, "[i]n turn, law schools will become challenged to develop approaches to impart the new skills needed to serve the emerging global community."[342] Because "[t]he most effective approach to clinical studies is to integrate clinical methodology throughout the law school's course offerings while at the same time constructing a series of progressive clinical experiences,"[343] the bulk of this new LL.M. should be comprised of experiential opportunities. These opportunities would wed best practices from clinical legal education with those from clinical entrepreneurship education, and, by incorporating global content and experiences, would also yield

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[337] This is the sense of legal entrepreneurship that our research has developed. *See supra* Evans & Gabel, *supra* note 2, at 400-01.

[338] *See* George A. Zaphiriou, Remarks, *in* AM. SOC'Y INT'L L. PROC., *supra* note 35, at 249 (reviewing these barriers).

[339] *See* Barry, Dubin & Joy, *supra* note 53, at 7 (discussing the combination of "general classroom work" with clinical opportunities); Moliterno, *supra* note 131, at 434-45 (calling for "sophisticated experiential education" consisting of, among other things, "simulation courses taught by a mixture of professors and expert practitioners").

[340] *See generally* Havard Asvoll & Petter Jacob Jacobsen, *A Case Study: Action Based Entrepreneurship Education: How Experience Problems Can be Overcome and Collaboration Problems Mitigated*, 15 J. ENTREPRENEURSHIP EDUC. 75 (2012).

[341] *See* Barry, Dubin & Joy, *supra* note 53, at 59.

[342] *Id.*; *accord* Ronald M. Criscuolo, *Global Efforts*, 43 INT'L L. NEWS 23, 26 (Spring 2014) ("[A]s domestic law schools make efforts to increase practical coursework in curricula, so too must they ground international legal practice in skills-based education").

[343] *See* Barry, Dubin & Joy, *supra* note 53, at 46.

the benefits of interdisciplinary education.[344] As with any experiential program intended to prepare its graduates for cross-border practice, the LL.M. proposed here will emphasize cross-cultural skills.[345] A few leading law schools have implemented new clinics that include "opportunities for international or cross-boundary practice . . . clinical practice settings involving international legal organizations or non-governmental organizations . . . externships and clinics that expose students to practice in foreign countries, and . . . collaborations and exchanges with emerging clinical programs in other countries."[346] As with any other form of entrepreneurship education, this LL.M. would endeavor to place students in their "learning zone," in which students "feel eustress, which is the type of stress that is healthy and gives one a feeling of fulfillment. It is a controlled stress that provides us with a competitive edge in performance related activities such as job interviews, public speeches, or business plan competitions."[347] Experiential learning approaches can be integrated into even the traditional classes that we propose for this LL.M.[348]

Although this new LL.M. would not necessarily be defined around a social justice dimension, one could be designed in such a manner.[349] For instance,

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[344] "Inter-disciplinary clinical education provides students with an optimal experiential education" because of the roles that students assume. Robinson & Malach, *supra* note 269, at 183. "As entrepreneurship is holistic by nature, faculty can provide an optimal learning experience by incorporating multi-disciplinary clinical experiences into their curriculum. The result is an enforcement of the substantive knowledge acquired in traditional learning methods through the experiential application of this knowledge to a client problem." Robinson & Malach, *supra* note 269, at 183-84. *See also* Barry, Dubin & Joy, *supra* note 53, at 69-71 ("Interdisciplinary clinical programs offer many opportunities for the acquisition of valuable skills by means of collaboration with and exposure to the culture, professional strengths, and limitations of other disciplines in a group setting. . . ."); *see supra* Part III.E. (discussing entrepreneurship education outside of the traditional context).

[345] *See* Barry, Dubin & Joy, *supra* note 53, at 59-60.

[346] *Id.* at 60-61.

[347] Robin Anderson, Brooke R. Envick & Prasad Padmanabhan, *A Practical Framework for the Continuous Advancement of Entrepreneurship Education*, 4 AM. J. ECON. & BUS. ADMIN. 65, 66-67 (2012). This requires getting students out of their comfort zone, but not so far out that they are in the panic zone. *Id.*

[348] *See*, e.g., Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TRANSACTIONS: TENN. J. BUS. L. 9 (2009) (discussing experiential learning approaches for preparing students for a transactional business practice and proposing that legal case studies, akin to those used in business schools, would more effectively train law students for transactional practice than the standard Socratic case method typically used in U.S. law schools).

[349] Clinical legal education historically has a strong social justice dimension. *See*

the LL.M. in Global Legal Entrepreneurship would enable its graduates to assist small businesspeople in developing countries with the launching of their businesses, thereby lifting their families from poverty and contributing to the general advancement of their communities. Economic opportunity and economic rights are widely acknowledged as human rights.[350] To this end, the degree's general focus on business strategy could readily be built around the themes of corporate social responsibility[351] and promotion of human rights through the advancement of economic opportunity.

This LL.M. would not only prepare U.S. attorneys for global practice, but would also add value to foreign attorneys who come to the United States to study.[352] This is true despite most LL.M. programs' lack of immediate substantive relevance for practice in foreign jurisdictions.[353] A market opportunity thus exists

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Barry, Dubin & Joy, *supra* note 53, at 12-16. Clinics with social justice motivations have successfully been conducted in countries other than the United States. *See e.g.* Michael Ramsden & Luke Marsh, *Using Clinical Education to Address an Unmet Legal Need: A Hong Kong Perspective*, 63 J. LEGAL EDUC. 447 (2014); Priya S. Gupta, Kudrat Dev, Meher Dev & Kirti Rana, *How Clinical Education Builds Bridges with Villages for a Global Law School in India*, 63 J. LEGAL EDUC. 512 (2014).

[350] *See*, *e.g.*, Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights*, at iv, United Nations (2005) (noting that "human rights . . . include economic rights. . . ."), http://www.ohchr.org/Documents/Publications/training12en.pdf; Amnesty International, *Economic, Social and Cultural Rights* (noting that economic, social and cultural rights are a broad category of human rights), http://www.amnesty.org/en/economic-social-and-cultural-rights.

[351] The business literature is well-developed with respect to business ethics and corporate social responsibility. *See generally*, CORPORATE SOCIAL RESPONSIBILITY: A RES. HANDBOOK (Kathryn Haynes, Alan Murray & Jesse Dillard eds., 2013) (providing an overview of this area); MIA MAHMUDUR RAHIM, LEGAL REGULATION OF CORPORATE SOCIAL RESPONSIBILITY (2013) (discussing corporate social responsibility and its relation to the law).

[352] For example, the opportunity to learn legal English is valued by many international students who study in U.S. law schools. Silver, *Internationalizing U.S. Legal Education*, *supra* note 19, at 156-57.

[353] *See*, *e.g.*, Swethaa Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?*, 80 FORDHAM L. REV. 2441, 2466-67 (2012) (finding that LL.M. students from India studied in the U.S. despite the fact that "[s]tudents are aware that an American graduate degree holds limited substantive relevance for practice in their home jurisdiction"). International students find numerous other benefits to the U.S. LL.M. degree; these include access to international resources and contacts, the experience of living in another country, access to a strong intellectual environment that offers educational rewards beyond substantive, technical knowledge, and the ability to personalize their career trajectories. *Id.* *See also* Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 4 GEO. J. LEGAL ETHICS 1, 55 (2011) ("The importance of the LL.M. is less about the credential itself and more about particular

for U.S. law schools: "[i]nternational and comparative LL.M. programs in most cases do not translate directly into skill sets for foreign lawyers to apply in their practices or careers back home (any more than they provide a practical skill set for U.S. lawyers)."[354] An LL.M. that was to effectively train attorneys as strategists across the world's jurisdictions would add value by training lawyers (both U.S. and foreign) with knowledge directly applicable (or immediately adaptable) to the lawyer's home environment. This could, but need not, include instruction in the jurisdiction's substantive law. Instruction in the jurisdiction's language, culture, and rule of law process would be directly applicable to legal entrepreneurship in the jurisdiction.

LL.M. programs that are explicitly focused on global elements (such as the one proposed here) should make a particularly compelling case for recruiting international students to the law school. Diversifying an LL.M. program through international student enrollments should benefit everyone enrolled in the program.[355] This dimension of diversity, however, may require modified instructional techniques,[356] sensitive to the cultures and expectations of the students involved.[357] This is especially true in our context, since national culture impacts individual behaviors and is known to shape entrepreneurship.[358] For students in a legal entrepreneurship program, the opportunity to develop global contacts should hold particular appeal, not only for the heightened learning

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experiences and lessons that it enables.").

[354] Howard N. Fenton, *The U.S. LLM for Foreign Lawyers: Real Value or Overpriced, Low-Utility Legal Education?*, 43 INT'L L. NEWS 9, 10 (Spring 2014).

[355] *See generally* Silver, *Getting Real*, *supra* note 14, at 457-59 (discussing the myriad benefits to U.S. law students of interacting with international students). Some scholars are concerned that an increase in international students may force U.S. law schools to ration scarce resources between foreign and domestic students. *See*, *e.g.*, Ribstein, *supra* note 20, at 1671. However, an increase in international students (who will ordinarily pay tuition rates at least as high as those paid by domestic students) should result in greater financial resources for the program, and will carry other benefits such as driving enrollments in courses that might otherwise fail to reach capacity through domestic students alone.

[356] *See generally*, *e.g.*, Erin Ryan, Xin Shuai, Yuan Ye, You Ran, & Li Haomei, *When Socrates Meets Confucius: Teaching Creative and Critical Thinking Across Cultures Through Multilevel Socratic Method*, 92 NEB. L. REV. 289 (2013) (recommending a modified version of the traditional Socratic Method, which the authors call "Multi-level Socratic Method," to accommodate law students hailing from cultures that, like China's, emphasize passive student involvement in class and rote memorization in study).

[357] *Id.* at 293 (distinguishing their study from prior literature on Socratic teaching, most of which exclusively addresses the experiences of U.S. minorities rather than international students). *See also* Silver, *Getting Real*, *supra* note 14, at 489 n.106 (listing examples of scholarship concerning the challenges of teaching law to internationally diverse students).

[358] KARIV, *supra* note 230, at 4-6.

experience, but also because "[a] more thorough knowledge and awareness of cultures has become one of the major building blocks in ongoing entrepreneurial business activities, [and] as such knowledge can be turned into a vehicle for learning new skills, fostering new ideas, reducing risk, and facilitating effective resource-sharing with people and businesses from different cultures."[359]

As for recruiting domestic students into an LL.M. in Global Legal Entrepreneurship, law schools can adopt admissions standards that explicitly favor those applicants who have best prepared for this type of experience. Numerous authorities provide advice on how generally to prepare for international law practice *before* attending law school.[360] Because this LL.M. would require a J.D. of domestic students as a prerequisite, admissions committees can also recruit and admit those who have invested their time as J.D. candidates to prepare for global careers.[361] Further diversity among students can be achieved by recruiting students from varying disciplinary backgrounds.[362] Course deliverables in this new LL.M. will be optimized if they are designed to resemble real-world work product—deliverables that the student could give to prospective employers.[363]

This new LL.M. would seek to develop a particular skill set in students. Several of these skills are fundamental to legal entrepreneurship.[364] To begin, entrepreneurs must work effectively with ambiguity.[365] Indeed, entrepreneurs view ambiguity (and its unavoidable derivative, uncertainty) as affirmatively

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[359] *Id.* at 6.

[360] *See*, *e.g.,* D. WES RIST, CAREERS IN INTERNATIONAL LAW: A GUIDE TO CAREER PATHS IN INTERNATIONAL LAW 19-34 (2013) (recommending, *inter alia*, that students pursue language study opportunities, obtain international experience through undergraduate studies, and obtain other international experiences before law school).

[361] *See id.* at 35-92 (discussing traditional means such as courses, moot court competitions, law reviews and journals, studies abroad, internships and professional networking events); *see also* Isabella D. Bunn, *Start Now: Leveraging Law School for a Global Career*, *in* CAREERS IN INTERNATIONAL LAW 203-10 (Salli A. Swartz ed., 4th ed. 2012) (recommending that students strive for academic excellence, get published, maximize their interdisciplinary expertise, apply for a fellowship, master a foreign language, serve in pro bono or public interest capacities, improve legal and leadership skills, maintain global awareness, and pass the bar exam).

[362] Some scholars have urged that international law—even when taught in the traditional doctrinal classroom setting—should involve students from different disciplines. *See*, e.g., Richard B. Lillich, *The Teaching of International Human Rights Law in U.S. Law Schools*, 77 AM. J. INT'L L. 855, 857 (1983).

[363] Several speakers expressed this view during Emory Law's Fourth Biennial Conference on Transactional Education, "Educating the Transactional Lawyer of Tomorrow," in June 2014.

[364] *See* Parts I-III (discussing the skills fundamental to legal entrepreneurship); *see also* Evans & Gabel, *supra* note 2, at 408-12.

[365] *See*, *e.g.*, LEONARD A. SCHLESINGER & CHARLES F. KIEFER, JUST START: TAKE ACTION, EMBRACE UNCERTAINTY, CREATE THE FUTURE (2012).

"good" or "favorable" features of the legal environment[366]—quite contrary to the instinct developed in law students from higher rule of law jurisdictions such as the United States. Both an organization and the individuals within it must have a reasonable risk tolerance in order to succeed entrepreneurially.[367]

Creativity is another core skill that must be developed in legal entrepreneurs. At a minimum, creativity involves originality and usefulness.[368] Creativity "is the envisioning of new combinations of resources and market realities, often through the questioning of conventional wisdom, the discovery of new knowledge with respect to market needs, technology, or the availability of vital resources, and/or finding new applications for pre-existing knowledge."[369]

Another key skill for entrepreneurs to master is the ability to collaborate with others. The entrepreneurial lawyer will work with, work for, and lead individuals from outside of the law.[370] The ability to work with non-lawyers is crucial.[371] Legal entrepreneurship is inherently an interdisciplinary exercise.[372] Attorneys trained in an interdisciplinary manner will be capable of serving as a more effective bridge between the law and business than can the traditionally-

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[366] Steve Case has explained that entrepreneurs "can deal with ambiguity, and believe that ambiguity creates opportunity. That if [a situation or an environment] were not ambiguous . . . competitors could do [what our company is doing], so more ambiguity and more fog is good, not bad . . . . [H]aving that mindset . . . is critical" to being an entrepreneur. Gendron & Greene, *supra* note 240, at 94 (comments of Case). *Accord* SCHLESINGER & KIEFER, *supra* note 365, at 81 (explaining that for entrepreneurs following the authors' model of "Creaction," "problems are a potential resource as opposed to a disadvantage").

[367] Gendron & Greene, *supra* note 240, at 94-95 (comments of Goldman); *see also* Evans & Gabel, *supra* note 2, at 421 (urging that "[t]he firm must be willing to take sensible risks in order to achieve competitive advantages in the law").

[368] KARIV, *supra* note 230, at 55.

[369] *Id.* at 54.

[370] Long before globalization, scholars called for interdisciplinary legal education. *See*, *e.g.*, Eugene A. Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227, 230 (1921) ("[T]here should be a thorough integration of the law course with the other courses of the university, and particularly with the courses in the allied fields of history, philosophy, political science, economics, and sociology.").

[371] *See*, e.g., Cassidy, *supra* note 27, at 1518-19; *see generally* Sophie M. Sparrow, *Can They Work Well on a Team? Assessing Students' Collaborative Skills*, 38 WM. MITCHELL L. REV. 1162 (2012) (noting that law students are frequently judged to lack emotional intelligence and collaborative abilities and that such skills are key to modern attorneys, and suggesting means by which law faculty can encourage collaboration and by which to assess students' collaborative efforts); Barry, Dubin & Joy, *supra* note 53, at 65-66 (noting that attorneys in all practices are increasingly working with "professionals in other disciplines to address client problems in a more holistic, efficient, comprehensive, and cost-effective fashion").

[372] Evans & Gabel, *supra* note 2, at 397-98.

trained lawyer.[373] Although it is in theory possible for non-lawyers to engage in legal entrepreneurship,[374] it will be the entrepreneurial lawyer who, as a practical matter, is best positioned to bridge business and the law, since only lawyers will ordinarily have developed the advanced knowledge required of the legal half of the bridge.[375] Still, legal entrepreneurship is more about intangible social and people skills and entrepreneurial abilities such as opportunity recognition, than it is about technical content mastery of the law. This new LL.M. should train students to identify opportunities for legal competitive advantage as entrepreneurs first and as lawyers second.[376]

Working through problems, familiarity with foreign law, the development of practical judgment, the ability to manage one's career, and the ability to manage one's practice are also crucial skills that law students should be developing.[377] Lawyers will add value to their clients' operations by managing the legal process[378] and by effectively functioning as management consultants for the client.[379]

The ability to manage information is crucial to the entrepreneurial lawyer.[380] Indeed, some entrepreneurs achieve heightened effectiveness at

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[373] *See*, *e.g.*, Nathan Isaacs, *The Teaching of Law in Collegiate Schools of Business: Discussion*, 28 J. POL. ECON. 113, 115-16 (1920) (beautifully illustrating the different lessons that a traditionally-trained attorney and a business person will draw from the same situation).

[374] *See* Evans & Gabel, *supra* note 2, at 400-01 (defining "legal entrepreneurship" without reference to legal training or admission to the bar).

[375] This is not to say that legal training for business executives is valueless. To the contrary: executives with some familiarity with the law will be impressed by its complexity, will be more likely to seek legal advice before decision-making rather than after, and will be empowered to work with lawyers intelligently. L.F. Schaub, *The Teaching of Law in Collegiate Schools of Business: Discussion*, 28 J. POL. ECON. 126, 127 (1920). Moreover, executives with some familiarity with the law are better-acquainted with "the problem of social control," and so are more inclined to play by the rules of the game. W.H. Spencer, *The Teaching of Law in Collegiate Schools of Business: Discussion*, 28 J. POL. ECON. 131, 132 (1920). The law is, indeed, a form of social control. Evans & Gabel, *supra* note 2, at 340, 370.

[376] KARIV, *supra* note 230, at 95-96 (discussing evaluation procedures that have been developed for entrepreneurs making decisions, noting several research models for identifying, exploiting, and evaluating opportunities, and noting that opportunity recognition skills can be taught).

[377] Cassidy, *supra* note 27, at 1520-29 (discussing these skills).

[378] SUSSKIND, *supra* note 42, at 114.

[379] *Id.* at 116-17.

[380] Evans & Gabel, *supra* note 2, at 410-11 (noting that "[a]cquiring and interpreting information are . . . vital skills" since perfect information virtually never exists and that this reality contributes to legal uncertainties and legal risks, particularly in lower rule of law environments). *See also* SUSSKIND, *supra* note 42, at 160-61 (arguing that the law is

discerning opportunities through information that they already possess by virtue of work experience, connections, and other means.[381] The discovery of opportunities for legal competitive advantage is based in part upon the same principal. Thus, the entrepreneurial lawyer can make a significant individual contribution to the firm's success.[382]

We have seen that entrepreneurial lawyers effectively manage risk.[383] Of equal danger to senseless risk-taking is an aversion to risk altogether.[384] Sensible risk-taking competencies can be learned.[385] Accordingly, the LL.M. in Global Legal Entrepreneurship must prioritize the development of students' attitudes and abilities concerning risk.

One of the most vital skills at the intersection of practical preparation, culture, and internationalization concerns language. Thus, the LL.M. in Global Legal Entrepreneurship should require the study and mastery of a foreign language.[386] Some jurisdictions have effectively accommodated linguistic diversity *within* the jurisdiction,[387] so it follows that an LL.M. program could train

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information-based).

[381] Scott Shane, *Prior Knowledge and the Discovery of Entrepreneurial Opportunities*, 11 ORG. SCI. 448, 451-52 (2000).

[382] *Id.* at 466 (noting the importance of individual differences to the entrepreneurship process); *see also* Evans & Gabel, *supra* note 2, at 418-21 (discussing the entrepreneurial lawyer's strategic value-add to clients and employers).

[383] *See supra* Part II.A and II.B. *See also* SUSSKIND, *supra* note 42, at 117-18 (discussing clients' need for legal risk managers).

[384] "General Counsel, like the boards to which they report, have a strong preference for avoiding legal problems rather than resolving them." SUSSKIND, *supra* note 42, at 117. Still, "[a]voiding risk is not always wrong, but always avoiding risk needlessly cedes immense value to one's rivals." Evans & Gabel, *supra* note 2, at 364. "The firm must be willing to take sensible risks in order to achieve competitive advantages in the law." *Id.* at 421.

[385] *See generally*, *e.g.*, Paula Kyrö & Annukka Tapani, *Learning Risk-Taking Competences*, *in* HANDBOOK OF RESEARCH IN ENTREPRENEURSHIP EDUCATION, at 285 (Alain Fayolle ed.,vol. 1 2007) (concluding that as a learnable skill, risk-taking is a fruitful area into which entrepreneurship pedagogy should reach).

[386] *See* Sanchez, *supra* note 49, at 672 (arguing that law schools should train attorneys in foreign languages). Moreover, "given the diversity of our nation's people and the burgeoning practice of international law, nearly every lawyer will be well-served at some point in her career by speaking another language." Tacha, *Training the Whole Lawyer*, *supra* note 25, at 1700-01; *accord* Deanell Reece Tacha, *Refocusing the Twenty-First Century Law School*, 57 SMU L. REV. 1543 (2004) (noting that "in a global economic and geopolitical world, we must have problem solvers who can listen, hear, and incorporate legal concepts and assumptions from very different cultures, traditions, and languages").

[387] *See*, *e.g.*, Jimena Andino Dorato, *A Jurilinguistic Approach in Legal Education*, 26 INT'L J. SEMIOT L. 635, 639 (2013) (arguing that foreign languages are crucial to preparing attorneys for practice in the multilateral environment).

U.S. attorneys to accommodate multiple languages *across* jurisdictions.[388] "There is one absolute truth when pursuing any international career, legally focused or not: language skills open up opportunities that would otherwise be unavailable," and "[w]hile there are still career opportunities that do not require specific language skills, there are many positions that either require or highly prefer applicants with fluency in non-English languages."[389] Certainly, for lawyers who want to practice in a foreign jurisdiction or represent clients from abroad, understanding the language of the jurisdiction is key to mastering the law there: not only are the laws expressed in the foreign language, but it is impossible to fully understand a foreign culture without understanding its language.[390]

The LL.M. in Global Legal Entrepreneurship could be offered with a number of concentrations. The most obvious dichotomy would call for concentrations in comparative law and international law.[391] The comparative law track would focus on one or a few foreign jurisdictions (the law school's resources and collaborative partnerships will determine what number of foreign jurisdictions is practicable), whereas the international law track would focus on international institutions such as the World Trade Organization (WTO) and the United Nations (UN). The Appendix considers what the curricula for these concentrations might look like.

In light of this discussion and the preceding portions of this article, the following general parameters have emerged to guide the design of a new LL.M.:

- Legal entrepreneurs are those who apply entrepreneurial skills to the *legal* market, thereby creating and managing competitive advantages for the client in the *economic* market. Legal entrepreneurs lower the firm's legal transaction costs and legal risks by innovatively harnessing the jurisdiction's legal flexibilities.
- The legal entrepreneur's two most important core functions are therefore to harness the law to the client's competitive

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[388] Indeed, many U.S. attorneys working in China have noted the importance of knowing the local language. *See*, *e.g.*, Evans, *supra* note 16, at 318 (discussing the role of language and arguing that "[t]o better hone U.S. attorneys' competitiveness in a global economy, law schools should develop foreign language curriculums").

[389] RIST, *supra* note 360, at 8. As to the factors to weigh in selecting a foreign language for study, *see id.* at 8-11. *See also* Ribstein, *supra* note 20, at 1671 (suggesting that U.S. law schools are enabling "U.S.-educated LLMs practicing in their home countries . . . to outcompete U.S.-based JDs [sic] seeking to enter these markets" by "failing to emphasize the importance of foreign language training" for U.S. J.D. students).

[390] *See* Sanchez, *supra* note 49, at 656-72 (discussing the intersection of language, culture and law, and providing illustrative examples).

[391] An informative discussion of these areas can be found at *id.* at 674-78.

advantage, and to bridge the firm's management and the jurisdiction's rule of law process.

- The entrepreneurial lawyer must apply a broad (and increasing) array of skills from the realm of traditional entrepreneurship. Chief among these are cross-cultural competence, opportunity recognition, and sensible risk management.
- The entrepreneurial lawyer pursues "purposeful innovation" and so must be both flexible and adaptive—both patient and aggressive.
- Entrepreneurship is an inherently interdisciplinary area, and thus, a program or degree in legal entrepreneurship must incorporate other key disciplines. This may require expanded training for existing faculty, or collaboration with other disciplines' faculties. These non-legal faculty may be housed within the law school's home institution, at another U.S. university, or at a foreign partner university.
- The entrepreneurial lawyer must still "think like a lawyer"—but in the cross-cultural, interdisciplinary, global environment of the twenty-first century. Moreover, this mode of thought is not the only skill that attorneys require to be equipped for practice.
- The skills of the legal entrepreneur are learnable; collaborative and experiential learning are the best (but not exclusive) means by which to develop these skills.

And the development of the following skills should take priority in this new LL.M.:

- An entrepreneurial mind-set
- Innovativeness
- The ability to manage uncertainty and to work under ambiguous conditions
- Cross-cultural competence
- The ability to manage risk effectively and a balanced approach to risk-taking
- The wherewithal to acquire, interpret, and use information
- Problem-solving ability
- Social skills (including relationships with others, persuading others, and adapting to changing social situations)
- An orientation toward action-taking
- The ability to analyze the external environment
- Sound, practical judgment

- The ability to work well in teams (particularly with non-lawyers)
- Opportunity recognition
- The ability to manage the client's "legal process"
- Effective communication (including, crucially, foreign language ability)

A variety of curricula could be designed with these goals and constraints in mind. One possible curriculum can be found in the Appendix, *infra*. Although most LL.M. programs are one year in length,[392] and although some commentators question the value of "the LL.M.,"[393] it is likely to require the investment of two years in order for students to develop the skills valued by employers in cross-jurisdictional practice. Thus, we recommend a two-year format for the LL.M. degree in Global Legal Entrepreneurship. If the foregoing discussion is correct, the optimal composition of these two years would probably consist of some permutation of the following components:

> *Doctrinal coursework*. This traditional coursework should incorporate, to the greatest extent possible, active learning beyond the Socratic Method. These courses will provide students with the background information needed in the program.
>
> *Experiential components*. These components will comprise the bulk of the program. Clinics, simulations, and other forms of experiential learning will enable students to hone their entrepreneurial skills through practice and by receiving constructive feedback.
>
> *Foreign language study*. Students will select the foreign language likely to be most relevant to their future careers and

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[392] Crane, *supra* note 20, at 55; *Understanding the Difference between JD and LLM Degrees*, LAW SCHOOL ADMISSION COUNCIL http://www.lsac.org/llm/degree/jd-llm-difference (last visited Oct. 7, 2015).

[393] Critics note that the LL.M., in contrast to the J.D., is relatively unregulated by the ABA's accrediting authorities, and is not required of U.S. lawyers (who will already possess a J.D.) to sit for a bar exam in the United States. Thus, the LL.M. is unshielded from market forces; its value is entirely in whether it directly impacts graduates' job prospects. *See*, *e.g.*, Elie Mystal, *The Value of the LL.M. Degree? Still Low*, ABOVE THE LAW, http://abovethelaw.com/2012/01/the-value-of-the-ll-m-degree-still-low/; *accord* Bryce Wilson Stucki, *LLM: Lawyers Losing Money*, THE AMERICAN PROSPECT, *available at* http://prospect.org/ article/llm-lawyers-losing-money.

> that they do not already speak at native fluency, and will study the language throughout the first three semesters in the LL.M program. The language would ideally align with both their career plans and their internship.
>
> *Internship and other networking*. The last semester of the program will be spent working for a law firm, business, or non-profit in a global function (preferably located in a foreign jurisdiction), where students will have the opportunity to test and refine their skills in an actual practice setting. Networking is also vitally important for securing a job in the law and should be required under the rubric of "professional development."

The Appendix, *infra*, proposes one possible means by which to organize the coursework for the LL.M. in Global Legal Entrepreneurship.

C. Adjustments to the J.D. Curriculum

Law school curricula must adapt in order to remain relevant—to prepare students for the new roles that employers and clients are demanding of their lawyers.[394] As we have noted, not all attorneys will be engaged primarily as global advisers—but nearly all U.S.-licensed attorneys *will* require some subset of the entrepreneurial lawyer's skill set moving forward. As a result of America's changing demographics, attorneys well-prepared for "multicultural and cross-cultural settings" will find their training applicable to and highly useful in the United States.[395] Thus, without converting the J.D. to a specialist degree for global practice, we urge that the following areas of emphasis from the LL.M. proposed above be incorporated into the J.D. curriculum:

- Cross-cultural competence
- The ability to manage risk effectively

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[394] SUSSKIND, *supra* note 42, at 136.

[395] Barry, Dubin & Joy, *supra* note 53, at 62; *see also* Cassidy, *supra* note 27, at 1522 (arguing that exposure to foreign laws "not only will prepare our graduates to practice in a global environment, but it will also equip them with a deeper understanding of the choices made by our own legal system"); Cavers, *supra* note 31, at 1059 ("The study of Comparative Law can, if successfully pursued, equip the student with techniques for comparing his own law with the laws of other countries. . . ."); Silver, *Getting Real*, *supra* note 14, at 468-69 (America's increasingly multi-cultural demographics will impact a wide variety of law practice settings in the U.S.); Criscuolo, *supra* note 342, at 26 ("Ultimately, a globalized education is a more fully formed education. It can solve local problems. . . .").

- Problem-solving ability
- Social skills
- Sound, practical judgment
- The ability to work well in teams (particularly with non-lawyers)
- The ability to manage the client's "legal process"
- Effective communication, including foreign language ability

These skills can be refined in many of the ways proposed for the LL.M. above: through experiential opportunities, the teaching of soft skills, and by transparently favoring such skills in the admissions process.

It is also possible to combine the U.S. J.D. with a foreign law degree as part of a dual degree arrangement, in which students earn both the U.S. and the foreign degrees together.[396] Only a very small number of schools have accomplished this, however.[397] This option entails unique challenges and its full exploration is beyond the scope of this article.

V. ADMINISTRATIVE AND LOGISTICAL ISSUES WITHIN THE LAW SCHOOL

The LL.M. program described in Part IV, *supra*, is our general conception of the optimal means by which law schools can prepare lawyers for today's globalized environment. But we realize that constraints are at work on every program—some are common[398] while others are unique to the school in question. Even if a school finds that it cannot craft the precise program proposed here, it likely will find value in pursuing another iteration of the program. Each school must find a way to overcome its constraints. Substantial value can still be delivered even if a school's global LL.M. diverges in its particulars from the proposal in Part IV. Moreover, some schools may find that the ideal described above is, for whatever reason, not ideal; and, as such, would do well to modify what is proposed here. "Innovations . . . need to be . . . discussed more, developed more and integrated throughout law schools in the twenty-first century. Law schools need to establish the expectation that faculty will teach a broad range of

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[396] Demleitner, *supra* note 46, at 8.

[397] *Id.*

[398] For example, some common challenges to the internationalization of law schools include a relative paucity of foreign language skills among faculty and students, the attitude that there is little to learn from foreign law, and law faculties that lack global exposure. Maxeiner, *supra* note 22, at 48-49.

skills . . . and the administration and faculty must give the necessary guidance and support to those faculty members who embrace this goal."[399]

This leaves us with the question of how law school administrators can best address the challenges that may accompany the creation of a program like the one proposed here. We identify and briefly discuss the challenges likely to be most pressing:

> *Recruiting faculty*. The law school has several options for staffing faculty in an interdisciplinary program. It can (a) recruit faculty with interdisciplinary backgrounds; (b) provide opportunities for further training to existing faculty; and (c) partner with faculty from outside the law school in the delivery of the program. The question for any interdisciplinary program is thus not "how can law faculty best instruct outside of the law?" but rather "how can law schools best facilitate quality instruction outside of the law and integrate this with legal education?" The best answer likely involves a combination of the options above. Collaboration with experts in different fields—particularly those in entrepreneurship—would provide a fruitful experience for students. Law faculty should remain at the center of any program in legal entrepreneurship, but a combination of these is most likely to produce students who think like lawyers for a globalized, intercultural world.
>
> *Experiential dimensions*. Providing international and cross-cultural experiences to students can be challenging.[400] Many universities have partnerships or other global programs already in place. These may provide the law school with a solid starting point in developing international opportunities for students. It may behoove law schools with assistant or associate deans to task one of these administrators with the development of international partnerships. Partnerships with American firms

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[399] Barry, Dubin & Joy, *supra* note 53, at 40.

[400] Demleitner, *supra* note 46, at 5 (noting the expansion of global opportunities in U.S. law schools). "Substantive knowledge about international and foreign laws, clinical involvement in legal issues abroad, and even dual degree and qualification are now available to law students." *Id.* at 5. Some schools are even offering upper-level electives on international topics in foreign languages, while some are offering simulation and clinical opportunities in international areas. These are often restricted, however, to the most heavily resource-endowed programs. *Id.*

that do business around the world would also likely prove helpful.[401]

Teaching the soft skills. "You can always learn technical details and applicable law but being able to work successfully with people from different countries, different cultures, with different world views, requires a skill set that is more people oriented than substantive oriented."[402] As with instruction in entrepreneurship, the law school must recruit faculty who can teach soft skills, including culture. Again, partnerships with faculty across disciplines likely will produce the best results.

Controlling costs. The financial model of any program is central to its feasibility. This is especially true in experiential contexts, such as clinical legal education.[403] A program's quality and its ability to generate additional revenues for the school must be considered in addition to its costs.[404] This is not to say that the costs of programs should be trivialized; indeed, quite the opposite is true.[405] Still, looking only at a program's costs does not make for sound strategic planning. The administrative temptation will be to resist a higher-cost program—at all costs. This temptation is likely to be present even if the program delivers higher value and higher potential

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[401] *See*, *e.g.*, James A. Fanto, *When Those Who Do Teach: The Consequences of Law Firm Education for Business Law Education*, 34 GA. L. REV. 839 (2000) (suggesting that legal educators should monitor the manner in which law firms train new attorneys and should incorporate developments of law firm education into law school curricula).

[402] Silver, *Getting Real*, *supra* note 14, at 460 (quoting an unnamed in-house counsel); *see also* Demleitner, *supra* note 46, at 5-6, 8 (discussing the importance of cultural competence to legal education today). Still, "[e]ven though a number of schools offer such cultural and legal competence-enhancing programs, they remain restricted to a relatively small quantity of students." *Id.* at 6. Incorporating international students into domestic programs can help bring global exposure to students who cannot afford to study abroad. *Id.*

[403] *See generally*, *e.g.*, Barry, Dubin & Joy, *supra* note 53 (discussing at length the costs of clinical law programs).

[404] *See id.* at 23-25.

[405] "Cost reform is the legal education battle for which legal education leaders in the early twenty-first century will be remembered. Each legal education stakeholder ought to ask whether he or she is willing to demand change rather than letting two common, powerful platitudes—access to education and access to justice—continue to serve as convenient rhetorical tools for those seeking to maintain a seriously broken model of delivering legal education." McEntee, Lynch & Tokaz, *supra* note 131, at 227.

> return for students, especially when applications to law schools are receding. But those administrators who make the investment now and who build their program's brand and reputation for value will better compete for students.[406] Many palatable, realistic options exist to manage those costs that will invariably accompany experiential learning programs.[407]

Taken together, these considerations imply the same general challenges and concerns that will confront any new program or innovation in the law school setting. These challenges are manageable, however, and should not dissuade law schools from offering programs in legal entrepreneurship.

VI. IMPLICATIONS FOR ACCREDITATION AND THE BAR EXAM

Any individual law school determined to distinguish itself along the lines proposed here can do so through its own initiative. But to make internationalization the norm in law schools nation-wide will likely require the coordination of two of the most potent external forces to which law schools appear responsive: accreditation and the bar exam.

The meaningful reform of legal education, at least on the macro-level, will require the leadership of the ABA Section of Legal Education and Admissions to the Bar,[408] or a broader, more foundational reform of the manner by which law schools are accredited.[409] Law school accrediting standards should be revised not only to encourage the global aspects of contemporary legal education, but to require them. Law schools have neglected the deep integration of globalization in large measure because accreditation standards invite this result.[410] The ABA has adopted new regulations to try to keep pace with law schools' innovations in international legal education, but regulating what law schools do after the fact misses the potential to shape incentives.[411] By requiring measurable learning outcomes in global and cross-cultural knowledge and skills, the ABA could encourage the whole legal education industry to advance more uniformly.[412]

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406 *See* Barry, Dubin & Joy, *supra* note 53, at 26.

407 *Id.* at 26-30.

408 Thies, *supra* note 131, at 614-22.

409 *See*, *e.g.*, Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1494 (2011) (arguing that "[i]t is time for legal education to embrace a system of accreditation that is grounded on peer assessment," akin to most other disciplines in higher education).

410 Silver, *Getting Real*, *supra* note 14, at 462.

411 *See generally* Edelman, *supra* note 144.

412 *See*, *e.g.*, Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measure in the ABA Standards for Approval of Law Schools*

We propose that the ABA integrate mandatory global and cross-cultural experiences into the basic law school education.

Additionally, with respect to the J.D., students are far less incentivized to study a given subject area in law school when it is not covered on the bar exam.[413] This discourages all but the most elite law schools from further diversifying the curriculum, and from requiring non-bar subjects as mandatory courses.[414] "By pressuring students to be prepared for a dizzying number of subjects, the bar exam impedes reforms that would assist students in being prepared to practice law. Courses, or activities within courses, on writing, problem solving, project management, teamwork, business-savvy, financial knowledge, and the like, are not tested on the bar exam."[415]

These effects are felt with particular force in international law. "Not one state has begun to test on principles of international law, implicitly signaling that they are of secondary importance in legal training."[416] The bar exam's lack of coverage of international law artificially depresses[417] the number of students who feel that they can "afford" to take globally-oriented courses and has contributed directly to the widening gap in the quantity and quality of international opportunities between the elite law schools and all other law schools.[418] State bar authorities would do a service to lawyers and to the legal industry—as well as to law schools—to test basic international law knowledge on the bar exam.[419]

VII. CONCLUSION

In 1915, Felix Frankfurter wrote that

> [o]ur society is becoming more and more complex, which means more law and not less law. . . . [The lawyer therefore] must adapt old loyalties to new facts; [the lawyer], above all,

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Might Transform the Educational Experience of Law Students, 35 S. ILL. U. L. J. 225 (2011).

413 *See supra* Moliterno, *supra* note 46, at 432-33.

414 *Id.* at 433.

415 *Id.*

416 Demleitner, *supra* note 46, at 4.

417 In this context, by "artificially depresses," we mean "readjusts with no reference to actual market needs."

418 Demleitner, *supra* note 46, at 4.

419 A few states do offer the option of a certification in international law after one is admitted to practice. *See*, *e.g.*, The Florida Bar, International Law Certification, http://www.floridabar.org/DIVCOM/PI/CertSect.nsf/9736b6935363096385256fd4005e5cea/c5fd87df4f7c446485256fd4005c0eef!OpenDocument (last visited Dec. 20, 2015).

> must find ways to reconcile order with progress. The problems ahead present to our profession opportunities for great leadership, but correspondingly they call for equipment adequate to the task; they call for fresh thinking, disinterested courage, and vision.[420]

Frankfurter was speaking in the context of law schools' contributions to leadership, and his message carries particular force in today's global and cross-cultural environment. Law schools have an immense opportunity to capitalize on the defining features of this environment—to train law students for the world as the students will experience it and, in the process, to revitalize the U.S. law school.

Still, as we have seen, U.S. law schools have fallen behind on the international front. The United States is, for example, "a more important receiving country for law students than it is a sending country, and as a result, we risk educating a cadre of globally savvy competitors that domestic students cannot possibly match in terms of experience and expertise relevant to navigating the challenges of a global practice environment."[421] This is bothersome since "[t]he United States' continued success as legal educator to the world depends on how well U.S. law schools can compete in a dynamic global market."[422] The LL.M. in Global Legal Entrepreneurship proposed here would help to remedy this in a manner consistent with our prior conceptual and empirical research.[423] Our proposal, centered on legal entrepreneurship, is by no means the only avenue for preparing global law graduates, but we do think this program would address a pressing market need and merits serious consideration.

"There is now a widespread belief that law school graduates are not 'practice ready,' that they do not understand the business of law, that they have not cultivated their nonanalytical skills, that they do not network well, that they do not know how to manage projects, that they lack empathy, and so on," Professor Richard Matasar has noted.[424] "In the years ahead, it seems quite likely that firms will begin to search for new employees who have these traits. . . . In turn, schools must try to produce such results."[425] We hope that the LL.M. proposed here will meet the "practice ready" standard for global needs, and that the reforms proposed for the J.D. will help to elevate the general practice readiness of U.S. law graduates here and abroad.

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420 Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A. J. 532, 540 (1915).
421 Silver, *Getting Real*, *supra* note 14, at 494.
422 Ribstein, *supra* note 20, at 1671.
423 *See supra* Part II.
424 Matasar, *supra* note 131, at 1591.
425 *Id.* at 1591-92.

While some law schools have advanced the global dimensions of their programs,[426] most have not yet fully embraced internationalization. Yet many benefits will accrue to globally-oriented law schools. "From the U.S. law school's perspective," for example, "in addition to the obvious commercial advantage, the inclusion of foreign students signals an internationalization atmosphere and experience."[427] And "from the perspective of the incoming students, the changes in the world market for legal services have created a new environment in which an international legal education has practical value."[428] Indeed, "[f]inancial aid for LL.M. programs generally tends to be limited, so LL.M. programs are viewed as profit centers for most law schools. There are other, less tangible benefits to U.S. law schools, including increased diversity, enhanced global perspective, and a certain amount of prestige."[429]

Global attorneys today must approach the law entrepreneurially. Even the lawyer whose practice is confined strictly to the U.S. context will find a pressing need for cross-cultural competence. Legal entrepreneurs can harness the law to the client's competitive advantage, and will thus be in high demand. The LL.M. in Global Legal Entrepreneurship may just be the optimal vehicle for training these lawyers, and for repositioning law schools that are otherwise hurdling into the twenty-first century without the full complement of competitive tools necessary for survival in their own hyper-competitive environment.

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[426] "[G]lobalization has become another weapon in the competitive battles law schools undertake to buttress their reputations for purposes of attracting applicants, donors, faculty, and prospective employers of their graduates." Silver, *Getting Real*, *supra* note 14, at 459.

[427] Ballakrishnen, *supra* note 353, at 2444-45.

[428] *Id.*

[429] Fenton, *supra* note 354, at 9.

Appendix I: Example Curriculum for the Two-Year LL.M. in Global Legal Entrepreneurship

Year 1 – Semester 1	**Year 1 – Semester 2**
• Fundamentals of Entrepreneurship • Introduction to Global Legal Entrepreneurship • Introduction to International & Comparative Law • Strategic Analysis of the Legal and Business Environments • Foreign language (first semester)	• Cultural Competence • Fundamentals of Risk Management • Institutions and the Law • Foreign language (second semester) • Professional development (first semester)
Year 2 – Semester 1	**Year 2 – Semester 2**
• Solving Client Challenges (simulation and workshop-based) • Opportunity Recognition in the Legal Market • Managing the Client's Legal Process • Foreign language (third semester) • Professional development (second semester)	• Internship (preferably overseas) • Foreign language (fourth semester)

These courses should integrate experiential opportunities to the greatest extent possible.[430] Each of these courses could be designed as one, two, three, four or five credit-hour offerings. A comparative law track in this LL.M. would entail additional coursework, disbursed throughout the first three semesters, centered on the substantive law and legal institutions of the country of focus.[431] An international law track would entail additional coursework, disbursed throughout the first three semesters, focused on the representation of clients with

[430] *See generally supra* Parts III and IV (urging that experiential elements should be incorporated into legal education, and particularly with respect to a degree such as this one, to the greatest extent possible).

[431] *See supra* Part IV.B (discussing potential concentrations in this LL.M.).

respect to international institutions such as the World Trade Organization and the United Nations.[432]

[432] *See supra* Part IV.B (discussing potential concentrations in this LL.M.).

PUNITIVE DAMAGES AND THE PUBLIC/PRIVATE DISTINCTION: A COMPARISON BETWEEN THE UNITED STATES AND ITALY

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I. INTRODUCTION

In 2007, the Italian Supreme Court stated in a landmark judicial decision regarding the enforcement of a U.S. punitive damages award that Italian tort law is meant to serve a compensatory function and that there is no room for any goal other than corrective justice within domestic tort law. The majority of Italian jurists, while criticizing this mono-functional reading of tort law, have excluded the adoption of punitive damages as a domestic remedy on the grounds that they would blur the line between tort law and criminal law and the conditions existing in the United States make punitive damages non-replicable in different settings.

In this paper, I criticize the Italian rejection of punitive damages by offering a comparative analysis of the treatment punitive damages receive in the United States and the Italian legal discourse, with a special focus on the relationship between this tort law remedy and the public/private distinction. The significance of this analysis transcends Italy and the United States: controversial judicial decisions and intense academic discussions concerning punitive damages are detectable both in the United States and across Europe. Everywhere, punitive damages raise issues concerning essential aspects of legal systems, such as tort law's function(s), the difference between tort law and criminal law, and the relationship between public law and private law.[1]

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[1] For an overview of punitive damages in Europe, *see generally* HELMUT KOZIOL & VANESSA WILCOX, TORT AND INSURANCE L., 25 (2009); Helmut Koziol, *Punitive Damages–A European Perspective*, 68 LA. L. REV. 741 (2008). For an overview of punitive damages in Germany, *see* Volker Behr, *Punitive Damages in American and German Law–Tendencies towards Approximation of Apparently Irreconcilable Concepts*,

The comparative analysis I propose unfolds as follows. In Part II, I explore U.S. punitive damages law and the explanatory theories U.S. scholars propose to accommodate this controversial tort law remedy within domestic law. This inquiry shows that the battle over the "true" justification of punitive damages is part of a larger clash relating to the public/private distinction because punitive damages have the effect of locating punishment and deterrence within private law, where, according to traditional thought, they should not be.

Part of U.S. law conveys the message that courts and juries award punitive damages to further the public's interest in punishing and deterring wrongdoers. On this account, punitive damages are a public sanction that contributes to minimizing the distinction between public and private law. Other legal materials offer a different picture by suggesting that punitive damages are awarded to promote the interest of private parties in punishing tortfeasors for their egregious wrongs. On this account, punitive damages are reconcilable with a vision of the law that keeps private law distinct from public law.

These *prima facie* contradictory indications in the extant law mirror the divergent conclusions scholars have reached as to the theoretical foundations of punitive damages. Some jurists see punitive damages as instrumental to the fulfillment of public goals and proffer explanatory theories that tend to blur the line between public and private law. Others, focusing on different parts of extant law, justify punitive damages in a way that serves their commitment to preserving the public/private distinction. Basically, they argue that punitive damages are about private, as opposed to public, punishment. If so understood, punishment is consistent with the basic tenets of private law.

Although both strands of legal scholarship recognize that U.S. punitive damages law exhibits a mélange of public and private law features,[2] their conceptualizing efforts consider punitive damages as essentially public or private. These legal thinkers fail to satisfactorily accommodate punitive damages within domestic law because they do not perceive that public and private elements coexist throughout tort law (and private law more generally). By resorting to the

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78 CHI.-KENT L. REV. 105 (2003); Madeleine Tolani, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANN. SURV. INT'L & COMP. L. 185 (2011). For an overview of punitive damages in France, *see generally* Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damages Awards in France after Fountaine Pajot*, 60 AM. J. COMP. L. 775 (2012); Matthew K.J. Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT'L & COMP. L. 389 (2013). For a detailed analysis of punitive damages in the United States, *see infra* Part II. For a reconstruction of different paths punitive damages have followed in the United Kingdom and the United States, *see* Cristina Costantini, *Per una genealogia dei punitive damages. Dissociazioni sistemologiche e funzioni della responsabilità civile*, *in* IL RISARCIMENTO DEL DANNO E LE SUE "FUNZIONI," 287, 287-97 (2012).

[2] See Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1797 n. 97 (2012) [hereinafter *Palsgraf Punitive Damages*].

"nesting" method,[3] I show that although punitive damages law is characterized by an internal coexistence of public and private as opposite and yet inextricably linked poles, it should not be read as an isolated and perhaps unfortunate instance in which public and private are under the same shelter.

I use the findings of Part II to illuminate and critically assess the Italian rejection of punitive damages. In Part III, I argue that in Italy too tort law mixes public and private elements. Against this background, I criticize the position of the Supreme Court and of scholars towards punitive damages. I demonstrate that the Court relies on the ideal of corrective justice to the point of transforming it into a dogma that legal reasoning must obey with virtually no exception. This approach unveils adherence to an unhelpfully rigid distinction between public and private that can only generate detrimental effects, such as impeding desirable legal reforms. It further appears that Italian jurists, although disenchanted as to the absoluteness of the public/private dichotomy, still see the notion of punishment as a wall between public and private law, even though extant law shows that punitive and deterrent elements feature in Italian tort law. Italian legal actors fail to realize that if punitive damages were adopted in Italy, they would only represent an additional element to the already-conspicuous list of public elements in tort law.

In Part IV, without any pretense of being exhaustive, I analyze three situations where the Italian system is remedially deficient. I argue that punitive damages could be very useful in solving the following long-standing problems: when the wrongdoer's gain exceeds the loss suffered by the victim; when the wrongful action harms personality rights currently protected by the criminal law; and when a harm is caused to a number of people but it is likely that few, if any, of them will bring an action seeking damages.

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[3] For an application of "nesting" to legal arguments and concepts, *see* Jack M. Balkin, *Nested Oppositions*, 99 YALE L. J. 1669, 1676 (1990), (arguing "a nested opposition is a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other."). Interestingly, regarding the distinction between public and private power, he contends that "[p]ublic and private form a nested opposition, which means that they are similar in some respects while different in others, and that they have a mutual conceptual dependence even though they are nominally differentiated." *Id.* at 1687. *See also* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 97-104 (1991); Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 821-30 (2010). The "nesting" idea is borrowed from Claude Levi-Strauss. *See* CLAUDE LEVI-STRAUSS, THE SAVAGE MIND, 16-22 (1966).

II. PUNITIVE DAMAGES IN THE UNITED STATES

After English courts expressly accepted punitive damages in the second part of the 18th century,[4] they were transplanted into the United States. Since then, they have flourished across the country and courts regularly apply them despite ongoing debates as to their permissibility. Today, punitive damages constitute a theoretically controversial but judicially enforced legal doctrine that sometimes exposes tort defendants to substantial, even crushing, liability. The discussions of punitive damages turn on various puzzles that academics have tried to solve to accommodate the tort law remedy in domestic law. The controversial issues are many: is it acceptable to have punishment and/or deterrence as part of private law? Does this not undermine the traditional distinction between private and public law? Is the plaintiff's windfall from punitive awards fair and consistent with the normative foundations of tort law? If punitive damages are really punitive, is it acceptable that criminal procedural safeguards are not applied? To these and other questions different scholars have given different answers.

The degree of intimacy between punitive damages and the public/private distinction can be fully appreciated by focusing on the treatment punitive damages received in different periods of legal thought. During the late 19th century, legal thinkers carried out a systematizing effort in order to provide a conceptually clear and orderly legal structure.[5] Within this framework, there was a rigid distinction between public and private law. The former, encompassing constitutional law, administrative law, and criminal law, governed the vertical relationship between the state and the individual. An essential feature of public law was that legal rules were crafted in the interest of the community and represented the expression of public will. By contrast, private law, comprised of contract, tort, and property law, was conceived as a system centered on the ideal of individual autonomy and aimed at governing the horizontal relationship between private individuals.[6]

The public/private distinction entailed sorting everything that was legally relevant, including punitive and deterrent functions, into public and private domains. Both functions were perceived as belonging exclusively to public law on the ground that only the state was entitled to interfere with individuals' autonomy by regulating their conduct. Since tort law was intended to compensate victims of wrongs through corrective justice and criminal law was intended to regulate conduct by imposing sanctions, it comes as no surprise that late 19th-century U.S. legal thinkers argued to abolish punitive damages.[7] This tort law

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[4] The first decision awarding punitive damages was issued in 1763. *See* Huckle v. Money, [1763] 2 Wils. 205, 95 Eng. Rep. 768 (K.B.).

[5] *See* Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425-26 (1982) [hereinafter *Public/Private Distinction*].

[6] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 10-11 (Oxford Univ. Press ed., 1992).

[7] *Public/Private Distinction*, *supra* note 5, at 1425.

remedy represented an aberration by contaminating the purity of private law with regulatory ideas.

Since the beginning of the 20th century, U.S. courts and jurists have vigorously criticized this architecture on the ground that what was presented as neutral and inevitable was in reality the product of policy choices.[8] As a consequence of the progressive critique of the late-19th century mode of legal thought, private law underwent important transformations over the first four decades of the 20th century and acquired a clearly "social" posture. To any American legal thinker, it was clear that private law could no longer be conceived as an autonomous legal domain, immune from politics and public law. This skeptical view, which reached its heyday in the 1960s-70s, is still shared by a majority of U.S. jurists, who have been deeply influenced by the lessons of Legal Realism.[9] Unsurprisingly, as soon as the public/private distinction came under attack, the movement against punitive damages lost its force, and U.S. tort law has continued to provide an overtly punitive and deterrent remedy. Since the battle over the existence and normative desirability of the public/private distinction continues to animate academic discussions, it is natural that U.S. theories of punitive damages either minimize the distinction by recognizing the public nature of the remedy or emphasize it by treating punitive damages as a mistake or by considering punishment as part of private law.

The next section overviews the main U.S. explanatory theories of punitive damages. I propose to distinguish them depending on whether they minimize or emphasize the public/private distinction, earning the label, respectively, of "publicizing" or "privatizing" accounts of punitive damages. This classification allows investigating the public/private distinction, which lies at the heart of the punitive damages discussion. Exploring these explanatory theories in light of extant law demonstrates that there is something to both the "publicizing" and "privatizing" accounts of punitive damages. At the same time, neither of them is completely satisfactory because each fails to account for what the other captures. In this respect, an approach that emphasizes that punitive damages are not an isolated and unfortunate instance of a public/private mélange, but rather one of the many instances in which the public and private coexist, offers a third, more promising way of accommodating punitive damages within domestic law.

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[8] *See, e.g.*, Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a European critique of the same phenomenon, *see* RUDOLF VON JHERING, LAW AS A MEANS TO AN END 297 (Isaac Husik et al. trans., 1924); FRANCOIS GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (La. St. L. Inst. trans., 2d ed. 1963).

[9] *See generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004) (discussing the current resurgence of late 19th century private law).

A. "Publicizing" Theories of Punitive Damages

In the United States, the vast majority of commentators and, more relevantly, courts and legislators share a pragmatic vision of the law, showing that they have learned from the Realist and post-Realist critiques of rigid categorizations and conceptualisms. Consequentially, it is no surprise that the language used by most courts and legislators conveys the idea that punitive damages are conceived of a regulatory tool to further policy goals. Many commentators, relying on these "publicizing" legal materials, propound theories of punitive damages that minimize the public/private distinction and that deem it as immaterial to the conferral of punitive and deterrent powers on public authorities or private entities.

1. "Publicizing" Extant Law

In conceptualizing punitive damages, federal as well as state courts and legislators tend to blur the line between public and private law, for they identify the foundations of this tort law remedy with *public* punishment and deterrence. By doing so, they confer on punitive damages a marked regulatory quality and reinforce those doctrinal theories that see the plaintiff as a private attorney general pursuing the state's objectives on behalf of the public authority.

To begin with, the federal legislator is very clear in excluding any compensatory aim from punitive awards and in limiting punitive damages to deterrent and punitive functions. As Congress explicitly stated, "[p]unitive damages are intended to punish the wrongdoer and do not compensate the claimant for lost wages or pain and suffering."[10] Moreover, in a number of states local legislators have adopted split-recovery schemes, whereby a percentage of the plaintiff's punitive damages award goes to the plaintiff and the remainder – often a majority of it–goes to a state- or court-administered fund.[11] These schemes, taken together with other legislative changes such as the adoption of the clear-and-convincing standard of proof and the "bifurcation" or "trifurcation" of trials involving punitive damages claims, reinforce the criminal (hence public) nature of punitive damages and considerably blur the public/private divide by attributing typically public functions to private law.[12]

Similarly, courts conceive of punitive damages as pursuing punitive and deterrent goals in the interest of the state.[13] For instance, the U.S. Supreme Court

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[10] H.R. REP. NO. 104-586, at 143 (1996).

[11] Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375-78 (2003).

[12] *Palsgraf Punitive Damages*, *supra* note 2, at 1783-84.

[13] RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct

stated that punitive damages are imposed: "for purposes of retribution and deterrence";[14] "if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence";[15] "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[16] Lower courts share a similar view. Inspired by an efficiency-based rationale, in *Mathias v. Accor Economy Lodging, Inc*. the Court of Appeals for the Seventh Circuit argued that punitive awards are necessary to avoid the detrimental effects of under-detection, so that "if a tort-feasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away."[17] Similarly, in *Jacque v. Steenberg Homes, Inc*., the Supreme Court of Wisconsin ordered the trespasser to pay one dollar in nominal compensatory damages and $100,000 in punitive damages: "[p]unitive damages, by removing the profit from illegal activity, can help to deter such conduct [intentional trespass]. In order to effectively do this, punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss."[18] In sum, by founding punitive damages on public punishment and deterrence, courts endorse a regulatory conception of punitive damages that greatly blurs the distinction between public and private law.

Disagreeing with any monolithic conception of punitive damages, other courts prefer to adopt a more nuanced approach. For instance, Judge Calabresi argues that punitive damages cannot and should not be reduced to a legal device pursuing only one goal.[19] This functionalist approach, which considers mono-dimensional views of punitive damages as a serious threat to their multi-functional capacity,[20] rejects the idea of tort law as an autonomous system, and criticizes the reductionism of both corrective justice and civil recourse.[21] This view, which assesses a legal device not on its compatibility with a given domain of law but

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in the future.").

[14] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

[15] St. Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

[16] Philip Morris U.S. v. Williams, 549 U.S. 346, 352 (2007).

[17] 347 F.3d 672, 677 (7th Cir. 2003).

[18] 563 N.W.2d 154, 165 (Wis. 1997) (This decision fits both the "property rule" model and the "gain elimination" model as articulated by their proponents (see *infra*, Subsection (A)(3))).

[19] Ciraolo v. City of N.Y., 216 F.3d 236, 244-45 (2d Cir. 2000). *See also* GUIDO CALABRESI, THE COMPLEXITY OF TORTS. THE CASE OF PUNITIVE DAMAGES*, reprinted in* LIBER AMICORUM PER FRANCESCO DONATO BUSNELLI, Vol. II, 327-28 (2008) (stating that the reasons for punitive damages in tort law serve the five following functions: (i) "enforc[ing] societal norms, through the use of private attorney's general," (ii) pursuing deterrence by employing the "multiplier" model, (iii) "the Tragic Choice Function, such as in the *Pinto* case;" (iv) "permit[ting] Recovery of Generally NonRecoverable Compensatory Damages," and (v) "permit[ting the] Righting of Private Wrongs.").

[20] *Id*. at 329.

[21] Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449, 467-68 (2013).

rather on how well it performs its functions, has the effect of blurring the distinction between private and public law.

An additional point worthy of consideration is the U.S. Supreme Court's constitutionalizing of punitive damages initiated in the late 1980s. In a series of successive cases analyzed below, the Court stated that punitive damages must comply with the principles of reasonableness and proportionality to survive scrutiny under the Due Process Clause of the 14th Amendment. This judicial development confirms the impact that public law, especially constitutional law, has on private law matters and the (great) extent to which the outcome of private law disputes can depend on the settlement of constitutionally relevant issues.

A good number of U.S. scholars rely on these "publicizing" segments of extant law to build descriptively plausible and normatively attractive theories of punitive damages. These jurists produce instrumental views of punitive damages, for they see them as a regulatory tool that furthers public, not private, goals. By doing so, they are able to account for some, but not all, of the features current U.S. punitive damages exhibit.

2. Punitive Damages as Delegation of Public Power

Marc Galanter and David Luban put forward a theory according to which punitive damages are truly a form of punishment that can fairly be imposed even without the procedural safeguards required for punishment in criminal law. On their account, punishment is not an exclusively legal institution, but is rather a social institution that pervades our society in many forms.[22] Calling into question the conventional taxonomy in which criminal law, a branch of public law, and punishment go hand in hand and must be kept distinct from private law and civil remedies, they argue that punishment cannot be described as solely pertaining to criminal law and that the very notion of punishment is present in other branches of law as well.[23] For instance, in private law, compensatory damages do not clearly distinguish, from a subjective point of view, between punishment and restoration of the victim of a civil wrong.[24] That is, the victim may well seek compensatory damages not in order to be made whole, but instead to punish the wrongdoer.

These two authors argue that punitive damages are grounded in ideas of retribution and deterrence. Moreover, they contend that punitive damages are normatively desirable because they tend to sanction sophisticated and powerful economic actors who usually can steer clear of criminal sanctions that are usually wielded against the poor and the marginalized.[25] In this context, private parties act as private attorneys general, exercising a law enforcement power delegated by

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[22] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397-99 (1993).

[23] *Id*. at 1401.

[24] *Id*. at 1406.

[25] *Id*. at 1426.

the state. In response to the concern that punitive damages administer punishment without adequate procedural protections, they argue that lesser protections are required because the life and liberty of a defendant are not at stake in a tort case, and because private parties, rather than a powerful state, seek punitive damages.[26]

Galanter and Luban's theory has been criticized on the grounds that, by postulating that punitive damages are almost exactly like criminal sanctions, it does not reconcile the punitive component of punitive damages with their status as one of the legal weapons of which a private party may legitimately avail itself in private law disputes.[27] In other words, Galanter and Luban have been criticized because their theory minimizes the distinction between private and public law.

3. Punitive Damages as a Means for Achieving Efficiency

A different approach is adopted by law and economics theorists, according to whom the main objective of tort law, and of law more generally, is efficiency, the maximization of utility without the waste of valuable resources. With respect to punitive damages, law and economics advocates identify three possible models.

According to the multiplier model, put forward in 1998 by Steven Shavell and A. Mitchell Polinsky, the total damages (compensatory damages plus punitive damages) a wrongdoer pays must be calculated by multiplying the harm "by the reciprocal of the probability that the injurer will be found liable when he ought to be."[28] In order to prevent under-deterrence, they maintain that punitive damages should be imposed only if the injurer has a significant chance of escaping liability for the harm she causes.

A number of scholars have criticized Shavell's and Polinsky's theory. For instance, Catherine Sharkey argues that the multiplier model unduly limits the scope of the under-deterrence problem, confining it to cases in which the harm cannot be detected. Actually, there are other situations in which the injurer may escape liability but which the multiplier model does not capture: when the injured party does not bring a lawsuit either because (1) "the probable compensatory damages are too low, or (2) the victim is not particularly litigious, is unsophisticated, lacks the necessary financial resources," or perhaps has been harmed by a shaming tort; when the defendant's identity is unknown; or when there are more diffuse societal harms.[29]

Keith Hylton criticizes the multiplier model on the ground that it makes sense only when the injurer's gain is greater than the victim's loss. When the

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[26] *Id*. at 1454-58.

[27] Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 147 (2005) [hereinafter *A Theory of Punitive Damages*].

[28] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889 (1998).

[29] Sharkey, *supra* note 11, at 366-67.

injurer's gain is less than or equal to the victim's loss, the multiplier model should be replaced by the imposition of punitive damages to eliminate the prospect of gains on behalf of the injurer.[30] The difference between these two models can be explained by reference to the type of deterrence pursued. The multiplier model pursues optimal deterrence (the wrongful conduct is prohibited so long as its costs outweigh its benefits), whereas Hylton's "gain elimination" model seeks to achieve complete deterrence (the wrongful conduct is prohibited altogether).

David Haddock, Fred McChesney, and Menahem Spiegel provide a different economic rationale for punitive damages, labeled the "property rule" model.[31] Drawing on the traditional distinction between property rules and liability rules, they argue that when certain activities have zero social value and ought to be totally avoided, an efficient legal system should employ a property rule instead of a liability rule. On this view, punitive damages force a potential wrongdoer to use the market rather than illicit activities to procure goods. According to its proponents, this approach is particularly useful in "illiquid" markets such as those involving bodily injuries, slander, libel, trespass, deceit in inducing marriage, and many others.[32]

Although the efficiency-based approach provides an at least partially accurate picture of how courts conceive of punitive damages in the United States, it is not free from criticisms. As Benjamin Zipursky observes, law and economics theorists do little to solve the puzzle over the acceptability of punitive damages as a private law remedy, for they tend to obscure the difference between criminal and civil liability and to treat all types of damages as, essentially, fines.[33] The consequence of this approach, the critique goes on, is the inability to reconcile the punishing side of punitive damages with their position in private law, an issue that matters a great deal if not to economists, to jurists who care about legal coherence.

4. Punitive Damages as a Means for Achieving Societal Compensation and Deterrence

Catherine Sharkey offers a justification for punitive damages distinct from punishment and deterrence.[34] Analyzing *State Farm Mutual Automobile Insurance Co. v. Campbell*, together with other relevant cases and recent legislative and judicial developments in a number of states, she argues that punitive damages can be understood as a special form of compensation, namely,

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[30] Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L. J. 421, 470 (1998).

[31] *See generally* David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990).

[32] *Id.* at 26 (citing CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 287 (1935)).

[33] *A Theory of Punitive Damages*, *supra* note 27, at 134.

[34] Sharkey, *supra* note 11, at 389-414.

compensation for the victims of wrongdoing who, for various reasons, do not bring an action against the wrongdoer. [35]

Sharkey traces the notion of punitive damages as "socially compensatory" damages to Judge Calabresi's multiple opinions in *Ciraolo v. City of New York*.[36] In his concurring opinion, he argues that the term "punitive damages" is confusing and that they should instead be labeled "socially compensatory damages . . . [f]or, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages are, in a sense, designed to make society whole by seeking to ensure that all of the costs of harmful acts are placed on the liable actor."[37]

Sharkey develops more fully the idea of punitive damages as societal damages by analyzing state legislative reforms consisting in the adoption of split-recovery schemes.[38] Besides the contingent reasons that brought States' courts and/or legislators to adopt these schemes, Sharkey identifies a common denominator, largely ignored by most of the academic literature, to such legislative and judicial moves: the goal of pursuing societal compensation.

According to Sharkey, the societal compensation approach can advance fairness and corrective justice goals by, respectively, preventing the plaintiff from acquiring a windfall gain and by making sure that all the persons whom the defendant's wrongful conduct harmed can obtain proper compensation through the distribution of punitive damages awards. Moreover, Sharkey maintains that the theory of punitive damages as societal damages would also meet the economic goal of optimal deterrence by forcing wrongdoers to internalize their costs.[39]

Sharkey's theory has been criticized on the ground that if the purpose of punitive damages was really that of compensating victims of the defendant's wrongdoing not before the court, there would be no reason for courts to require, as they invariably do, "grave misconduct as a threshold for a punitive award."[40] It can also be argued that Sharkey's reading of punitive damages captures interesting ongoing developments of punitive awards but that, at least for the moment, her interpretive effort is more an encouragement for further transformation than an accurate depiction of the current status of punitive damages in the United States, founded as they are judicially on the notions of punishment and deterrence.

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[35] *Id.* at 400; *see also* St. Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[36] Sharkey, *supra* note 11, at 393. *See also* Ciraolo v. City of N.Y., 216 F.3d 236 (2d Cir. 2000).

[37] *Ciraolo*, 216 F.3d at 245.

[38] Sharkey, *supra* note 11, at 373 ("Eight states currently have split-recovery statutes of some form, including: Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah.").

[39] *Id*. at 354.

[40] John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 961 n. 221 (2010) [hereinafter *Torts as Wrongs*].

B. "Privatizing" Theories of Punitive Damages

For those committed to the preservation of the public/private distinction, punitive damages represent a serious problem, for punishment and deterrence (but especially punishment) have been traditionally presented as belonging to the exclusive province of public law. How can this issue be solved while preserving the autonomy of private vis-à-vis public law? There are two possible solutions. One, adopted by commentators like Benjamin Zipursky, Anthony Sebok, and Thomas Colby, consists in producing theories that draw on parts of extant law to accommodate punitive damages while guarding the public/private distinction. Another solution, embraced by corrective justice adherents, consists in treating punitive damages as an unfortunate mistake that cannot be reconciled with the idea of correlativity and that should be erased as soon as possible.[41]

1. "Privatizing" Extant Law

Whereas some segments of extant law legitimize a "publicizing" reading of current punitive damages, a number of different features of U.S. punitive damages law legitimize a "privatizing" interpretation of this tort law remedy. First, in a tort law dispute the plaintiff must explicitly claim punitive damages, as judges and juries do not automatically grant them. Second, a certain standard of conduct on the part of the wrongdoer is required, for courts award punitive damages only if the conduct of the defendant has been particularly reprehensible, qualifying as willful, wanton, or reckless.[42] Third, punitive damages fall within the full discretion of judges or juries. That is to say, even if the adjudicator finds the defendant liable and its conduct above the required threshold of reprehensibility and then orders the payment of compensatory damages, it can deny punitive damages.[43] Fourth, in many states the punitive award accrues to the victim and not to some state- or court-administered fund.[44] Fifth, criminal procedural safeguards are not applied to punitive damages.[45] Sixth, "the nonparty-harm rule" applies, whereby a defendant cannot be ordered to pay punitive damages for harms caused to individuals not part of the litigation.[46] These features, considered as distinctive of private law's autonomy vis-à-vis public law,

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41 *See infra* Subsection (B)(4).

42 *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-76 (1996).

43 *Palsgraf Punitive Damages*, *supra* note 2, at 1785.

44 *Id*.

45 BMW of N. Am., Inc., 517 U.S. at 575.

46 Philip Morris U.S. v. Williams, 549 U.S. 346, 348, 353-354 (2007). The expression "nonparty-harm rule" is owed to Benjamin C. Zipursky. *See* Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 CT. REV. 134, 135 (2007).

appear to be emphasized by the advocates of private law's autonomy to legitimate and reinforce the idea of a public/private distinction.

2. Civil Recourse Theory[47]

Zipursky argues that punitive damages have a "double aspect" that derives from an ambiguity in the idea of punishment. In one sense, punitive damages have the same nature as criminal sanctions. They are administered in the name of government or society as a whole for the purpose of punishing and deterring certain forms of highly anti-social conduct. In another sense, punitive damages embody a right on the part of the victim of an egregious wrong to punish the wrongdoer.[48] How can the punitive nature of punitive damages be reconciled with the fact that they are available to a party in private litigation?

To solve this problem, Zipursky argues that tort law should be understood not as aiming to make the wronged person whole, but rather to provide her with "an avenue of civil recourse against the wrongdoer."[49] The state prohibits victims from responding on their own to those who have wronged them, for reasons of social peace. Consequently, it must provide a structure through which a private individual can obtain justice if wronged. Within this conception of tort law, Zipursky argues, there is room for a notion of punitive damages. In particular, the state is not authorizing a private individual to act as a private attorney general. Rather, it is empowering the victim of a certain kind of egregious wrong to be vindictive toward the wrongdoer and to exact a penalty from her using a civil remedy.[50] By letting the plaintiff claim punitive damages in addition to compensatory damages, the wrongdoer is punished and other people, fearing the same treatment, will refrain from adopting a similar conduct. In this way, Zipursky produces a normative theory of punitive damages that, as part of his broader civil recourse theory, should be understood as connatural to his commitment to preserving the public/private distinction.[51]

Zipursky's theory is not immune from criticism. His "double aspect" characterization of punitive damages, although expressive of the Supreme Court's "schizophrenic jurisprudence," does not satisfactorily justify the absence of

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[47] This view can be assimilated to a slightly different theory, that of Anthony J. Sebok. *See* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2006-2007).

[48] *A Theory of Punitive Damages*, *supra* note 27.

[49] *Id.* at 151.

[50] *A Theory of Punitive Damages*, *supra* note 27, at 153.

[51] For a discussion of civil recourse theory, *see* John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569 (2013); John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341 (2011); *Torts as Wrongs*, *supra* note 40, at 919.

criminal procedural safeguards.[52] The fact that besides their civil aspect, punitive damages also have a criminal aspect suggests that criminal procedural safeguards should be applied when punitive damages are awarded. In contrast, and unacceptably to this view, Zipursky's theory seems to suggest that so long as the criminal side of punitive damages is accompanied by a civil side, those procedural safeguards are not required.[53] Moreover, as Zipursky himself admits, his normative theory of punitive damages does not coincide with current U.S. punitive damages law, characterized as it is by a mixture of "publicizing" and "privatizing" elements.[54]

3. Punitive Damages as Private Punishment for Private Wrongs

Colby argues that the dominant conception of punitive damages as an instrument to punish the wrongdoer for a *public wrong* is an inaccurate depiction of punitive damages.[55] By relying on the segments of "privatizing" extant law seen above, Colby concludes that punitive damages should be conceived not as public sanctions operating in private law settings, but as private sanctions operating in private law settings.[56] According to his approach, punitive damages cannot be equated to criminal, hence public, sanctions, and the public benefits deriving from this civil remedy are only an incidental effect of punitive damages.[57] Rather, punitive damages are a form of punishment for private, individual wrongs. For this reason only, criminal procedural safeguards are not necessary in punitive damages cases.

Colby's theory has been criticized because his proposed distinction between private and public wrongs to explain punitive damages erects a descriptively unpersuasive barrier between public wrongs and criminal punishment on the one hand and private wrongs and punitive damages on the other. According to this critique, it is not true that punitive damages are awarded for exclusively private wrongs and that criminal sanctions are imposed only for exclusively public wrongs: it may well be that a private wrong is also a public wrong because the wrongdoing is not just harmful to the injured person, but also constitutes a threat to the public peace, and that a public wrong (e.g. a homicide) is not only a threat to the public peace but also an offense to a private individual.[58]

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[52] Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L. J. 392, 447 (2008) [hereinafter *Clearing the Smoke*].

[53] *Id.* at 446.

[54] *See Palsgraf Punitive Damages*, *supra* note 2, at 1777.

[55] *Clearing the Smoke*, *supra* note 52.

[56] Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 607-9, 630 (2003).

[57] *Clearing the Smoke*, *supra* note 52, at 462.

[58] *A Theory of Punitive Damages*, *supra* note 27, at 143-44.

4. Rejection of Punitive Damages: The Corrective Justice Framework

Corrective justice theorists, committed to keeping as firm as possible the distinction between public law and private law, harshly criticize the very existence of punitive damages. In Aristotelian terms, corrective justice, as distinct from distributive justice, can be understood by resorting to arithmetic notions of addition and subtraction applied to two parties between whom a transactional injustice has taken place and between whom a reverse transaction can re-establish the *status quo ante*.[59] Some argue that tort law embodies the principle of corrective justice by undoing injustices that occur between two parties when a wrongful injurer gains something and the victim loses something. Corrective justice is built upon a notion of correlativity, in the double sense that the injustice is beneficial to the wrongdoer and detrimental to the wronged individual (structural correlativity) and that the remedy consists in making the defendant return to the plaintiff what the former previously and wrongfully took from the latter (content-related correlativity).[60]

A corrective justice approach to understanding tort law has no room for punitive damages. Ernest J. Weinrib gives two fundamental reasons for this that flow directly from the structural correlativity and content-related correlativity of corrective justice. Under structural correlativity, punitive damages are based on an evaluation that is focused on the gravity of the wrongdoer's wrong, rather than on the interaction between injurer and victim. Under content-related correlativity, because punitive damages seem to provide a windfall in favor of the plaintiff, they cannot accord with corrective justice, which calls for a restoration of the victim's infringed right and nothing more.[61]

C. Understanding Punitive Damages in Relation to the Public/Private Distinction

In offering "publicizing" or "privatizing" conceptualizations of punitive damages, U.S. jurists fail to satisfactorily accommodate this tort law remedy within domestic law because they do not perceive that public and private elements coexist throughout tort law and not only within punitive damages law. By highlighting the public and private poles of U.S tort law and its sub-domains, I show how the relationship between public and private plays itself out within this area of U.S. law. In brief, fault-based liability represents the private, relational pole of tort law, whereas strict liability represents the public, regulatory pole. By

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[59] John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 L. & PHIL. 1, 11 (2011).

[60] Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350 (2002).

[61] Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 290 (2011-2012).

private and public I mean that the reasons for imposing liability on the defendant are, respectively, internal or external to the plaintiff/defendant relationship. Both fault-based and strict torts are characterized by the coexistence of private and public rationales, with a prevalence of the former in fault-based torts and a prevalence of the latter in strict torts.

1. Fault-Based Liability

A fundamental distinction is that between intentional torts and the tort of negligence. In cases related to the former class of torts, e.g. battery or intentional infliction of emotional distress, the language courts use demonstrates that liability is imposed on the wrongdoer essentially because of the wrongful harm she inflicted on the plaintiff.[62] Implicated here is the ideal of individual justice, according to which the victim of a wrongdoing is entitled to hold the tortfeasor accountable and to obtain the righting of the wrong.[63] To be sure, there are policy reasons justifying the imposition of liability on such defendants, but such reasons seem to be of secondary importance and, at any rate, unable to exempt wrongdoers from liability. By way of example, in *State Rubbish Collectors Association v. Siliznoff*, Justice Traynor held that administrability reasons such as a steep increase in litigation and in unfounded claims do not override the need of protecting a person's interest in being free from the infliction of emotional distress.[64] When it comes to intentional torts, their private, relational dimension has much to do with the ideal of individual justice, and the reasons for holding a defendant accountable are principally internal to the wrongdoer-victim relationship. The public dimension of the law of intentional torts is constituted instead by deterrent and punitive ideas, clearly instantiated in the remedy of punitive damages. For reasons of exposition, I will return to them later.

The way courts handle concepts such as duty of care and actual causation (or cause in fact) confirms the relational, inherently private quality of the tort of negligence. A good example is provided by the famous case *Palsgraf v. Long Island Railroad*, in which Cardozo, speaking for the majority, held that a tort plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of a duty to another," and "[w]hat the plaintiff must show is a 'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not a

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[62] *See, e.g.*, Garratt v. Dailey, 46 Wn.2d 197 (Wash. Ct. App. 1995) (discussing the tort of battery); Ellis v. D'angelo, 116 Cal.App.2d 310 (1953). *See, e.g.*, GTE Sw., Inc. v. Bruce, 998 S.W.2d 605 (discussing intentional infliction of emotional distress); Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1 (7th Cir. 1972).

[63] For a critical overview of the variants of individual justice, with the exception of civil recourse theory, *see* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 563-78 (2003) [hereinafter *Twentieth-Century Tort Theory*].

[64] 38 Cal.2d 330, 338 (1952).

wrong to any one."[65] In other words, the duty of care links the plaintiff to the defendant: the plaintiff recovers in negligence if and only if the harm she suffers is the consequence of the breach of the duty of care the defendant owed her.[66]

Barnes v. Bovenmyer is quite illustrative as to actual causation. There, the court found for the defendant on the ground that his conduct, although negligent, was not the actual cause of the plaintiff's injury.[67] That is to say, the notion of cause in fact links the defendant's negligent conduct strictly to the plaintiff's harm and is an indispensable requirement for recovery. In sum, the notions of duty of care and actual causation are currently employed in a way that testifies to the profoundly relational quality of the tort of negligence.

However, the existence of a duty of care and of a relationship of actual causation between conduct and injury does not tell courts whether the defendant's conduct has been reasonable. The test U.S. courts usually use to this end is the Hand, or BPL, formula, elaborated by Judge Learned Hand in *United States v. Carroll Towing*.[68] This test asks whether the costs of precautions, or burdens, (B) that the defendant could have adopted exceeded the foreseeability of harm (P) multiplied by the magnitude of the loss (L). If $B < PL$, the defendant is liable; if $B > PL$, she is not. This approach reveals a non-relational, efficiency-driven rationale, for it aims at maximizing wealth rather than producing individual justice on a case-by-case basis.[69] In this respect, the tort of negligence has a public, regulatory posture, for courts "use" it to achieve efficient deterrence.[70]

The upshot is that fault-based torts are characterized by a remarkable private, relational quality that brings together defendant and plaintiff. Moreover, the reasons for holding the defendant accountable are essentially internal to the wrongdoer-victim relationship. Nonetheless, policy reasons are also detectable in courts' reasoning, especially in the negligence area. With strict torts, the situation changes. As courts articulate it, strict liability is justified on policy reasons, and its relational dimension becomes marginal, though by no means absent.

2. Strict Liability

To begin with strict product liability, U.S. courts usually ground the defendant's liability on policies such as cost spreading, loss internalization, risk

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[65] 162 N.E. 99, 100 (N.Y. 1928).

[66] See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter IDEA OF PRIVATE LAW]; *Palsgraf Punitive Damages*, *supra* note 2, at 1764.

[67] 122. N.W.2d 312 (Iowa. 1963).

[68] 159 F.2d 169, 173 (2d Cir. 1947).

[69] Richard A. Posner, *A Theory of Negligence*, 1 J. OF L. STUD. 29, 32-33 (1972).

[70] *See, e.g.*, Chi. Burlington and Quincy R.R. Co. v. Krayenbuhl, 91 N.W. 880 (Ne. 1902); Osborne v. Montgomery, 234 N.W. 372 (Wis. 1932); Davis v. Consol. Rail Corp., 788 F.2d 1260, 1263-64 (7th Cir. 1986). *See generally* RESTATEMENT (SECOND) OF TORTS § 2292 (1979).

reduction, and efficient allocation of resources. For instance, in the famous *Escola* case, Justice Traynor's concurring opinion postulated that the cost of an injury from a defective product "can be insured by the manufacturer and distributed among the public as a cost of doing business."[71] In *Doe v. Miles Laboratories, Inc*., the court held that "strict products liability . . . affords society a mechanism for a rational allocation of resources."[72] In *Promaulayko v. Johns Manville Sales Corp*., another court held that the two fundamental rationales of strict product liability are "the allocation of the risk of loss to the party best able to control it [and] the allocation of the risk to the party best able to distribute it."[73] Notwithstanding the fact that courts treat strict product liability as a tool to further socio-economic goals, this tort presents also a private, relational component, though it is somewhat tenuous. Manufacturers who are found strictly liable are in some way responsible, either because something went wrong in the assembly line, or because the product design was flawed, or finally because the product lacked proper warning. In each of these cases, the manufacturer is held accountable because the victim/user has been harmed by a wrongdoing imputable to the manufacturer. On the one hand, without suffering an injury caused by a design, manufacturing, or warning defect, the user cannot claim anything as against the manufacturer. On the other hand, to trigger liability this defect must be within the sphere of control of the manufacturer. These elements appear to unveil a private, relational dimension in strict product liability.[74]

A similar analysis applies to the *respondeat superior* doctrine, according to which the employer is vicariously liable for the damages her employees cause while acting in the scope of their employment. The rationales courts usually adduce to justify this doctrine are cost spreading, for the employer can be considered the one best able to spread the costs of injuries through insurance,[75] and cost internalization, for the employer can be induced to "consider activity changes that might reduce the number of accidents."[76] The regulatory posture of *respondeat superior* is counterbalanced by a sometimes-neglected relational quality.[77] Actually, some courts consider the employer and the employee as a single agent and the harm materially caused by the latter as legally committed by the former: "the enterprise may be regarded as a unit. . . . Employee's acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself."[78] Similarly, in *Ira S. Bushey & Sons, Inc. v. United States*, the

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[71] Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[72] 675 F. Supp. 1466, 1471 (D.Md 1987).

[73] 562 A.2d 202, 204 (N.J. 1989).

[74] John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1944-46 (2010).

[75] *See, e.g.,* Kohlman v. Hyland, 210 N.W. 643, 645 (N.D. 1926).

[76] Konradi v. United States, 919 F.2d 1207, 1213 (7th Cir. 1990).

[77] *See generally* IDEA OF PRIVATE LAW, *supra* note 66, at 185-87.

[78] *See, e.g*., Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972) (considering cost

court held that although policy goals provide some basis for *respondeat superior*, it is more than anything else the ideal of responsibility that grounds liability.[79]

Finally, strict liability for abnormally dangerous activities[80] so much constitutes one of the public prongs of tort law that some of the scholars committed to preserving the public/private distinction admit that this sort of liability should be seen as falling outside tort law.[81] Actually, courts usually base liability for abnormally dangerous activities on policies such as cost spreading, the efficient allocation of resources, and cost internalization.[82] At the same time, however, it seems that this kind of liability is not totally divorced from an idea of "relationality" between defendant and plaintiff. For instance, the Supreme Court of Washington held that, besides problems of proof, strict liability for abnormally dangerous activities rests on "the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible."[83] Similarly, some private law theorists have tried to reconcile this tort with the tenets of corrective justice by arguing that culpability is not alien to liability for abnormally dangerous activities and that the strict quality of this tort is a function of the necessity to relieve the plaintiff from an otherwise unbearable burden of proof.[84] The foregoing analysis can be shown in a "nesting" mode:

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spreading and cost internalization the main rationales of *respondeat superior*).

[79] 398 F.2d 167, 171 (2nd Cir. 1968) ("*[R]espondeat superior* . . . rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.").

[80] Rylands v. Fletcher, [1868] UKHL 1. For a discussion of U.S. progeny, see Ball v. Nye, 99 Mass. 582 (1868); Shipley v Fifty Assocs., 106 Mass. 194 (1870); Cahill v. Eastman, 18 Minn. 324 (1871); Siegler v. Kuhlman, 502 P.2d 1181; N.J. Dep't of Envtl. Prot. v. Ventron Corp., 468 A.2d 150 (N.J. 1983); Splendorio v. Bilray Demolition Co., 682 A.2d 461 (R.I. 1996). Similarly, no-fault plans such as the Workers' Compensation Law attribute reparatory awards that are independent of any fault on the part of the employer. *See* ROBERT E. KEETON ET AL., TORT AND ACCIDENT LAW–CASES AND MATERIALS 26 (4th ed. 2004). As regards the Workers' Compensation Law, employees who suffered harm arising out of and in the course of employment are entitled to monetary benefits, which "are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame." *Id*., at 26.

[81] John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 353-54 (2011).

[82] *See, e.g*., Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1209 (E.D. Cal. 1976); Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir., 1990).

[83] *Siegler*, 502 P.2d at 1185.

[84] IDEA OF PRIVATE Law, *supra* note 66, at 187-90.

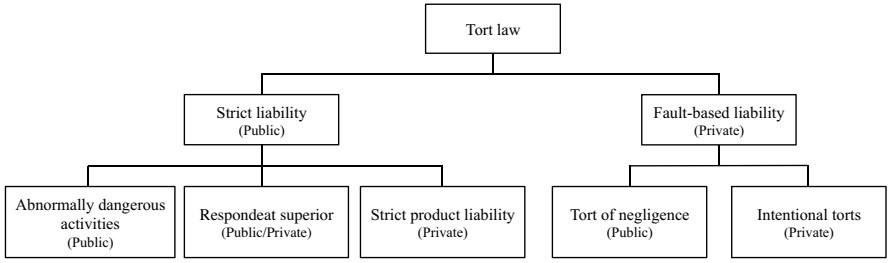

Figure 1

As the analysis of the five areas of liability represented below strict and fault-based liability demonstrates, each of these areas contains public and private elements, allowing their internal public/private distinction to continue further down. Moreover, as one proceeds from the right to the left extreme of the diagram, the relational, private quality of torts diminishes in favor of an increasingly prominent public, regulatory quality. The upshot is that U.S. tort law can be portrayed as a mixture of public and private elements and that theories purporting to establish either that "all law is public law" or that private law is a self-contained system are fallacious.

Against this background, accommodating punitive damages within U.S. law should be easier. Actually, compensatory and punitive damages represent the private and public pole of fault-based liability from a remedial perspective. In the late 19th century, compensatory damages, together with the idea of objective causation, constituted one of the pillars of U.S. tort law. In that mode of legal thought, the restoration of the *status quo ante* had to be the sole goal of tort law, removed from any distributive or redistributive effort. From a remedial perspective, compensatory damages represented the natural arrangement. As noted above, any "more-than-compensatory" award was seen as threatening the purity of tort law by contaminating it with public, regulatory ambitions. Hence, punitive damages came under attack and risked being extruded from tort law.

Today compensatory damages are no longer linked to the ideal of a self-contained private law, nor are they synonymous with corrective justice. Actually, a number of 20th-century theories of tort law suggest more or less plausibly that there are other justifications for compensatory damages than just the settlement of disputes between private individuals. These justifications are identified sometimes with deterrence/compensation,[85] sometimes with the need to give victims of accidents monetary relief,[86] sometimes with economic efficiency,[87] and sometimes with social justice.[88]

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[85] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 10, 28 (1941); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice,* 75 TEX. L. REV. 1801, 1828 (1997). For a critique of the compensation-deterrence approach, see *Twentieth-Century Tort Theory*, *supra* note 63, at 531-37.

[86] *See, e.g.*, PATRICK S. ATIYAH, THE DAMAGES LOTTERY, 143-50 (1997); Marc A.

All of these theories, supported by abundant case law, tend to attribute a public, regulatory quality to private law and, consequently, to compensatory damages. Yet, it is hardly possible to disregard the intimate connection between the ideal of righting a wrong and compensatory damages. By restoring, as far as money can, the *status quo* the victim enjoyed before the wrongdoing, compensatory damages illuminate the directness of the relationship between plaintiff and defendant.[89] The plaintiff can hold the defendant accountable because of the harm the latter caused to the former and for which the latter is responsible to the former.

The fact that in most fault-based tort cases the defendant is ordered to pay the victim compensatory damages independently of whether policy goals are thereby promoted,[90] emphasizes the "privateness" of the relationship between plaintiff and defendant, in the sense that it makes evident that the outcomes of judicial disputes can be independent of, or even contrary to, the policy rationales often attached to tort law. For this reason, compensatory damages can be considered as presenting a profoundly relational, private quality.[91]

Punitive damages, in contrast, emphasize the public role of fault-based torts. Because quantitatively well above compensation, they undermine the "relationality" embodied by compensatory damages. Moreover, in some jurisdictions they do not accrue to the victim but rather to some public fund. They must comply with the constitutionally relevant principles of reasonableness and proportionality, as established by the U.S. Supreme Court. Furthermore, in most states of the Union they can be awarded only upon satisfaction of the clear-and-convincing standard of proof,[92] and they are often dealt with in a separate phase of the trial.[93] Finally and most importantly, courts and legislators conceive of punitive damages as pursuing public punishment and deterrence.

It would be erroneous, however, to think that punitive damages are devoid of a private quality. Actually, in a number of jurisdictions they still accrue to the plaintiff. They cannot be granted absent a compensatory award and they are

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Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). For a critique of the enterprise liability approach, see *Twentieth-Century Tort Theory*, *supra* note 63, at 540-44.

[87] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS, 253-57 (6th ed. 2012).

[88] *See, e.g.*, Anita Bernstein, *Complaints,* 32 MCGEORGE L. REV. 37, 51-53 (2000); Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011).

[89] *See generally*, IDEA OF PRIVATE LAW, *supra* note 66, at 10-11.

[90] JULES COLEMAN, RISKS AND WRONGS, 304-5 (1992); *Twentieth-Century Tort Theory*, *supra* note 63, at 574-75.

[91] If further deconstructed against the background of U.S. tort law, compensatory damages have public and private functions, reproducing the public/private opposition.

[92] Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?* 7 U. ST. THOMAS L. J. 1, 3 (2009).

[93] *Palsgraf Punitive Damages*, *supra* note 2, at 1784.

closely related to compensatory damages from a quantitative point of view. They depend on the reprehensibility of the defendant's conduct. The victim must expressly claim punitive damages and the defendant cannot be ordered to pay for harms caused to persons not part of the litigation. Finally, courts and juries have absolute discretion in deciding whether to award punitive damages or not.

In sum, as currently administered in the United States, within punitive damages law some elements can be seen as public and some as private, reproducing again the distinction between public and private law. Diagrammatically, punitive damages can be represented as in the chart below.

In conclusion, my ordering of U.S. tort and punitive damages law around the public/private distinction reveals that punitive damages are not a legal *monstrum*, but rather one instance, among many others, of public and private elements coexisting in a given legal domain.

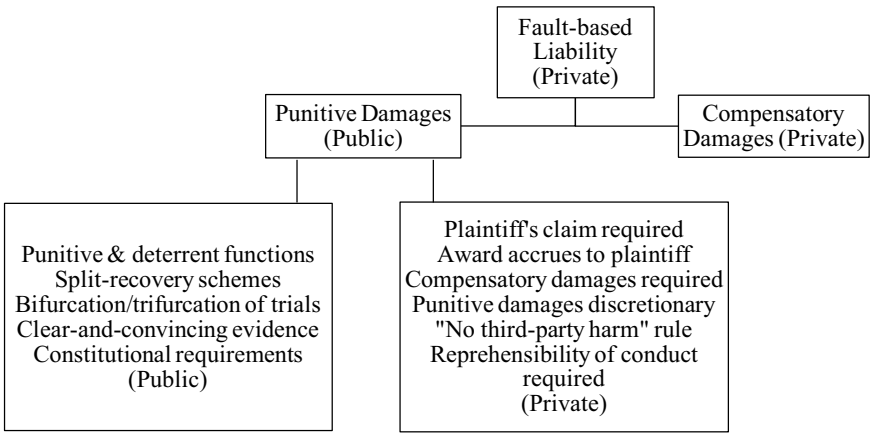

Figure 2

III. ITALIAN TORT LAW AND PUNITIVE DAMAGES

The question of whether punitive damages are compatible with Italian law is a vexed one, and the negative answer given to it thus far seems not to allow for any doubt. Insistence on a rigid separation between tort and criminal law, together with a number of untenable observations put forward by both the Supreme Court and commentators wrongly suggest that Italian tort law is structurally inadequate to host punitive damages.

On the one hand, the Court offers a mono-functional interpretation of tort law as focused exclusively on corrective justice, and it consequently rejects punitive damages. The mistake is twofold: first, the Court advances a dogmatic separation between punishment and deterrence associated with criminal/public law and private law. Second, from this dogmatic assumption it derives a series of rules that in its view inform Italian tort law but that, in reality, do not correspond

to its current status. The Court's misreading of U.S. punitive damages completes the drama.

On the other hand, most Italian jurists criticize the Court's view and posit a multi-functional reading of tort law. According to these jurists, tort law can have deterrent effects or even pursue deterrence, but it cannot serve punitive functions. This position, combined with a poor understanding of U.S. punitive damages and an additional set of untenable arguments, brings virtually all Italian scholars to rule out any possibility for the adoption of punitive damages. How is all of this possible?

A. The 2007 Ruling of the Italian Supreme Court

In 2007, the heir of a motorcyclist who lost his life in an accident because the buckle of his helmet was defective asked the Italian Supreme Court to recognize and enforce a punitive damages award granted by an Alabama court. The Court denied enforcement on the ground that the function of Italian tort law is compensatory, so punishment and deterrence must be alien to it.[94] In so holding, the Court seemed to disapprove of how closely punitive damages consider the defendant's conduct. The Court seemed to think that the harm the victim suffered, rather than the defendant's wrongful action, should be the central element of the tort law theoretical framework. Furthermore, the Court argued that punitive damages are disproportionate to the harm actually suffered by the victim and that they are related to the wrongdoer's conduct, not to the harm done. Finally, the Court stated that the wrongdoer's conduct and wealth are and must be irrelevant to the idea of compensating damages and to Italian tort law more generally.[95]

Does the decision of the Court accurately reflect the current situation of Italian tort law? Or does the Court mischaracterize it and also fail to understand punitive damages as they are currently administered in the United States? To answer these questions, we need to ascertain the adequacy of the various assertions made by the Italian Supreme Court in the above-mentioned case in light of the way Italian tort law is currently articulated.

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[94] Cass. civ., sez. III, 19 gennaio 2007, n.1183 (It.).

[95] Cass. civ., sez. III, 19 gennaio 2007, n.1183 (It.). The same view has been vigorously reaffirmed by the Italian Supreme Court in a very recent decision. *See* Cass. civ., sez. I, 8 febbraio 2012, n.1781. For a harsh critique of this holding, see Paolo Pardolesi, *La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!*, CORRIERE GIURIDICO, agosto-settembre 2012, 1070.

B. The Supreme Court's Objections to Punitive Damages and Their Critiques

1. Italian Tort Law, Corrective Justice, and the Public/Private Distinction

The first objection to punitive damages the Supreme Court made is that Italian tort law serves only a compensatory function, to the exclusion of any goal other than corrective justice. In particular, the Court seems to have ruled out any role for punishment and deterrence from tort law. Is it really so?

Since the 1960s, a gradual process of transformation of Italian tort law has opened new perspectives on the functions that tort law can perform. The establishment of a constitutionally-oriented interpretation of private law, the rapid expansion of the strict liability regime, the increase in the number of legally-protected interests via tort law, the influence exerted by U.S. efficiency-driven and deterrence-seeking approaches on Italian jurists, and a lively debate on the punitive functions of tort law rules have cast new light on the public/private distinction and have undermined any mono-functional reading of Italian tort law.[96] These new impulses, accompanied by a steep increase in the number of legislative interventions regulating the law of torts, have contributed to give the impression that many tort law rules constitute the product of policy choices and affect the socio-economic life of individuals no less dramatically than, albeit not as visibly as, public law measures.

The upshot is that Italian tort law is characterized by an internal coexistence of public and private elements that is very similar to that featuring in U.S. tort law. By paralleling the arguments developed with respect to U.S. tort law, I show that strict and fault-based liability represent, respectively, the public and private pole of Italian tort law and that, in turn, they include sub-domains similarly characterized by an internal mixture of public and private elements.

a. Fault-Based Liability

At first blush, the dictates of corrective justice appear to be fully obeyed in this area of tort law. Courts essentially focus on the plaintiff's injury, on the culpability of the defendant's conduct, and on the causal link between the two.[97] The defendant is ordered to compensate the plaintiff *because of* the injury the latter suffered as a consequence of the former's culpable misconduct. In this respect, fault-based torts are characterized by a strong relational, private quality.[98]

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[96] Giovanni Marini, *Gli anni settanta della responsabilità civile (prima parte). Uno studio sulla relazione pubblico/privato*, RIV. CRIT. DIR. PRIV., 2008, 23, 27-9.

[97] The general provision governing fault-based torts is Article 2043 of the Italian Civil Code, which states, "any intentional or negligent fact, which causes an unjust harm to others, obliges the author of the fact to compensate the loss."

[98] All of this is especially true in relation to negligence law. In this area, courts never refer to anything resembling the Hand formula. *See supra* notes 68-69 and

A more in-depth inquiry of extant law, however, shows that the situation is more complex than what one may initially think and that notions such as deterrence and punishment have a role to play in fault-based torts.

Intuitively, the very existence of tort liability for culpable wrongs appears to convey a deterrent message sent by the legal system to individuals. This is also true with reference to purely compensatory damages.[99] Every person knows that if she wrongfully harms someone else, she may be judicially ordered to pay for the harm caused. The threat of a legal sanction may well make many people desist from their intentional misconduct or act more prudently in carrying on their daily activities (e.g. driving a car).

There is surely a difference between the claim that tort damages can have deterrent effects and the claim that the state has set up tort damages in order to secure deterrence. A number of Italian legislative provisions support the view that the state pursues, at least in some circumstances, deterrence through tort law.[100] At a more general and abstract level, the following idea further supports this view. Even assuming that a state, when initially setting up tort liability and tort damages, has in mind the exclusive objective of allowing the victim to seek redress for the harm suffered, it is unlikely that as soon as it becomes aware of the deterrent potentialities of tort law, the state will not start recalibrating existing tort liability provisions or adding new ones in order to deter potential wrongdoers and increase social peace. To conclude, deterrence is a feature of negligent and intentional torts under Italian law in two senses: first, it is a common effect of tort liability, even if the state does not calculate tort damages with the goal of deterrence in mind; second, as the various provisions analyzed below demonstrate, the state, at least sometimes (especially in relation to intentional torts), pursues deterrence in setting up tort liability provisions.

While the ideal of deterrence appears to inspire both the law of negligence and that of intentional torts, the ideal of punishment pervades only the latter. In this respect, it is worth turning to a number of examples in extant law showing that the domestic tort system, though primarily committed to a compensatory function, is not so reluctant to provide for "more-than-compensatory" damages in cases of outrageous conduct, thus defying the apparently strict adherence to corrective justice as the exclusive preoccupation of Italian tort law.

In specific circumstances relating to the exercise of parental powers during the procedure for obtaining a separation between husband and wife, article

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accompanying text. Although some Italian jurists suggest an efficiency-driven rationale for negligent wrongs, courts have thus far not been sympathetic with this approach. This does not mean, however, that Italian *negligence* law is devoid of any public quality.

[99] *E.g.*, Gardner, *supra* note 59, at 29.

[100] For a discussion of this viewpoint, *see* Giulio Ponzanelli, *I Danni Punitivi*, in LA FUNZIONE DETERRENTE DELLA RESPONSABILITÀ CIVILE – ALLA LUCE DELLE RIFORME STRANIERE E DEI PRINCIPLES OF EUROPEAN TORT LAW 319, 322 (2011); Pier Giuseppe Monateri, *La Responsabilità Civile*, *in* 3 TRATTATO DI DIRITTO CIVILE, 21 (1998).

709-ter of the code of civil procedure empowers the judge, if one of the parents does not comply with previous orders issued by the judge herself, to: (i) admonish the non-compliant parent; (ii) condemn him or her to compensate damages inflicted on the child; (iii) condemn him or her to compensate damages inflicted on the other parent; and (iv) condemn the non-compliant parent to pay a monetary administrative sanction. Are measures (ii) and (iii) instances of punitive damages within Italian private law? A majority of courts seem to answer in the affirmative. Distinguishing article 709-ter c.p.c. from articles 2043-2059 of the civil code, the cornerstones of tortious liability in Italy, a court tells us that the monetary obligations imposed by provisions (ii) and (iii) on the non-compliant parent "constitute a form of punitive damages, that is a private sanction not traceable to articles 2043-2059 c.c."[101] Another court adds that, for the purposes of article 709-ter c.p.c., the measure of the sanction may be proportionately related not just to the harm suffered by the victim but also to the "nature and type of the defendant's conduct."[102]

This judicial attitude may seem *prima facie* surprising, even disorienting: why attribute a punitive nature to provisions expressly framed in terms of compensatory damages? The reasons, as argued by some scholars, are that (1) the proof of harm is unnecessary to get a damages award[103] under (ii) and (iii), and (2) the amount of the monetary sanction is not related to the harm the child suffered but rather to the wrongful conduct.[104] A few scholars reject this view and argue that, at most, the discussed provision may have a deterrent function, but not a punitive one, and that in any event it would be erroneous to think of article 709-ter c.p.c. as an instance of punitive damages.[105] Independently of whether article 709-ter c.p.c. represents an instance of punitive damages or not, it is relevant that a majority of courts and commentators agree on the fact that the legislative provision under scrutiny does not serve a merely compensatory function, and that deterrent and/or punitive rationales can be adduced as foundational to it.

Another illustrative piece of legislation is article 4, l. 20 November 2006 n. 281 (article 4), regarding the publication of telephone communication interceptions. In protecting individuals' privacy, article 4, clause 1 establishes that besides compensatory damages (recoverable under article 4, clause 4), the victim of the wrongful publication can claim a sum of money against the publisher

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[101] Trib. Messina, 5 aprile 2007, FAM. E DIR., gennaio 2008, 60 (It.).

[102] Trib. Venezia, 14 maggio 2009, n.9234 (It.).

[103] Angelo Riccio, *I Danni Punitivi non sono, dunque, in contrasto con l'ordine pubblico interno*, in Contratto e Impresa, 4-5, 854, 867 (2009); Angela D'Angelo, *Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art. 709-ter c.p.c.*, FAMILIA, novembre-dicembre 2006, 1048.

[104] Elena La Rosa, *Il nuovo apparato rimediale introdotto dall'art. 709-ter c.p.c.: i danni punitivi approdano in famiglia?*, FAM. E DIR., gennaio 2008, 64, 72.

[105] *See, e.g.*, Francesco D. Busnelli, *La Funzione Deterrente e le Nuove Sfide della Responsabilità Civile*, in FUNZIONE DETERRENTE DELLA RESPONSABILITÀ CIVILE – ALLA LUCE DELLE RIFORME STRANIERE E DEI PRINCIPLES OF EUROPEAN TORT LAW, 37 (2011).

that varies according to the means of publication that have been used (radio, television etc.) and to the extension of the catchment area.

Article 4, clause 1 does not establish compensation for a loss possibly suffered by the victim; rather it sanctions a conduct, irrespective of its consequences for the victim's sphere. This provision runs patently contrary to the (not so?) firm principle the Italian Supreme Court asserted, according to which, in tort law, only a *loss* resulting from the defendant's conduct, the latter being totally irrelevant, enables a monetary award.[106] For this reason, one may well argue that article 4, clause 1 does not pursue any compensatory goal. Rather, it serves a punitive function and thereby a deterrent goal.

It has been suggested, in partial disagreement with this view, that article 4, clause 1 is surely a sanction, but not a form of punishment.[107] According to this view, the remedy under discussion is "reparatory,' but neither compensatory nor punitive. True, such a remedy is surely not compensatory, given that the sanction established by clause 1 is unrelated to the loss suffered by the victim. But why exclude that the remedy at issue is punitive? Because, it is argued, clause 1 represents an instance in which the legislator did not want to punish anyone, but rather to fix in advance the monetary value of a good the legal system is committed to protect.

Now, there seems to be a *non sequitur* in such reasoning. How does fixing the economic value of a good in advance logically exclude the punitive nature of a remedy consisting in paying that value when the good is harmed? It is correct that such an *ex ante* monetary determination does not necessarily imply punishment. But the reverse is also true, i.e. the monetary pre-determination does not exclude the punitive nature of the sanction. After all, establishing a monetary value in advance for a certain good is a legal technique widely used in criminal law, and no one would argue that criminal fines are not punitive. In discussing the nature of the remedy provided for by article 4, clause 1, a decisive factor is represented by the very large amount of money the defendant may be obliged to pay (€10.000–€1.000.000). This element, coupled with the fact that the remedy is not directly related to the harm inflicted on the victim, may well lead one to think that the sanction is punitive and that it is meant to discourage the defendant and other publishers from taking the same course of conduct in the future.

A clearly punitive provision is represented by article 18, clause 2 of the Italian Workers' Statute. This provision, established in 1970, provides that when an employer unjustly fires her employee, the former will be judicially ordered to "re-hire" the latter and to pay the employee a sum equaling at least the salary due for five months of work, independent of any economic loss the employee suffered as a consequence of the dismissal. The minimum measure of damages awarded in such an instance renders the nature of this provision indisputably punitive and

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[106] Cass., sez. III, 4 giugno 2007, n.12929 (It.).

[107] Ponzanelli, *supra* note 100, at 327.

deterrence-seeking, as virtually all Italian commentators acknowledge.[108] It seems inevitable to consider that the punitive remedy granted to the Italian worker who is illegitimately fired is a clear instance of punitive damages.

Finally, article 96, clause 3, of the Italian code of civil procedure establishes that a judge can condemn the losing party to pay the winning party an equitably determined sum if the former adopted a highly reprehensible (typically intentional or grossly negligent) civil procedural conduct. There are various judicial and doctrinal theories regarding the nature of the sanction a judge may impose on the basis of this provision. Particularly interesting, in view of the 2007 Italian Supreme Court decision, is a decision issued by a lower court in 2011[109] that condemned the losing party to pay not just the other party's legal expenses, but also an additional sum equaling the litigation costs, on the grounds that article 96, clause 3, constitutes an instance of punitive damages.[110] The lower court so concluded by asserting that (i) this legislative provision requires only the proof of bad faith or gross negligence, and not of the existence of an actual harm to the other party, and that (ii) there are no constitutional provisions prohibiting the legislator from providing for such damages. Other courts tend to focus more on deterrence than on punishment in articulating the reasons behind article 96, clause 3,[111] as some commentators do as well.[112] Regardless of whether it is appropriate to qualify the provision under scrutiny as an instance of punitive damages, what is undisputable is that according to the majority of courts and commentators article 96, clause 3, pursues punitive and/or deterrent goals.[113]

What emerges from the foregoing analysis is that even if no one can doubt that corrective justice is a goal of Italian tort law, this domain of the Italian system can pursue other functions when deemed necessary. In contrast, the Supreme Court depicts Italian tort law as concerned only with compensation. It

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[108] *See*, CESARE SALVI, LA RESPONSABILITÀ CIVILE 265 (2005).

[109] Tribunale di Piacenza, 15 novembre 2011, NUOVA GIURISPRUDENZA CIVILE COMMENTATA, gennaio 2012, 269, with case note by Laura Frata, *L'art. 96, comma 3°, cod. proc. Civ. tra "danni punitivi" e deterrenza*, 271-278.

[110] Riccio, *supra* note 103, at 879 (agreeing that the losing party pays not only the other party's legal fees, but an additional sum equaling the litigation costs). Similar conclusions are reached by Trib. Milano, 4 marzo 2011, FORO ITALIANO, 2011, I, 2184 (It.); Trib. Rovigo, 7 dicembre 2010, IL CIVILISTA, 2010, 10 (It.); Trib. Pordenone, 18 marzo 2011, (It.), http://www.ilcaso.it/giurisprudenza/archivio/3574.php; Trib. Varese, sez. Luino, 23 gennaio 2010, FORO ITALIANO, 2010, 7-8, I, 2229 (It.).

[111] Trib. Varese, 16 dicembre 2011 (It.).

[112] Ponzanelli, s*upra* note 100, at 329, (arguing that the provision here discussed focuses on the wrongdoer's conduct and clearly has a deterrent function, whereas it does not care about any possible harm suffered by the victim). *Contra*, Rosanna Breda, *Art. 96 terzo comma cod. proc. civ.: prove di quadratura*, NUOVA GIURISPRUDENZA CIVILE COMMENTATA, gennaio 2011, 439, 442.

[113] *See, e.g.*, Francesco D. Busnelli and Elena D'Alessandro, *L'enigmatico ultimo comma dell'art. 96 c.p.c.: responsabilità aggravata o "condanna punitiva"?*, DANNO E RESP., giugno 2012, 585.

ignores the widely shared idea that tort law, or at least the law of intentional torts, pursues and produces deterrent effects, and it does not take into account a number of instances in which this specific area of tort law serves punitive and deterrent functions. This judicial approach, supported by some scholars as well, is descriptively inaccurate and ought to be rejected. [114]

b. Strict Liability

Turning briefly to the realm of strict torts, the situation in Italy is similar in some respects to that observable in the United States, and different in others.

Regarding product liability, the two systems have much in common. Under Italian law, the manufacturer can escape liability if she proves that the product was not defective when it entered the market,[115] the user was aware of the product's defectiveness and of its consequent dangerousness and yet exposed herself to it,[116] or the level of scientific development of the time did not enable the product to be recognized as defective.[117] Moreover, if the user is in some way culpable, a comparative fault regime applies.[118]

Given all these similarities, one might expect to find in the Italian case law language comparable to that of U.S. judges. Such an observer would be sorely disappointed. Italian courts focus on doctrines and rarely refer to policy goals such as those U.S. courts invoke. They do nothing more than ascertain whether the plaintiff meets the burden of proof (damage, defectiveness, causal link) and, if so, whether the defendant puts forward a convincing defense. In this respect, the relational, private dimension of product liability law is quite evident.

But Italian product liability law implements two European Directives[119] that overtly refer to policy goals such as the protection of consumers' health, the promotion of scientific and technological development, free competition within the European market, and the fair apportionment of risk among manufacturers and

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[114] *See, e.g.*, Carlo Castronovo, *Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale*, EUR. DIR. PRIV., febbraio 2008, 315; Pasquale Fava, *Funzione sanzionatoria dell'illecito civile? Una decisione costituzionalmente orientata sul principio compensativo conferma il contrasto tra danni punitivi e ordine pubblico*, CORRIERE GIURIDICO, gennaio 2009, 525.

[115] *Compare* Codice del Consumo art. 118-b (Consumers' Code), *with* RESTATEMENT (SECOND) OF TORTS § 402A (1979).

[116] *Compare* Codice del Consumo art. 122, c.2, *with* the U.S. doctrine of "assumption of risk." RESTATEMENT (SECOND) OF TORTS §402A, cmt. n (1979).

[117] *Compare* Codice del Consumo art. 118-e, *with* the U.S. doctrine of "state of the art defense." RESTATEMENT (SECOND) OF TORTS §402A, cmt. n.

[118] *Compare* Codice del Consumo art. 122, c.1, *with* RESTATEMENT (THIRD) OF TORTS §17 (1998).

[119] Directive 85/374, art. 95, O. J. (L. 210/29) 1 (EEC); Directive 1999/34, art. 95, O. J. (L. 141/20) 1 (EC).

consumers. Here the public, regulatory quality of European, and hence Italian, product liability law emerges with force.

As regards *respondeat superior*, enshrined in article 2049 of the civil code, Italian law is somewhat similar to U.S. law. A requisite of such vicarious liability is that the servant's misconduct constituted a culpable tort, with the result that the master is liable only if her employee acted intentionally or negligently and if the victim can prove the employee's culpability.[120] This rule seems to reveal a private, relational quality of *respondeat superior* because it grounds the master's liability on her responsibility for the employee's misconduct. Similarly, some commentators[121] justify *respondeat superior* by relying on the "Weinribian" idea that the tort is committed by the employer-through-the-employee.[122]

At the same time, the Italian Supreme Court has made clear that the master is liable for the torts of her servants even if she demonstrates the lack of any culpability on her part.[123] That is, vicarious liability is quite strict because it is unrelated to the conduct of the employer. The strictness of *respondeat superior* is further confirmed by the rule that even if the employee/tortfeasor is not identifiable, the master is liable.[124] As to the policy rationales behind *respondeat superior*, some judicial decisions assign a regulatory quality to this tort doctrine by holding that article 2049 codifies the idea of "business risk" and grounds liability not on culpability but on the objective, business interest of the employer.[125] Jurists too have put forward rationalizing theories that emphasize the public quality of *respondeat superior*: some refer to the apportionment of risks among employers and victims,[126] some to the efficiency-based argument that the employer must internalize the costs of accidents when these accidents are due to her inability to make her servants act with due care.[127]

Finally, as regards liability for abnormally dangerous activities, the governing rule is enshrined in article 2050 of the civil code, which does not differentiate between abnormally and inherently dangerous activities. Under article 2050, she who carries on a dangerous activity is subject to liability for any resulting injury, *unless* she proves that she adopted all appropriate measures to avoid the harm. By allowing the actor to escape liability, article 2050 gives birth to a liability rule that is neither truly strict nor truly fault-based. In recent times,

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[120] *See, e.g.*, Cass. civ., sez. III, 24 maggio 2006, n.12362, Mass. Giur. it., 2006 (It.); Cass. civ., sez. III, 4 marzo 2005, n.4742, Mass. Giur. it., 2005 (It.); Cass. civ., sez. un., 6 giugno 1986, n.3025, Mass. Giur. It., 1986 (It.).

[121] RENATO SCOGNAMIGLIO, RESPONSABILITÀ CIVILE E DANNO 173 (2010).

[122] S*upra* notes 77-79 and accompanying text.

[123] Cass. civ., sez. III, 10 marzo 2000, n. 5957 (It.); Cass. civ., sez. III, 20 giugno 2001, n. 8381 (It.).

[124] *See, e.g.*, Cass. civ., 10 febbraio 1999, n.1135 (It.).

[125] *See, e.g.*, Cass. civ., 27 marzo 1987, n.2994, in Rep. Foro it., 1987, voce Trasporto (contratto di), n. 9 (It.); Cass., 26 giugno 1998, n.6341 (It.).

[126] *See, e.g.*, PIETRO TRIMARCHI, RISCHIO E RESPONSABILITÀ OGGETTIVA 57-80 (1961).

[127] PIER GIUSEPPE MONATERI, MANUALE DELLA RESPONSABILITÀ CIVILE 334 (2001).

however, courts have interpreted this provision as establishing an instance of truly strict liability, independent of any culpability on the part of the actor. Courts have reached this result by imposing on the defendant a particularly onerous burden of proof, consisting in giving evidence of a fact that breaks the causal link between the dangerous activity and the plaintiff's injury.[128] Hence, although the letter of the norm relies on a notion of culpability that entails a relational quality of the tort at hand, the interpretation provided by courts attributes to it a clearly regulatory flavor, based on the policy goal of preventing accidents.[129]

In sum, as the foregoing analysis shows, asserting that tort law is only about compensating victims of wrongs is empirically mistaken. In fault-based torts, notions of deterrence and punishment have an important role to play. In the realm of strict torts, policy goals such as the improvement of free competition, the prevention of accidents, the protection of consumers' health, the promotion of scientific and technological development, and the fair apportionment of risk among firms and individuals, are quite central. Diagrammatically, Italian tort law can be represented in "nesting" mode, as shown in Figure 3.

Similar to what we have observed for the United States, each of the five areas of liability represented at the lowest level of the diagram is characterized by an internal coexistence of public and private elements, allowing for the "nested" public/private distinction to continue further down. Moreover, as one proceeds from the right to the left end of the diagram, torts lose a progressively greater portion of their private quality in favor of a more public, regulatory posture. In sum, public and private coexist throughout tort law and permeate each of its sub-domains in different proportions.

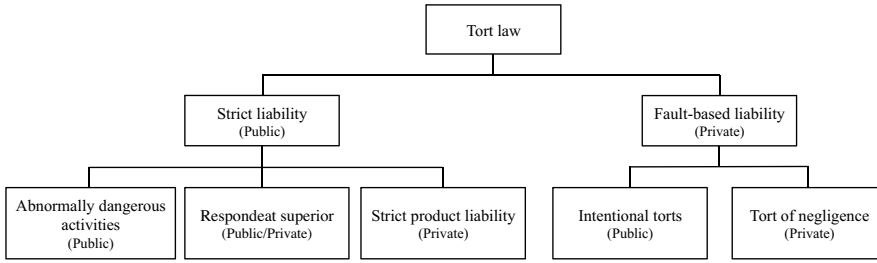

Figure 3

[128] Camilla Fin, *Responsabilità per esercizio di attività pericolose: prova liberatoria e concorso di colpa del danneggiato*, LA RESPONSABILITÀ CIVILE, marzo 2012, 216, 218. *See* Cass., 4 maggio 2004, n.8457 (It.); Cass. civ., 10 marzo 2006, n.5254 (It.).

[129] *See, e.g.*, Arianna Fusaro, *Attività pericolose e dintorni. Nuove applicazioni dell'art. 2050 c.c.*, RIVISTA DI DIRITTO CIVILE, giugno 2013, 1337, 1339.

2. Are U.S. Punitive Damages Disproportionate to the Loss Suffered by the Victim?

The second assertion made by the Italian Supreme Court in opposing punitive damages was that they are "characterized by an unjustifiable disproportion between the damages awarded and the harm actually suffered by the plaintiff." With reference to the early application of punitive damages, this contention might have been true, but today it has little force because of the U.S. Supreme Court's "constitutionalization" of punitive damages.

In *Pacific Mutual Life Insurance Co. v. Haslip*,[130] the Court made a series of important points. First, it acknowledged that courts and juries have a degree of discretion in determining the amount of punitive damages awards, though admonishing them that such discretion had to comply with the principle of reasonableness.[131] Second, the Court sowed the seeds for its future decisions involving the substantive side of the Due Process Clause of the Fourteenth Amendment. By holding that procedural fairness had been guaranteed because the punitive damages award was "not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages,"[132] the Court, although not overtly speaking in terms of substantive fairness, used language that seemed to open the door to substantive considerations relating to what constituted a quantitatively "just" punitive award.

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*,[133] the Court issued a decision that explicitly addressed the issue of the "grossly excessiveness" of a punitive damages award. The Court held that, as a general principle, grossly excessive awards violated the Due Process component of the Fourteenth Amendment.[134] Then, in the well-known case of *BMW of North America Inc. v. Gore*,[135] the Court set three guideposts for courts to apply in deciding whether or not the amount of the award determined by juries is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and punitive damages; and (3) the difference between punitive damages and the civil and criminal penalties imposed in comparable cases.[136]

The first occasion the Supreme Court had to apply this three-prong test came soon after, in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[137] The Court declined "to impose a bright-line ratio which a punitive damages award cannot exceed" but held that "few awards exceeding a single digit ratio between

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130 499 U.S. 1 (1991).
131 *Id*. at 20.
132 *Id*. at 22.
133 509 U.S. 443 (1993).
134 *Id*. at 458.
135 517 U.S. 559 (1996).
136 *Id*. at 574-75.
137 538 U.S. 408 (2003).

punitive and compensatory damages, to a significant degree, will satisfy due process."[138] Consistently with its flexible approach, the Court added that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'"; by the same token, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[139]

What is to be learned from all these cases? One might reasonably argue that, because the Court was mindful that punitive damages are criminal-like sanctions and serve the legitimate state interest of punishing the wrongdoer and deterring her and other potential wrongdoers from committing the same harmful wrong, it felt the need to establish a set of constraints to be applied to punitive damages on both procedural and substantive levels. In other words, while denying that criminal procedural safeguards should be applied to punitive damages, the peculiar criminal-like nature of this civil law remedy counseled the establishment of constraints aimed at avoiding distorting effects potentially resulting from the great measure of discretion afforded to adjudicators.[140]

Thus, the Italian Supreme Court's remark that punitive damages are totally out of proportion with the harm actually suffered by the victim does not reflect how punitive damages are administered in the United States. As noted above, according to the U.S. Supreme Court's jurisprudence, an award of punitive damages must comply with the principles of reasonableness and proportionality.

Moreover, even if one finds that the metric used today by U.S. courts in determining punitive damages is still irreconcilable with the principles of proportionality and reasonableness as understood by the Italian legal community, this does not counsel against the adoption of punitive damages in Italy. The U.S. metric does not constitute an element that must be imported. Italy may benefit from the U.S. experience and adapt punitive damages to the metric ordinarily used by the Italian legal system in squaring afflictive measures with the principles of reasonableness and proportionality.

3. The Relationship Among Conduct, Harm, and Punitive Damages

Two other relevant, intertwined points made by the Italian Supreme Court in 2007 are: first, punitive damages are not related to the harm done, for they merely look at the wrongdoer's conduct; second, the wrongdoer's conduct is irrelevant to Italian tort law. It is certainly true that punitive damages focus more

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[138] *Id*. at 425.

[139] *Id*.

[140] *See* BMW of N. Am. Inc. v. Gore, 517 U.S. 559 (1996); St. Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

on the wrongdoer's conduct than on the harm suffered by the victim. This is inherent in the nature of punitive damages, which are meant to pursue the punishment of egregious conduct as one of their fundamental goals. However, as already seen with the U.S. Supreme Court's decision in *Campbell*, there must ordinarily be a close relationship between the amount of the punitive award and the harm suffered by the victim.[141] Moreover, it is incorrect from another point of view to say that punitive damages are not concerned with the harm inflicted on the victim, for without such harm neither compensatory nor (consequently) punitive damages can be awarded. As a result, the Italian Supreme Court's assertion that "punitive damages are not related to the harm" is accurate only with these important qualifications.

More fundamentally, it is difficult to understand why the link between punitive damages and the wrongdoer's conduct would render punitive damages unacceptable in Italian tort law. As the Court states, the only possible reason for this conclusion is the irrelevance of the wrongdoer's conduct in Italian tort law. Unluckily for the Court there are, as amply shown above, several legislative provisions and judicial decisions suggesting unequivocally that Italian tort law cares not just about the harm suffered by the injured party, but also about the wrongdoer's conduct.

In general terms, there are two ways that the wrongdoer's conduct is relevant to domestic tort law. First, there are situations in which damages can be awarded only if the wrongdoer's conduct is intentional. By way of example, we may think of all the conduct sanctioned by the legislative provisions assessed in subsection (B)(1)(a) as well as of calumny, defamation, inducement of breach of contract, and diversion of employees. In these and similar cases, the kind of conduct the wrongdoer adopts is relevant to the very existence of a tort.

Second, and more importantly for present purposes, the wrongdoer's reprehensible conduct has a demonstrable impact on the determination of the amount of compensatory damages, particularly when the wrongdoing offends the personal, emotional, and non-economic sphere of the victim. This is something courts never state overtly, but on which many commentators agree.[142] By way of example, in a case regarding a father who violated his obligations towards his son, an appellate court condemned him to pay €2.582.284,00.[143] Even though the court tried to justify the sum in purely compensatory terms (and on the ground that the father was affluent), the very large amount of the award indicates the court's willingness to punish the wrongdoer because of the particularly high

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[141] *St. Farm Mut. Auto. Ins. Co.*, 538 U.S. 408, at 425 ("[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

[142] *See, e.g.*, PAOLO GALLO, PENE PRIVATE E RESPONSABILITÀ CIVILE 61 (1996); PAOLO CENDON, IL DOLO NELLA RESPONSABILITÀ EXTRACONTRATTUALE 21 (1974).

[143] Corte d'Appello di Bologna, 10 febbraio 2004, FAM. E DIR, maggio 2006, 511 (It.).

reprehensibility of his conduct.[144] Drawing on the analysis conducted here and in subsection (B)(1)(a), it is plausible to conclude, contrary to the Italian Supreme Court's view, that the wrongdoer's conduct is anything but irrelevant to Italian tort law, at least when it comes to non-economic losses.

4. Is the Wrongdoer's Wealth Irrelevant to Italian Tort Law?

Before assessing the Italian Supreme Court's assertion that the wrongdoer's wealth is irrelevant to Italian tort law, it is necessary to ascertain the extent to which the wrongdoer's wealth is a factor in awarding punitive damages in the United States. This issue is debated among law and economics scholars. Some economists assert that the wrongdoer's wealth should be considered in quantifying the punitive award in order to ensure the optimal level of deterrence when "either the victim's loss or the defendant's gain from wrongdoing is unobservable and correlated with the defendant's wealth."[145] Others, in contrast, argue that this is not the case and that wealth should never be a factor when the wrongdoer is a corporation, whereas it could be relevant, but only in limited circumstances, when the wrongdoer is an individual.[146]

For its part, however, the U.S. Supreme Court has taken a clear stance on the issue of the degree to which wealth should be relevant in the determination of punitive damages. In *Haslip* the Court mentioned a number of factors that the Alabama Supreme Court elaborated to assess the reasonableness of punitive awards, including the financial position of the defendant, and concluded that these factors impose "a sufficiently definite and meaningful constraint on the discretion of . . . fact-finders in awarding punitive damages."[147] In *TXO*, the Court stated that the punitive damages award was very large but that many factors, including "the petitioner's wealth," convinced the Court to conclude that such award was not "grossly excessive."[148] In sum, the U.S. Supreme Court holds that the defendant's wealth may be a factor to consider in determining the amount of a punitive damages award. However, its relevance must be properly cabined in the sense that the defendant's wealth cannot legitimize a punitive award not comporting with the constitutional limitations of reasonableness and proportionality the Court itself imposed.

With respect to the situation in Italy, contrary to the Supreme Court's view expressed in 2007, courts frequently refer to the wrongdoer's wealth in determining the amount of damages, especially in the family law context. For

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[144] Giovanni Facci, *L'illecito endofamiliare tra danno in re ipsa e risarcimenti ultramilionari*, FAM. E DIR., maggio 2006, 515, 519.

[145] Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L. J. 927, 930 (2008).

[146] Polinsky & Shavell, *supra* note 28, at 910-14.

[147] 499 U.S. 1, 22 (1991).

[148] 509 U.S. 443, 462 (1993).

instance, in the case of the non-compliant father,[149] the court granted very high damages, overtly stating that the wrongdoer's wealth was among the essential elements to be considered in determining the amount of the compensatory award. Some commentators even argue that by astutely "using" the wealth factor, courts camouflage punitive awards by giving them the form of compensatory damages.[150] Whether true or not, what is important to note here is that wealth is surely relevant, at least in the family law context, thus qualifying as not alien to Italian tort law. In conclusion, the wealth-based objection to punitive damages does not seem to be particularly powerful in light of the fact that (i) wealth to some degree is already relevant within Italian tort law; (ii) the U.S. Supreme Court holds that the defendant's wealth *may* be a factor in quantifying punitive damages; and (iii) among U.S. academics the issue of the relationship between the wrongdoer's wealth and punitive damages is unsettled.

5. Is a Windfall Benefitting the Plaintiff in Punitive Damages Cases Consistent with Italian Tort Law?

Corrective justice dominates the interpretations of tort law Italian courts provide. The victim of the wrongdoing can obtain a sum equivalent to the losses suffered from the wrongdoer, and nothing more. If one embraces corrective justice as the theoretical framework for deciding what is normatively desirable and what is not, then justifying the windfall to the plaintiff in punitive damages cases is hardly possible.[151]

However, legislative provisions confirm that the Italian legislator sometimes entitles the victim to claim more than compensatory damages.[152] They cast doubt on the capacity of the corrective justice framework to provide a descriptively accurate and thorough account of Italian tort law and challenge the absolute rejection of the idea of allowing the victim to get more than purely compensatory damages.

A windfall, usually in the form of more than compensatory (not necessarily punitive) damages benefitting the plaintiff in a tort law case is already a possible occurrence in Italy. In light of this finding, it is not clear why a windfall specifically deriving from a punitive damages award, rather than from a merely more than compensatory award, would constitute an inadmissible abnormality in the domestic system. If there is some reason counseling against

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[149] Corte d'Appello di Bologna, 10 febbraio 2004, FAM. E DIR., maggio 2006, 511, 514 (It.).

[150] Angela d'Angelo, *L'art. 709 ter c.p.c. tra risarcimento e sanzione: un "surrogato" giudiziale della solidarietà familiare?*, DANNO E RESP., dicembre 2008, 1199.

[151] *See* Castronovo, *supra* note 114, at 339. For an interesting attempt to justify the discussed windfall of punitive damages as societal damages, see Sharkey, *supra* note 11, at 390-91.

[152] *See supra* Part III, Subsection (B)(1)(a).

the adoption of a punitive remedy, it might at most be identified with the punitive character of the windfall award, not with the windfall in and of itself.

6. Concluding Remarks on the Italian Supreme Court's Decision

The foregoing analysis shows the mistakes the Italian Supreme Court committed in 2007. Besides exhibiting a poor understanding of punitive damages, the Court is blindly devoted to corrective justice and repudiates any non-compensatory significance that Italian tort law may have. It explicitly excludes any punitive function from that area of law. By offering a mono-functional reading of tort law, the Court demonstrates or pretends to ignore not only positive law, but also relevant developments occurring in the past five decades.

In the 1960s and 1970s, Italian legal culture underwent a process of transformation that profoundly affected ways of thinking about the law and about tort law more specifically. Leading scholars have paved the way toward an approach that attributes a plurality of functions to tort law, from preventing torts to allocating their social costs to compensating their victims.[153]

The Supreme Court's rigidity in defining the boundaries of tort law may well prevent this area of law from addressing unresolved issues that could be given appropriate answers by a more flexible approach. In the 2007 decision, the Court did not provide any explanation for its assertions. It declared some general principles and rules as if they were immutable features of tort law. Because of the lack of an elaborated analysis by the Court, it is not easy to fully understand the reasons for its decision. Perhaps the Court is truly committed to keeping the public/private dichotomy as firm as possible, not realizing that this distinction is fluid and that it has been under considerable pressure for many decades. Or perhaps the Court is waiting for other, even more overtly punishment- and deterrence-seeking legislative interventions before recognizing that Italian tort law also pursues punitive and deterrent functions. What is certain is that ruling out the adoption of punitive damages on the ground that this remedy would undermine the alleged purity of Italian tort law constitutes a disservice to the Italian legal community for two reasons. Practically, it deprives Italian tort law of a useful legal tool that may cure remedial deficiencies and other problems affecting the Italian legal system. Theoretically, it conveys a false, mono-dimensional account of Italian tort law.

Introduced to address willful, wanton or reckless misconducts, punitive damages would represent the public pole of fault-based liability by emphasizing its punishment- and deterrence-seeking functions. The private pole would instead

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[153] *See*, *e.g.*, Rodolfo Sacco, *L'ingiustizia di cui all'art. 2043 cod. civ.*, in Foro Padano, I, 1420 (vol. 15, 1960); Pietro Trimarchi, *supra* note 126; FRANCESCO D. BUSNELLI, LA LESIONE DEL CREDITO (1964); STEFANO RODOTÀ, IL PROBLEMA DELLA RESPONSABILITÀ CIVILE (1964).

be represented by compensatory damages that, as already seen, are mainly devoted to corrective justice. After the adoption of punitive damages, Italian fault-based liability could be represented in the "nesting" mode as follows:

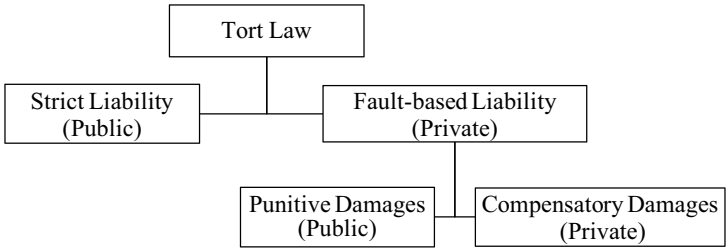

Figure 4

C. Academic Objections to Punitive Damages and Their Critiques

In discussing U.S. punitive damages and their compatibility with the Italian legal system, Italian jurists proffer various objections to the adoption of punitive damages. Some of these commentators fully endorse the indefensible 2007 Supreme Court's decision by referring to the necessity of preserving the distinction between public and private law.[154] On this account, the idea of introducing a punitive flavor into tort law is unacceptable, and deterrence is admissible only if it operates without undermining the tenets of corrective justice.

Other scholars such as Giulio Ponzanelli criticize the Court's findings for its failure to grasp the radical changes affecting Italian tort law in the past decades.[155] Nonetheless, they rule out any possibility for the adoption of punitive damages in Italy. In particular, Ponzanelli points to four institutional obstacles that allegedly make evident the uniqueness of U.S. punitive damages and prevent Italy from adopting this foreign juridical creation.[156] Firstly, whereas the Italian separation between tort law and criminal law has determined important differences in their respective adjudicatory procedures, U.S. tort law still retains a "strong criminal character," and the safeguards guaranteed in criminal trials are not applied to punitive damages.[157] This fact, according to Ponzanelli, argues against the introduction of punitive damages in Italy. Secondly, he maintains that the U.S. jury and its role in the domestic justice system constitute an institutional obstacle to the reception of punitive damages. His reason is that the U.S. jury

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[154] *See* Castronovo, *supra* note 114, at 329; Fava, *supra* note 114, at 526, 529.

[155] Ponzanelli, *supra* note 100, at 321-22. Italian commentators have been looking quite intensely at deterrence as a desirable objective rather than as a merely incidental effect of tort law. *Id*. at 319.

[156] *Id*. at 321-22; Busnelli, *supra* note 105, at 43 (following Ponzanelli).

[157] Ponzanelli, *supra* note 100, at 321.

usually awards very high damages to the plaintiffs, well beyond what would be necessary to successfully perform compensatory and even punitive functions.[158] Thirdly, punitive damages should be read in light of the different rules governing legal expenses. In the United States, each party pays her own attorneys, whereas Italy adopts, at least in principle, the "loser pays system," whereby the loser pays the attorneys' fees of the winning party as well as her own. Thus, U.S. judges consciously award (punitive) damages covering attorneys' fees to ensure that the plaintiff is truly made whole. The unstated conclusion of such reasoning is that U.S. punitive damages cannot be explained without referring to the "American rule," which, absent in Italy, contributes to rendering the reception of punitive damages unrealizable. Fourthly, the law and economics school of thought has not developed, so the Italian context lacks a powerful voice advocating for punitive damages. This would explain why Italy has not adopted punitive damages.

1. Criminal Safeguards and Punitive Damages

According to the first objection raised by Ponzanelli against the adoption of punitive damages in Italy, the absence of a rigid separation between U.S. tort and criminal law makes it acceptable for the U.S. system to administer punitive damages without the kind of safeguards that characterize criminal proceedings. For instance, the Fifth Amendment double-jeopardy guarantee does not apply to U.S. punitive damages. Moreover, in a good number of states the standard of proof applied with reference to punitive damages is still the traditional "more probable than not" test, despite the unquestionably retributive nature of punitive damages. By contrast, the clear separation between Italian tort and criminal law would make it unfeasible to adopt punitive damages in domestic tort law, for it would be unacceptable to punish a defendant without due procedural protections.

In general terms, the "criminal procedural safeguards" objection certainly has force, as demonstrated by the fact that both U.S. and Italian scholars are aware of it.[159] However, this concern should not bar the introduction of punitive damages into Italy. It rather suggests that if punitive damages are adopted, heightened safeguards should be applied. For instance, with reference to the U.S. system, Owen suggested the adoption of a "mid-level burden of proof, such as that of 'clear and convincing evidence,'" in order to guarantee a sufficient degree of procedural fairness to the defendant.[160] States have begun to adopt such a

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[158] Ponzanelli, *supra* note 100, at 321 (adding that the American jury does not have to give reasons for its determinations and that it is committed, by awarding substantial damages, to offset a poor social security system).

[159] *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 382-83 (1994); Gallo, *supra* note 142, at 186-211.

[160] Owen, *supra* note 159, at 383 (explaining that in both the United States and Italy "beyond all reasonable doubt" applies to criminal cases whereas "more probable than not" applies to civil cases).

standard and today it is used in half of them.[161] This trend may prove to be useful to the Italian legal engineer entrusted with the task of introducing punitive damages in the domestic legal system. By introducing a somewhat higher, mid-level burden of proof benefitting the defendant, Italy may easily resolve one of the most discussed problems surrounding punitive damages.

To be sure, the traditional "more probable than not" standard invariably applies to civil proceedings involving the legislative provisions performing punitive functions.[162] This may *prima facie* suggest that so long as a sanction, independently of its nature, is imposed in civil proceedings the Italian system would not investigate the advisability of requiring heightened standards of proof. However, should the Italian system adopt punitive damages as a general remedy, the issue of the burden of proof would in all likelihood become a relevant and pressing one, to be resolved with the adoption of heightened guarantees.

Turning to the "double-jeopardy" issue, the U.S. Supreme Court held in *United States v. Halper* that if a civil sanction constitutes a form of punishment it triggers the "double-jeopardy" clause.[163] However, the Court added that the Fifth Amendment guarantee did not apply to private parties' litigation,[164] meaning that if a public body is not a party to the litigation, the same individual may be punished repeatedly for the same fact. So the "double-jeopardy" guarantee does not apply to U.S. punitive damages in most cases.

Does the "double-jeopardy" concern counsel against the adoption of punitive damages in Italy? One could answer in the affirmative by arguing that the "double jeopardy" guarantee applies to punishment in its broadest meaning, encompassing criminal as well as civil punitive sanctions, with the consequence that no one could be punished more than once for the same misconduct, in either criminal or civil proceedings. This reasoning would be unconvincing because this type of guarantee is enshrined not in some Italian constitutional provision, but rather in article 649 of the code of criminal procedure, according to which no one can be prosecuted twice for the same crime. Hence, the temptation to consider this safeguard a protection linked to the typical content of a criminal sanction (i.e. deprivation of personal liberty through incarceration) is very strong. In sum, it appears correct to draw a line between civil punitive sanctions and criminal sanctions, with the consequence that the procedural safeguards typically characterizing Italian criminal proceedings (e.g. "beyond all reasonable doubt" standard of proof, "double-jeopardy" guarantee) may be deemed to be unnecessary when it comes to civil, even punitive, sanctions.[165]

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[161] Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?* 7 U. ST. THOMAS L.J. 1, 3 (2009).

[162] *See supra* Part III, Subsection (B)(1)(a).

[163] 490 U.S. 435, 442 (1989).

[164] *Id*. at 451.

[165] *See* Lorenzo Di Bona De Sarzana, *Il Legal Transplant dei Danni Punitivi nel Diritto Italiano*, in LIBER AMICORUM PER FRANCESCO DONATO BUSNELLI, Vol. I, 563, 572 (2008).

Finally, an aspect that is relevant to the divide between criminal law and tort law involves the principle of legality (*nulla poena sine lege*). According to this principle, only the legislator can set forth the circumstances under which an individual may be punished for her conduct and empower the judge to apply a punitive measure. Adopting the perspective of a corrective justice theorist, one would argue that only the criminal law pursues punishment, that whenever punishment is sought only the legislator can intervene and impose punishment, and that the legislator must do so through clearly stated legislative provisions, identifying all the requirements that must be met in order to trigger punitive sanctions. In contrast, tort law, at least Italian tort law, only pursues compensation. And for this function to be pursued, compliance with the principle of legality is not required because it applies only to punishment, which is alien to Italian tort law.

But what if one concedes, as Italian jurists should, that Italian tort law can also pursue punitive and deterrent goals? In this case the principle of legality raises an issue that must be addressed before adopting punitive damages or any other form of civil punitive sanction. This is so because according to Italian constitutional principles, neither criminal nor civil punitive awards may be granted unless the adjudicator is *ex ante* authorized by the legislator to do so.[166] The solution seems quite simple. Actually, the principle of legality appears not to prohibit, but rather to channel the adoption of punitive damages in the sense of requiring one general (or a series of specific) legislative provision(s) attributing to judges the power to grant punitive awards. Such legislative intervention should be enough to alleviate legitimate concerns of legality, confirming that the *nulla poena sine lege* difficulty is simply a matter of legal engineering.

2. The Role of the Jury

With respect to the relationship between juries and punitive damages, it has been argued that juries are not well equipped to determine the amount of punitive awards and that only judges should be entrusted with such task.[167] The

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[166] As applied to criminal sanctions, the principle of legality is enshrined in Article 25, Clause 2 of the Italian Constitution, which states "[n]o one may be punished except on the basis of a law in force prior to the time when the offence was committed." More debated is the issue of which constitutional provision enshrines the same principle as applied to civil punitive sanctions. *Compare* Pietro Nuvolone, *Depenalizzazione apparente e norme penali sostanziali*, RIV. IT. DIR. E PROC. PEN., 60 (1968) (maintaining that the relevant source is Article 25, Clause 2 of the Italian Constitution), *with* Franco Bricola, *Le 'pene private' e il penalista*, in LE PENE PRIVATE, 51 (1985) (arguing that the relevant provision is Article 23 of the Italian Constitution, which states "[n]o obligations of a personal or a financial nature may be imposed on any person except by law.").

[167] *Compare* Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager,* 40 ARIZ. L. REV. 901, 916 (1998), *with* Marc Galanter &

essential point made by all these scholars is that jurors do not possess the same degree, if any at all, of the experience and competence usually belonging to judges. This situation, in turn, would tend to produce unpredictable results characterized by irrationally and unacceptably large amounts of punitive damages awarded to plaintiffs.

Even if this were true, one wonders why U.S. juries' poor performances in awarding punitive damages should counsel the Italian jurist against adopting punitive damages. Firstly, as a matter of descriptive accuracy, the Italian legal engineer should be aware of the fact that the U.S. Supreme Court has elaborated a series of substantive limitations meant to avoid excessively large amounts of punitive damages by curbing adjudicators' discretion in granting punitive awards. Secondly, and more importantly, why should one think that the jury as an institution represents an *essential* feature of punitive damages, so that the absence of juries as adjudicators in the "importing" legal system would make the transplant of this tort law remedy unfeasible? Punitive damages are not a prerogative of juries. On the contrary, judges often award them as well.[168] This is no surprise given that judges and juries are functional equivalents, i.e. they are both adjudicators. There seems to be no real reason to consider the American jury and its role in punitive damages cases an insurmountable obstacle to the reception of punitive damages in Italy. Punitive damages, if adopted, could and should be awarded by Italian judges, the other form of adjudicator (the jury) being absent.

It is also worth questioning the skepticism academics exhibit toward juries and their performances in punitive damages cases. As demonstrated by an empirical study conducted at the beginning of the 21st century, there is "no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards."[169] In other words, what some Italian as well as U.S. scholars should learn is that the frequency with which judges and juries award punitive damages and the amounts of the awards they grant do not differ in any meaningful way. In conclusion, it appears that the "jury argument" is fallacious. In no way does it present the existence of a genuine obstacle to the adoption of punitive damages in the Italian legal system.

3. Attorneys' Fees

The argument for attorneys' fees links punitive damages to attorneys' fees. In a punitive damages case, this view suggests, U.S. judges increase the amount of punitive damages to cover the legal expenses the plaintiff sustains on

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David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism,* 42 AM. U. L. REV. 1393, 1439 (1993) (praising the work of juries).

[168] Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 759 (2002).

[169] *Id*. at 746.

the basis of the "American rule." Should courts fail to do so, the plaintiff would not be made truly whole considering that "at least one-third of the plaintiff's recovery ordinarily is expended on legal fees."[170] Does the fact that punitive awards cover the plaintiff's legal expenses, coupled with the fact that Italy adopts the "loser pays system," counsel against the adoption of punitive damages?[171]

Reasoned analysis suggests that it does not. Actually, the view here criticized would be tenable if the attorneys' fees owed by the plaintiff accounted for punitive damages in their entirety or for nearly all the amount. But this is not the case. Even assuming that the legal expenses represented one-third or any other considerable fraction of the punitive award, a substantial part of it would still call for a justification. As we know, such justification can be traced to punishment and deterrence. In other words, it is not reasonable to regard punitive damages as merely absorbing plaintiffs' legal expenses. Apart from this, it is difficult to see in the quite cryptically developed "attorneys' fees" argument any other detectable line of reasoning capable of supporting the rejection of punitive damages.

4. Economic Analysis of Law

The fourth and final argument made by Ponzanelli suggests that a further reason for not adopting punitive damages in Italy is the absence of a well-developed "law and economics" movement in domestic legal discourse. Unlike the second and third objections, the fourth one seems to be *prima facie* correct, in the sense that the lack of overtly efficiency-based rationales driving policy choices is an unquestionable truth as a matter of Italian history. Whether this argument is right, however, requires some analysis.

To begin, one should be careful to avoid confusing the idea of deterrence with the efficient allocation of resources. The former can be pursued independently of efficiency-driven rationales: there is no better example of this than Italy itself. The Italian legal system certainly pursues deterrence in the field of, say, the criminal law. However, it does so not by applying the instruments elaborated by economists committed to efficiency, but rather by focusing on the idea of fairness. The same is true, *pace* the Italian Supreme Court, also with reference to Italian tort law. As demonstrated, deterrence is one of the goals domestic tort law pursues, but, as has been correctly suggested, efficiency has never been an element consciously used to seek deterrence.[172] In sum, it would be a mistake to think that the notion of deterrence at some point collapsed into that of efficiency simply because of the contribution efficiency-based theories have given, and continue to give, to the pursuit of deterrence.

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[170] Owen, *supra* note 159, at 379.
[171] Such a regime is established by Article 91 of the Italian Code of Civil Procedure.
[172] Ponzanelli, *supra* note 100, at 322.

Furthermore, one may wonder whether, historically, punitive damages flourished in the United States because of efficiency-driven considerations or because of a desire to pursue deterrence. Given that the birth of punitive damages can be traced back to judicial decisions issued in the mid-18th century[173] and that the law and economics movement is much younger, one may infer that punitive damages were adopted in the United States to pursue deterrence (and, of course, punishment), but without any precise idea of efficiency in mind.[174] Consequently, it appears fair to conclude that a legal system does not necessarily need law and economics theories before adopting a legal tool such as that represented by punitive damages. This, quite inevitably, fatally weakens the fourth argument.

IV. THE NORMATIVE DESIRABILITY OF ADOPTING PUNITIVE DAMAGES IN ITALY

Does Italy need punitive damages? I believe it does. In general terms, Italy should consider the opportunity to adopt punitive damages with reference to all wrongdoing in which the defendants' conduct is so outrageous and harmful that an enhanced deterrent and punitive response is warranted. More particularly, building on the elaborations of two Italian scholars, and with no pretense of being exhaustive, I suggest that there are at least three situations in which punitive damages would be useful within the Italian legal system:[175] (1) when the wrongdoer's gain exceeds the loss suffered by the victim; (2) when the wrongful action harms personality rights that are now protected by the criminal law; and (3) when a harm is inflicted on a number of people but it is unlikely that many, if any, of them will bring an action seeking damages.

The following analysis should not be understood as a fully developed position but rather as a series of hypotheses intended to suggest the existence of situations that could be ideal for legislative experimentation. The possible solutions put forward in connection with each situation are meant to provoke thought and stimulate further elaboration.

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[173] *See supra* note 4 and accompanying text.

[174] The birth of modern law and economics is generally thought to coincide with Ronald Coase and Guido Calabresi. *See* Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295, 325 (2008) ("Ronald Coase and Guido Calabresi, who are typically described as the founding fathers of the law and economics movement. . . "). *See also* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

[175] Ponzanelli, *supra* note 100, at 324; Gallo, *supra* note 142, at 7-123.

A. The Wrongdoer's Gain Exceeds the Loss Suffered by the Victim

Article 125 of the code of industrial property provides for an ultra-compensatory remedy for when the tortfeasor violates someone else's industrial property rights and gains a profit from such illicit activity. Article 125 makes available a "special" action that permits the victim to obtain either the profits realized by the wrongdoer, independently of any loss on the former's part, or compensatory damages for the loss suffered plus the profits for the amount exceeding the loss. The rationale inspiring article 125 can easily be identified in the legislator's willingness to achieve deterrence by warning the potential wrongdoer that, if "caught," she will be ordered to disgorge the illicit profits.

Unfortunately, article 125 may not be a satisfactory response to a situation in which the wrongdoer's illicit gains exceed the victim's losses. Assume that by willfully committing the tort sanctioned by article 125 the wrongdoer gains a profit of $100,000 and causes a loss of $70,000 to the victim. The wrongdoer knows that if she is "caught" she will have to pay, at most, $100,000 (either as a single sum constituting the illicit profits or as the aggregate of compensatory damages plus the illicit profits for the part exceeding the measure of compensatory damages) plus legal expenses. In such a situation, the disincentive to commit the wrong seems represented only by the possibility of running a risk for nothing, i.e. of committing a wrong without then being able to keep the gains of that illegal conduct. Thus, although representing a step in the right direction (the pursuit of deterrence), article 125 generates a concrete risk of under-deterrence, especially if the potential wrongdoer is wealthy and not afraid of some "extra" legal expenses.

The correctness of this reading appears to be confirmed by the way U.S. federal legislation regulates the type of violations addressed by the Italian code of industrial property. In particular, and by way of example, it is statutorily established that patent infringements can be sanctioned through a sort of modified version of punitive damages, the so-called "treble" damages.[176] Multiplying the recoverable damages by up to three times is a powerful way to discourage a potential wrongdoer from committing an antisocial activity. Applying treble damages to our example, one finds that the wrongdoer now knows that if she is brought to justice she will have to pay not $100,000 but $210,000 ($70,000 multiplied by three). A difference of $110,000 between the "treble damages" regime and the "article 125" regime suggests that by adopting a treble damages-like remedy, Italy would be able to achieve an increased level of deterrence.

More generally, because article 125 is circumscribed in its scope of application to the situations legislatively addressed in the provision itself, Italian tort law cannot deter tortfeasors who, by committing even extremely deplorable

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[176] 35 U.S.C. § 284 ("[w]hen the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. . .").

wrongs, secure gains exceeding the victims' losses in situations other than the violation of industrial property rights. This is so because under Italian tort law the victim of a wrong entailing economic losses is generally entitled only to one form of monetary reparation: compensatory damages equaling the losses. Thus, even if held accountable, the wrongdoer is incentivized to commit outrageous and remunerative wrongs because of the profits retained after paying compensatory damages to the victim. To this problem as well, punitive damages may give a satisfactory answer. Forcing the tortfeasor to pay a sum substantially higher than the plaintiff's losses would be likely to have powerful deterrent effects.

B. Personality Rights and the Criminal Law/Tort Law Dilemma

Consider the following situation: as part of a deliberate defamatory campaign, an important newspaper gravely offends the honor and reputation of a well-known politician in order to cause a decrease in her rate of approval among Catholic voters by falsely attributing to her Nazi statements or extra-marital affairs. This kind of conduct can expose the responsible persons to both criminal and civil liabilities. In other words, as of today the Italian legal system reacts on two different levels against defamatory conduct: it punishes the wrongdoer for the antisocial misconduct by imposing criminal penalties, and it allows the victim to get compensation for the loss suffered in a civil trial.

On the criminal side, if convicted in a criminal proceeding, the journalist and/or the editor of the newspaper may be sentenced to jail (very unlikely) or condemned to pay a small, *ex ante* legislatively fixed, criminal fine. The choice to treat offenses to honor and reputation as a crime is undoubtedly questionable, and in fact is questioned by many commentators.[177] The huge costs of a criminal trial, the resources spent to run prisons, the intolerable length of criminal trials in Italy, and the advisability of using scarce resources for much more serious and socially alarming crimes than offenses to honor and reputation (deplorable though they are) all suggest that this type of wrong and many others should be punished and deterred through legal tools other than the criminal law.

In some cases, tort law may altogether replace instead of complement the criminal law in addressing conduct that is reprehensible enough to trigger some sort of reaction but not reprehensible enough to trigger the reaction of the criminal law. Certainly, the egregiousness of the conduct exemplified in the initial example calls for a punitive and deterrent response. Surely though, as it stands today Italian tort law would be unable to achieve these goals. What modifications would Italian tort law need to remedy its incapacity? Punitive damages appear to be a promising solution.

Undoubtedly the Italian legal system considers the kind of conduct carried out by the newspaper in our example as constituting a serious violation of

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[177] The first author to pose this issue was Cesare Beccaria in 1764. *See* CESARE BECCARIA, DEI DELITTI E DELLE PENE (Renato Fabietti ed., 1973).

personality rights, directly assaulting the dignity, honor, and reputation of the defamed person. Otherwise, such conduct would not constitute a crime under current Italian law. However, for the institutional reasons given above, and more importantly because offenses to personality rights do not seem to be socially alarming enough to deserve a reaction from the criminal law, the criminal justice system is not suitable to address these types of wrongs. Rather, tort law and punitive damages seem to represent a better approach. In this way, the wrongdoer would be punished for her highly reprehensible conduct and other potential wrongdoers would be deterred from adopting the same course of conduct.

C. The "Absent Victims" Situation

Suppose that the poor quality of fabrics employed by a large-scale firm to manufacture a certain product allows the firm to save a good number of dollars per unit if compared to the costs entailed by using materials of higher quality. Suppose also that, because of choosing poor materials, a good number of people will be injured by the product and that only a few of them will file a lawsuit and recover damages. Suppose, finally, that a court will award compensatory damages in an amount far below the profits earned by the firm as a direct consequence of the choice of poor materials.

A first effect of this situation is that the firm "gets away with" a certain amount of "uncompensated injury" because only a few of the victims either sue or manage to obtain compensation. A second effect is that the firm is incentivized to keep marketing defective products because, according to economies of scale, it knows that the reduction in production costs allowed by poor materials outweighs the compensatory damages it will have to pay. The firm's conduct is particularly reprehensible because it "coldly" calculates its costs of production in order to secure as much profit as possible at the expense of the life or health of consumers, who usually rely on the quality of products and on the manufacturer's good faith. Punitive damages might represent an adequate response to the deplorability of the firm's conduct and its effects. If properly quantified, they would likely deter the firm's reprehensible course of action and reduce the risk of "uncompensated injury."

It is also true, however, that the "absent victims" situation may generate a relevant problem if addressed through punitive damages. When the wrongdoer harms multiple victims she risks being exposed to multiple punitive damages claims, which means that the defendant would have to pay punitive damages as many times as the number of claimants bringing subsequent actions. This problem, still plaguing U.S. tort law, may be solved in Italy by strengthening the class action mechanism.[178] In particular, it may be possible to convert the opt-in

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[178] For an overview of the Italian class action, *see* ERNESTO CESARO & FERNANDO BOCCHINI, LA NUOVA CLASS ACTION A TUTELA DEI CONSUMATORI E DEGLI UTENTI:

model in Italy into an opt-out model and to apply it exclusively to punitive damages claims.[179] An opt-out model would (i) give all victims the chance to get compensatory and punitive damages, with the effect that those victims explicitly deciding not to take advantage of this opportunity would be denied access to courts if they seek punitive damages through subsequent independent actions; and (ii) allow the judge to order the defendant to pay a single punitive award (to be apportioned among the plaintiffs who did not opt out) to avoid exposing her to subsequent and unpredictable claims seeking punitive awards. Thus, so long as the multiple-punishment problem is resolved, it appears that the "absent victims" situation may be effectively addressed by resorting to punitive damages.

V. CONCLUSION

The real controversy about punitive damages turns on the public/private distinction and the way this distinction is articulated in different legal systems. In the United States, jurists "publicize" or "privatize" punitive damages depending on whether they oppose or defend the public/private distinction. By doing so, they fail to satisfactorily accommodate this tort law remedy within domestic law because they do not perceive that public and private elements coexist throughout tort law and that punitive damages, by emphasizing the public pole of fault-based liability, represent one instance of that coexistence.

In light of this, I have argued that the staunch opposition reserved by the Italian Supreme Court and by the vast majority of commentators to the adoption of punitive damages in Italy is unwarranted because it is based on a poor knowledge of U.S. punitive damages and on a portrait of Italian tort law that does not correspond to reality. The time is ripe for Italy to look pragmatically, not dogmatically, at punitive damages and to seriously consider the introduction of a remedial tool whose positive effects would substantially outweigh any possible cost. Punitive damages would be beneficial to Italy in numerous ways. They would give relief to an overloaded criminal justice system by "demoting" certain wrongs from crimes to torts. Their application would very likely improve Italian tort law's deterrence in specific circumstances, such as when the defendant's gains exceed the plaintiff's losses. Finally, they would send members of society a

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COMMENTARIO ALL'ARTICOLO 140-BIS DEL CODICE DEL CONSUMO (2012); ANTONIO PALAZZO & ANDREA SASSI, CLASS ACTION: UNA PRIMA LETTURA (2012); Roald Nashi, *Italy's Class Action Experiment*, 43 CORNELL INT'L L.J. 147 (2010); PAOLO FIORIO, *L'azione di classe nel nuovo art. 140 bis e gli obiettivi di deterrenza e di accesso alla giustizia dei consumatori*, in I DIRITTI DEL CONSUMATORE E LA NUOVA CLASS ACTION, 487-536 (2010); VALENTINO LENOCI, *Profili di diritto internazionale: la class action nei paesi anglosassoni*, in I DIRITTI DEL CONSUMATORE E LA NUOVA CLASS ACTION, 537-53 (2010).

[179] Italian class action is governed by Article 140-bis of the Italian Consumers' Code. Clause 3 establishes that consumers who wish to join the class action can do so, and that "joining class action entails discontinuation of any individual restitutory or remedial action based on the same title."

message that committing torts is morally wrong and calls for the issuance of afflictive measures, especially when the wrongdoer takes advantage of its economic power to the detriment of weak parties. As to the negative effects of adopting punitive damages, there are none, unless a loss in dogmatic purity is taken to constitute an unbearable cost that prevents the introduction of a new and potentially very useful legal tool.

THE ECONOMY OF THE DEBTORS' PRISON MODEL: WHY THROWING DEADBEATS INTO DEBTORS' PRISON IS A GOOD IDEA

Briana L. Campbell*

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I. INTRODUCTION

Recently, the United States has seen a surge of state courts allowing imprisonment of debtors pursuant to an order of civil contempt. Complicating this ordinarily innocuous procedural remedy, the orders at issue are often based on the debtor's failure to pay a court-ordered debt. Thus, as some have posited, individuals are being imprisoned for being too poor—a schema reminiscent of Charles Dickens-esque debtors' prisons operating throughout 1800s America. Although some states have already outlawed the practice, citing concerns of unconstitutionality, many recognize the economic efficiency and possibly large deterrent effect of the revamped process.

This Note attempts to reframe the debate by arguing that critics suggesting the debtors' prison model promotes little deterrence fail to look to the correct link in the debt collection chain. Indeed, it is not the imprisonment of debtors that creates deterrence, but rather the *threat* of imprisonment that creates settlement. Although some deterrence value may be gained on the debtors' side of the equation, the true value of the model is in its deterrence of overly risky lending. Use of this model has resulted in a higher rate of settlement and repayment, in turn increasing both the return on investment and overall profit margin of third-party debt buyers. Because nationally recognized banks cannot legitimately use the debtors' prison model, first-party creditors may be deterred from entering into overly risky loan agreements in an attempt to stop lining the pockets of their direct competitors. This becomes an especially salient argument as more third party debt buyers move into the same commercial loan and financial services market as nationally recognized banks. Because this practice only recently reemerged within the United States, this Note necessarily evaluates debtors' prisons employed abroad—with a specific emphasis on the more traditional models enforced in Saudi Arabia and Dubai. Examining these models not only bolsters the argument that the threat of imprisonment deters risky borrowing and lending, but also highlights important truths about the systems operating behind the model. Part II of this Note alleviates complexity by providing an overview of the argument. Part III provides relevant historical background on debtors' prisons in England and the United States. Part IV continues to provide relevant information on the integrated parts of the model, and simultaneously analyzes how those parts work together to provide deterrence. Throughout Part IV, debtors' prisons in Saudi Arabia and Dubai are used to support the thesis of this Note. Part V of this Note identifies implications of the implementation of the debtors' prison model. Part VI offers a comprehensive conclusion tying these complicated parts into one cohesive theory.

II. OVERVIEW

Early critics of the debtors' prison model were quick to utilize emotionally sympathetic cases to bolster an argument that imprisonment for

failure to repay debt provides no deterrent to future similar behavior because those actually imprisoned are unlikely to repay their outstanding debt.[1] Moreover, critics of this option have argued that the *in terrorem*[2] effect of the debtors' prison model is either ineffective or too socially costly. Such critiques, however, have narrowly focused on the imprisonment itself, failing to take into account the larger picture of debt buying and collection. Indeed, looking at the *threat* of imprisonment instead of the relatively small number of debtors actually imprisoned, reveals that the *in terrorem* effect of the practice leads to shockingly high levels of repayment and settlement of amounts owed.[3] Likewise, while some have voiced concerns that utilization of imprisonment for failure to pay debt puts too much power in the hands of those creditors who offered the risky loan in the first place,[4] the threat of debtors' prison offers a strong disincentive to future similar behavior on the creditors' side as well. Because third party debt buyers compete directly with the nation's largest financial institutions,[5] which are unlikely to take advantage of the threat of debtors' prisons due to the involved optics, such institutions may react by engaging in less risky lending practices in order to curb lining the pockets of their competitors. This is especially true since utilization of the threat of imprisonment based on debt has shown record rates of return for third party debt buyers[6]—particularly in the wake of the 2008 Great Recession.

Because the return of this refurbished process is recent in the United States, it is helpful to look outside our borders when assessing the potential pitfalls and advantages of this model. Recently, the use of the debtors' prison

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[1] Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 143-84 (2002) (representing one of the main critiques of the debtors' prison model and discussing the model's lack of deterrence value).

[2] "In terror or warning; by way of threat." *In terrorem*, BLACK'S LAW DICTIONARY (2d ed. 1995), *available at* http://thelawdictionary.org/in-terrorem.

[3] Richard Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support,* 16 LAW & SOC'Y REV. 513, 513-68 (1981-1982) (discussing both special and general deterrence gained by imprisonment for failure to pay child support, a system enforced through similar mechanisms as debtors' prison and receiving similar criticisms).

[4] Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509 (2011) (recommending modification of particular features of *in personam* proceedings to balance creditors' collections interests while protecting against abuse of the system).

[5] Although debt buyers compete with banks in the collection of debts in general, more and more debt buying companies are using complex structuring to move into the lending and borrowing business both inside and outside of the United States. Doug Alexander, *National Bank Benefits by Taking out the 'Garbage,'* BLOOMBERG BUSINESS, Sept. 30, 2014.

[6] "[O]ne hyper-successful company boasts of a 239 percent return." Peter Van Buren, *Poverty Is Profitable: 1 out of 3 US Consumers in Debt Collection*, HUFFINGTON POST POLS (July 29, 2014, 3:03 PM EDT), http://www.huffingtonpost.com/peter-van-buren/poverty-is-profitable-1-debt_b_5630444.html.

model throughout the Middle East has become one of the most controversial issues facing the world of debt buying and collection today. Looking comparatively to those models employed in Saudi Arabia and Dubai reveals truths about the deterrence value of this system. Analyzing these three systems on a spectrum, from implementation of a government enforced model in Saudi Arabia, to the most traditional form of debtors' prisons seen in Dubai, and lastly the system employed in the United States, where courts act as a check on creditor power, reveals significant conclusions. Particularly, examining the systems in place in Saudi Arabia and Dubai reveals that contrary to critics' conclusions, the threat of imprisonment seems to offer at least some amount of deterrence to overly risky lending and borrowing practices. Moreover, this comparative analysis reveals that the amount of deterrence served directly correlates to the efficiency of the enforcement mechanism behind the system.

Applying these lessons within the United States, it becomes obvious that in analyzing the deterrence value of the system, critics may have too quickly discounted this model. Specifically, it is not the imprisonment itself, but the *threat* of imprisonment combined with the check of an independent legal authority, which allows for a realization of the benefits of this *in terrorem* system while minimizing its social costs. Stated precisely, while the *threat* of imprisonment encourages a high rate of repayment and settlement amongst those already in debt, enforcement through an independent and democratic court system works congruently to alleviate social costs by minimizing arbitrariness. Together these factors ensure an efficient system, allowing debt buyers to make a remarkable return on their investment, and in turn discouraging future risky lending practices amongst first party creditors.

It is important to note at the outset that while many have concluded that imprisonment for failure to repay a debt is a de facto institution of a modern-day debtors' prison, those actually imprisoned are incarcerated not because they failed to repay their debt, but rather because they have willfully ignored an order of the court.[7] Even though some see this as a distinction without a difference, imprisonment on an order for civil contempt has long been recognized as an important coercive power of the courts. Indeed, an analogy in this arena can be drawn to that regarding the payment of child support. Although imprisonment for failure to pay child support has met similarly harsh critiques, the very real possibility of prison time in this arena has resulted in deterrence of similar behavior, providing a net gain to social welfare.[8] Like in cases involving imprisonment for debt, it is the threat of jail in child support cases that not only leads to settlement, but also deters similar behavior—maximizing the *in terrorem* effect of the practice while insulating the social costs to those worst offenders.[9] Analogously, imprisonment for debt serves a social good by holding

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7 Please see the discussion of relevant case law below for support of this assertion.

8 Lempert, *supra* note 3, at 513-68.

9 *Id.*

borrowers to their debts, ensuring first party creditors realize a financial loss for engaging in overly risky behavior, and hopefully deterring similar future behavior on both sides.

Thus, while issues of constitutionality and possibilities for abuse must be addressed and mitigated, the efficiency of the business model, potential return on investment, and deterrence of risky lending and borrowing suggests that critics of the system may have too hastily dismissed the potential of the debtors' prison model. This is especially true since any possible deterrent to risky borrowing and lending may become crucial as the United States faces impending debt bubbles from student loans and personal credit card debt.

III. BACKGROUND

A. Debtors' Prisons in England

Like many of America's legal structures, imprisonment for failure to pay a debt is a practice based on common law legal traditions inherited from Britain.[10] In 1267, the Statute of Marlbridge was among the first in England to allow imprisonment for debt.[11] Enacted as a preventative measure to flight, the statute allowed the debtor to be held in prison until a trial could establish a formal term of imprisonment.[12] This statute was followed by the passage of the Statute of Action of Burnell in 1283, which allowed a creditor to obtain a bond against a debtor's property.[13] If the debtor defaulted, the creditor could levy on and sell the debtor's property in repayment of the debt.[14] If the sale of the debtor's chattel could not raise the requisite amount to satisfy the debt, the creditor could then utilize the bond to imprison the debtor, provided that the creditor agreed to supply the debtor bread and water.[15]

Whereas creditors had previously been obligated to care for imprisoned debtors, as the debtors' prison system evolved during the 13th, 14th, and 15th centuries measures were instituted by which creditors could detach themselves from any modicum of support for the imprisoned debtor.[16] Indeed, English courts during this time could be quoted as stating, "[i]f a man . . . lie in prison for debt, neither the plaintiff at whose suit he is arrested . . . is bound to find him meat, drink, or clothes; but he must live on his own . . . and if no

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[10] Marcus Cole, *A Modest Proposal for Bankruptcy Reform,* 5 GREEN BAG 2d 269, 271-72 (2002).

[11] *Id*. at 271.

[12] *Id*. at 271-72.

[13] Vern Countryman, *A History of American Bankruptcy Law,* 81 COM. L.J. 226, 226 (1976).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 226-27.

man will relieve him, let him die in the name of God."[17] Although the above language may seem foreboding, inhumane treatment and death of imprisoned debtors was not uncommon.[18] In fact, after investigating debtors' prisons across England, one commentator reported, "[t]he city's prison officials . . . routinely tortured incarcerated debtors and herded destitute prisoners into overcrowded, disease-ridden wards and dungeons. . . . disobedient prisoners [were punished] by confin[ement] . . . in a yard containing the corpses of prisoners who had recently starved to death."[19] Statements such as this make clear that the court's language, excerpted above, was more honesty than embellishment.[20]

The practices of debtors' prisons were institutionalized with some modification when the English formally enacted their bankruptcy laws.[21] For example, in 1543, a law providing for involuntary proceedings allowed for the seizure and sale of the property of an imprisoned debtor, while the creditor sought additional remedies.[22] Despite reform, the practice remained common throughout the 16th and 17th centuries, with some reports claiming that as many as 2,437 out of 4,084 total inmates were imprisoned for debt during this time period.[23]

During the 18th century, presumably as the result of public pressure due to reports of inhumane treatment, a variety of insolvency acts were passed allowing debtors limited relief. One insolvency act, for example, allowed release from jail for those owing less than 100 pounds if the debtor agreed to surrender his estate and take a poor debtor's oath.[24] Although the Debtors Act of 1869 sought to extinguish the use of the debtors' prison model, the practice continued, with the Judicial Committee of the Privy Council reporting as many as 7,867 debtors still imprisoned in the year 1899.[25]

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[17] *Id*. at 227 (quoting Marbury v. Scott, 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (Exchequer 1674)).

[18] Alex Pitofsky, *The Warden's Court Martial: James Oglethorpe and the Politics of Eighteenth-Century Prison Reform*, 24 EIGHTEENTH-CENTURY LIFE 88 *passim* (Winter 2000) (discussing Oglethorpe's role as a reformer of the Eighteenth-Century English prison system).

[19] *Id*. at 88.

[20] *Id.*

[21] Countryman, *supra* note 13, at 227-228.

[22] *Id.* at 227.

[23] *Information Leaflet Number 66 Imprisoned Debtors*, LONDON METROPOLITAN ARCHIVES (July 2011), https://www.cityoflondon.gov.uk/things-to-do/london-metropolitan-archives/visitor-information/Documents/66-imprisoned-debtors.pdf.

[24] *Id.*

[25] *Judicial Statistics, England and Wales, 1898. Part II*. CIVIL JUDICIAL STATISTICS, (John Macdonell ed., London, Eyre and Spottiswoode, 1900).

B. The Institutionalization of English Style Debtors' Prisons in the United States

In response to a decade of repeated commercial failure and financial crisis, the United States Congress passed the Bankruptcy Act of 1800 ("Act"), just three years after the framing of the Constitution.[26] The Act, which emulated the still thriving British debtors' prison model, was limited to merchants, but provided for involuntary proceedings upon the creditors' filing of a petition alleging an act of bankruptcy.[27] Those debtors who did not surrender their property or person, failed to make the proper disclosure of assets, or unsuccessfully complied with some other measure, were deemed to "be adjudged a fraudulent bankrupt" and were to be imprisoned for a term not less than one, and not more than ten years.[28] Although this first Act was quickly repealed, during the interim period before the Second Bankruptcy Act in 1841, imprisonment for debt was widely used for both deterrence and enforcement purposes.[29] Debtors' prisons were employed with particular vigor in Massachusetts, Maryland, New York, and Pennsylvania.[30] Indeed, each of these states reported, "from three to five times as many persons [were] imprisoned for debt as for crime."[31] A wave of reform blossomed in the 1830s and many states outlawed debtors' prisons, a ban appearing in many state constitutions and statutes today.[32] Importantly, "many of these provisions are limited to contract debtors . . . and contain exceptions for absconding contract debtors or those guilty of fraud . . . ."[33] Thus, at no time was the practice of holding a debtor in civil contempt for failure to abide by a court order to pay a sum of money deemed illegal or unconstitutional, outside of a very limited set of circumstances pursuant to the language of the relevant state constitution or applicable statute.

Evidencing the continued constitutionality of the practice is the historical development of federal law during this time period. As early as 1902, the Supreme Court endorsed the idea that money owed *in custodia legis*[34] was not in

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[26] Countryman, *supra* note 13, at 226-33; *see also History of the Federal Judiciary-Bankruptcy Jurisdiction in the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/jurisdiction_bankruptcy.html (last visited Sept. 13, 2015).

[27] Countryman, *supra* note 13, at 228.

[28] *Id.*

[29] *Id.* at 229.

[30] *Id.* at 228.

[31] *Id.* at 229.

[32] Countryman, *supra* note 13, at 229; *see also Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 n.1 (1971) (stating that "[f]orty-one states ban imprisonment for indebtedness by provisions in their constitutions, and nine have statutory prohibitions").

[33] Countryman, *supra* note 13, at 229.

[34] "*In the custody of the law*" *in custodia legis*, BLACK'S LAW DICTIONARY (2d ed. 1995), http://thelawdictionary.org/custodia-legis.

fact "debt."[35] In *Mueller,* after being adjudicated a bankrupt, Mr. Nugent was ordered to pay a total of $14,233.45.[36] Mr. Nugent failed to do so and was found guilty of contempt, with a recommendation for imprisonment.[37] Mr. Nugent objected, arguing that he could not be imprisoned for failure to pay a debt.[38] Ultimately, the Supreme Court held that the order for incarceration was tenable because it "was not an order for the payment of a debt, but an order for the surrender of assets . . . placed *in custodia legis* by the adjudication."[39] Thus, the court recognized the very principle that allows imprisonment for failure to pay a creditor in modern times—put simply, it is not the debtor's failure to repay a debt which allows incarceration, but rather the fact that he has failed to comply with a court order dictating payment of a sum properly within the custody of the court.[40]

Years later in 1948, Congress passed 28 U.S.C. § 2007, which essentially attempted to mirror state provisions by forbidding imprisonment for failure to pay debt at the federal level.[41] Even though the statute appeared to eliminate debtors' prisons, in effect the language was interpreted to exempt imprisonment for debt based on orders of contempt, abiding by the Supreme Court's decision in *Nugent*.[42] Although Nugent arguably remains good law on this point of interpretation, it elucidates the Supreme Court's and the Federal Government's historical interpretation of the constitutionality of the practice at issue.

IV. ANALYSIS

A. An Analysis of Civil Contempt

"The power to punish for contempt[ ] is inherent in all courts."[43] Contempt for the purposes of this Note refers to the failure of the party subject to a court order to abide by its terms.[44] Civil and criminal contempt orders have long been employed for both coercive and punitive reasons.[45] A criminal contempt order is seen as a punitive measure, and as such carries with it the necessity of a defined jail sentence.[46] Unlike a criminal contempt order, civil contempt is

35 Mueller v. Nugent, 184 U.S. 1, 13 (1902).
36 *Id.* at 1.
37 *Id*.
38 *Id.* at 1-13.
39 *Id.* at 13.
40 Nugent, *supra* note 35, at 1-18.
41 28 U.S.C. § 2007.
42 James, *supra* note 1, at 154-160.
43 Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 369 (2006) (internal citation omitted).
44 *Id.* at 369-70.
45 *Id.* at 369.
46 *Id*. at 371.

deemed a coercive remedial measure meant to force the subject party to comply with the terms of a court order.[47] Because of the purpose behind civil contempt orders, there is no definite jail term attached.[48]

Civil contempt orders are commonly used to compel a debtor to pay a court ordered debt.[49] The legality of enforcing imprisonment through a contempt order for refusal to comply with a previous court order to repay debt is commonly upheld within the context of the federal courts.[50] This is especially true within the realm of cases involving an order to pay child support.[51] When such an order is filed, the "deadbeat" parent can be held in prison in the hopes that doing so will coerce them into paying their debt.[52] Indeed, as recently as 2011 the Supreme Court, presiding over an appeal from South Carolina, acknowledged a state's right to enforce civil contempt proceedings in child support cases.[53] *Turner v. Rogers* involved a claim by a father held in contempt five times for failure to pay a weekly sum of $51.73 in child support.[54] After being released from prison on his fifth contempt charge, he was found yet again to be in contempt for failure to pay $5,728.76 and was again sentenced to prison.[55] Mr. Turner appealed, on the basis of due process violations.[56] Ultimately, the Supreme Court found that Mr. Turner's due process rights were violated because he was unrepresented,[57] and had no notice that the case would turn on whether he was able to make the payment owed.[58] Moreover, the Court noted, the lower court did not make a finding that he was able to make the payment owed, as required.[59] Important for the purposes of this Note, the Court did not overturn the state court's right to imprison Mr. Turner, noting that both the Government and the State of South Carolina recognized the use of coercive enforcement remedies as important tools of the courts.[60]

Certainly, while incarceration for failure to pay child support should be narrowly utilized, the punishment exists both to deter similar behavior and in recognition that a state may require the use of a coercive threat in order to meet an important societal goal. Similarly, a civil contempt order for failure to pay debt also serves the public good. Considered broadly, holding those who enter into

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47 *Id.*

48 Ressler, *supra* note 43, at 371.

49 *Id.* at 363.

50 *Id.*

51 *Id.* at 363-64.

52 *Id.* at 371.

53 Turner v. Rogers, 131 S. Ct. 2507, 2517 (2011).

54 *Id.* at 2509.

55 *Id.*

56 *Id.* at 2509-12.

57 Right to counsel, although outside the scope of this Note, would go a long way toward dissuading the critiques of the current use of civil contempt orders to imprison based on failure to pay a debt.

58 *Rogers*, 131 S. Ct. at 2511.

59 *Id.*

60 *Id.* at 2517.

contractual agreements accountable for money owed ensures not only that the other contracting party benefits from repayment, but also that future would-be-borrowers understand the responsibility of entering into such an agreement. As with all *in terrorem* laws, the debtors' prison model may stand as a warning to those considering defaulting on their debt, but more precisely it operates to coerce settlement and repayment. Even though the threat of imprisonment is the key to promoting deterrence, it is the tangible punishment of imprisonment behind the threat that ensures the models' effectiveness. Although in general any economic system functions more efficiently if debt is constrained from building to disastrously high levels, even a modicum of deterrence gained by the debtors' prison model becomes vitally important in times during which the United States faces daunting levels of debt likely to result in the reemergence of financial downfall and crisis.

As the above analysis shows, in common law a debtor may be imprisoned when they refuse to abide by a court order to repay or disgorge tangible assets.[61] As *Turner v. Rogers* demonstrates, "[t]he ability of the contemnor to comply with a court order . . . is a required prerequisite to a finding of contempt . . . . It is axiomatic that a person may not be held in contempt nor imprisoned . . . for failure to comply with a court order if it is impossible to comply."[62] Indeed, "[b]efore an offender can be confined solely for nonpayment of financial obligations he . . . must be given an opportunity to establish inability to pay."[63] In these circumstances, a debtor must establish the existence of a negative.[64] As such, issues regarding the burden of proof may become complicated if, for instance, a contemnor neglects to provide the court with evidence of disputed assets or fails to convince the court that he or she is unable to pay by other means.[65] Nonetheless, the premise remains that a debtor cannot be imprisoned if he can show that it is impossible to comply with the terms of the court order.[66]

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[61] Ressler, *supra* note 43, at 364.

[62] *Id.* at 377 (citing Bearden v. Georgia, 461 U.S. 660, 667-68 (1983) ("holding that a fine may not be converted into a jail sentence simply because of the inability to pay"); Chadwick v. Janecka, 312 F.3d 597, 613 (3d Cir. 2002) ("[W]e cannot disturb the state courts' decision that there is no federal constitutional bar to Mr. Chadwick's indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue.")).

[63] George v. Beard, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003) (citing Commonwealth v. Schwartz*,* 275 Pa. Super. 112, 418 A.2d 637 (1980)), *aff'd*, 574 Pa. 407, 831 A.2d 597 (2003).

[64] *Id.*

[65] Ressler, *supra* note 43, at 377.

[66] *Id.*

B. The Constitutionality of Debtors' Prisons

The return to a modified debtors' prison model in the United States, whereby third party debt buyers have the option to use the coercive function of civil contempt orders to encourage repayment of debt, has led to questions about the constitutionality of the practice. To summarize, in most states the common practice is for a third party debt buyer to buy distressed debt for pennies on the dollar and then after exhausting all other collection options, file a complaint against the debtor individually to recoup the money owed.[67] A debtor will then be ordered to pay, likely within the confines of a court ordered judgment.[68] If the debtor willfully refuses to fulfill the terms of that order, without any indication that he is unable to pay back the debt, he may be imprisoned.[69] Although some states have held this practice unconstitutional, others have recognized the important difference of imprisonment based on contempt and imprisonment for failure to pay debt.

1. *Albarran v. Liberty Healthcare Management*

Recently in *Albarran v. Liberty Healthcare Management*, an Arkansas appellate court addressed whether a circuit court was precluded from using imprisonment as a punishment for failure to abide by the terms of a civil contempt order for repayment of a debt.[70] Because the reasoning of the court was highly dependent on the facts underlying the case, it is necessary to engage with the rather complicated series of events leading to the filing of the contempt order. The debtor in this case was injured in an auto-accident and after receiving treatment, his physician, Dr. Rick Looper at the Accident and Injury Treatment Center (listed as "d/b/a" for Liberty Healthcare Management), submitted a bill totaling $3,710.00 to his health insurance, Preferred Network Healthcare Recoveries ("Healthcare Recoveries").[71] Healthcare Recoveries then remitted payment of $637.43 to Dr. Looper in accordance with the details of the debtor's health insurance plan.[72] The debtor subsequently settled his auto-accident claim for a total of $30,000.[73] Healthcare Recoveries then sent two checks: one to the

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[67] Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J., (Nov. 28, 2010, 12:01 AM ET), http://online.wsj.com/articles/SB10001424052702304510704575562212919179410.

[68] *Id.*

[69] *Id.*; Albarran v. Liberty Healthcare Mgmt., 2013 Ark. App. 738, 431 S.W.3d 310 (2013) (holding that circuit court was not precluded from ordering debtor in contempt upon creditor complaint that debtor had failed to comply with attorney fee judgment of the court).

[70] 2013 Ark. App. at 7, 431 S.W.3d at 315.

[71] *Id.* at 1, 431 S.W.3d at 312.

[72] *Id.*

[73] *Id.* at 2, 431 S.W.3d at 312.

debtor for $26,290.00, and the other to Dr. Looper for $3,710.00 based upon a lien allegedly claimed by Liberty on behalf of the doctor.[74]

The debtor then filed a petition for declaratory judgment against Healthcare Recoveries and Liberty, seeking to invalidate Liberty's lien.[75] Although the debtor later settled and dismissed his claim with Healthcare Recoveries, his claim against Liberty continued.[76] Liberty subsequently filed a motion to dismiss the petition, disclaiming any interest in the proceeds of the debtor's settlement.[77] The circuit court entered an order granting Liberty's motion to dismiss, and awarded attorney's fees of $4,410.00, for payment within 30 days.[78] The debtor filed a notice of appeal of the initial order.[79] The circuit court certified the case for appeal, requiring the debtor to file an additional notice.[80] Because the debtor failed to file his notice, the Arkansas appeals court dismissed his claim.[81]

The debtor subsequently failed to timely pay Liberty's attorney's fees, arguing that he could not pay the proceeds out of his settlement money.[82] The circuit court rejected his argument.[83] Liberty then engaged in informal collections processes, but when unable to collect, filed a motion for contempt.[84] The debtor attempted to stop the contempt proceedings from moving forward by arguing that the circuit court was deprived of jurisdiction because he filed his appellate transcript with the Arkansas Court of Appeals.[85] The circuit court rejected the debtor's argument and held that he "was in willful . . . violation of the court's order due to his failure to comply with the order directing him to pay attorney's fees."[86] In doing so, the court noted "that there had been no testimony or evidence at the hearing demonstrating [the debtor's] inability to comply with the court's order."[87] In short, the court found that the debtor had willfully violated the court order because he had disregarded the court's order to pay the outstanding sum and provided no explanation as to his inability to pay the debt in light of his recent windfall.[88] Indeed, the circuit court reasoned that a court possesses the power to imprison when it appears that a contemnor has the ability to comply with the court's order, but chooses not to—such

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74 *Id.*
75 *Albarran*, 2013 Ark. App. 738 at 2, 431 S.W.3d at 310, 312.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Albarran*, 2013 Ark. App. 738 at 2-3, 431 S.W.3d at 310-13.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.* at 3, 431 S.W.3d at 312-13.
85 *Albarran*, 2013 Ark. App. 738 at 2-3, 431 S.W.3d 310-13.
86 *Id.*
87 *Id.* at 3, 431 S.W.3d at 313.
88 *Id.*

an action, concluded the court, is the meaning of willful obstinacy.[89] In so holding, the court allowed Liberty a body of attachment, allowing the local sheriff to bring the debtor into "custody to bring him before the court to see if there was any reason for his failure to comply with the court's order."[90] The debtor then timely filed notice of appeal, bringing the case before the Arkansas Court of Appeals.[91]

The Arkansas Court of Appeals began its analysis by acknowledging that civil contempt is designed to coerce compliance with a court order, and in this sense the contemnor[92] is thought to "carry the keys of their prison in their own pockets."[93] Because the circuit court's order was definite in its terms and clear in its impositions, the question before the court was whether the debtor's behavior constituted willful obstinacy.[94] The debtor in this case argued that because he did not have the ability to comply, his sentence would be a *de facto* sentence to debtors' prison, outlawed by the Arkansas State Constitution.[95] In response, the court of appeals acknowledged that "[a] court's power to institute civil contempt in order to acquire compliance with its orders is a long-standing rule of law, but it may not be exercised where the alleged contemnor is without the ability to comply."[96] Thus, noncompliance does not constitute willful disregard of a court order unless the debtor had the methods and means of complying and willfully chose not to do so.[97]

First addressing the debtors' prison argument, the court explained that a debtor imprisoned in this way is not being imprisoned for failure to pay a debt but rather because they have been given numerous opportunities to comply with a court order and refused to do so.[98] The court emphasized that just because the debtor chose not to comply with a contempt order *related to an outstanding debt*, it did not change the fact that he failed to comply with an order of the court.[99] Dismissing the first argument, the court ultimately held that the circuit court properly used their power to coerce compliance because: "there had been no testimony or evidence at the hearing demonstrating [an] inability to comply with the court's order, and the court found him in contempt but gave him another 30 days to comply . . . [and the debtor] has consistently refused to pay the attorney's fees" ordered by the court.[100]

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89 *Id.* at 4, 431 S.W.3d at 314.

90 *Albarran*, 2013 Ark. App. 738 at 3, 431 S.W.3d at 313.

91 *Id.* at 4, 431 S.W.3d at 313-14.

92 *Contemnor* is a common way to refer to the party subject to the contempt order. *Id.*

93 *Id.* (internal citation omitted) (quoting Fitzhugh v. State, 296 Ark. 137, 138, 752 S.W.2d 275, 276 (1988)).

94 *Id.* at 4-5, 431 S.W.3d at 313.

95 *Albarran*, 2013 Ark. App. 738 at 5, 431 S.W.3d at 313-14.

96 *Id.* (citing Ingle v. Ingle, 2013 Ark. App. 660, 3 (2013)).

97 *Id.*

98 *Id.* at 5-6, 431 S.W.3d at 313-15.

99 *Id.* (Emphasis added).

100 *Albarran*, 2013 Ark. App. 738 at 7-8, 431 S.W.3d at 315.

Although a thorough discussion of the *Albarran* case is helpful to our analysis in a multitude of ways, of particular importance is the court's discussion of the constitutionality of imprisoning someone based on debt default. Even though the Arkansas State Constitution includes a clause outlawing the jailing of an individual based on failure to pay a debt,[101] as the court rightly points out, the debtor in this case was not jailed for a failure to repay. Rather, the debtor was being jailed because he had been given upwards of three opportunities to comply with the court's order, and had failed to do so, providing absolutely no proof that he was in any way unable to pay the debt. This was further evidenced by the fact that the debtor had previously settled his auto-accident case and had in his possession a settlement check far in excess of the amount owed.[102] Other state courts considering this matter have failed to recognize the social value of ensuring compliance with a court order and have held antithetically to *Albarran*.

2. *In Re Byrom*

In a case of equal factual complication, the court in *In Re Byrom* refused to imprison a debtor on a contempt order for failing to deposit $85,000 into the court registry.[103] The debtor in this case, Mr. Jerry Byrom, became the sole beneficiary and independent executor of his mother's estate.[104] Shortly thereafter, a creditor filed an unsecured claim against the estate in the sum of $31,992.75 based on two orders signed by the applicable County Probate Court.[105] Both orders were due from the funds of the decedent's estate within 30 days of the issuance date.[106] Neither of the sums were paid, and the creditor was given notice that his claims had been rejected.[107]

Approximately two years later, the creditor filed to remove Byrom as the independent executor or, alternatively, to require him to post a bond in order to compel an accounting of his mother's estate.[108] The creditor claimed that he and the deceased's "attorney/guardian ad litem, sued Byrom in his capacity as independent executor 'for Authentication of Claims,'" alleging in relevant part that Byrom had "failed to comply with a final order of the court, signed on April 23, 2007."[109] The trial court held in the creditor's favor, removing Byrom as independent executor and awarding the creditor $14,034.10 to be paid in 30

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101 *Id.* at 6, 431 S.W.3d at 314; ARK. CONST. art. II, § 16.
102 *Albarran*, 2013 Ark. App. 738 at 1, 431 S.W.3d at 312.
103 *In re* Byrom, 316 S.W.3d 787 (Tex. App. 2010).
104 *Id.* at 788-89.
105 *Id.* at 789.
106 *Id.*
107 *Id*.
108 *Byrom*, 316 S.W.3d at 789.
109 *Id.*

days.[110] Moreover, the court ordered that Byrom deposit the cash relating to a sale of real property in the amount of $622,786.22—later the required deposit was reduced to $85,000.00.[111] Because Byrom had not paid the amount required in the time allowed, the creditor moved for contempt.[112] At the hearing on the matter, Byrom acknowledged the $622,786.22 windfall from the sale of his mother's estate, but claimed he was still unable to pay the $85,000 owed.[113] The trial court informed Mr. Byrom that if he failed to deposit the required money into the court's registry he would be held in contempt and imprisoned; Byrom did not pay the money and was imprisoned.[114]

On appeal, Byrom argued that imprisonment for failure to pay debt was unconstitutional under the Texas State Constitution Article 1, Section 18, which states, "[n]o person shall ever be imprisoned for debt."[115] The Texas Court of Appeals noted that "an obligation that is a legal duty arising out of the status of the parties is not a debt and therefore may be enforced by contempt."[116] While acknowledging the validity of the use of imprisonment in some instances, the court of appeals found that debts arising out of a contract or placed in the form of a judgment are debts within the language of the constitutional provision.[117] Because the court found that the debt at issue in this case qualified as such, the debtor could not be imprisoned to regain the sum owed.[118]

In Re Byrom represents a state court's interpretation of state law and should be read as such. To reiterate, the model discussed herein does not run afoul of laws like that discussed in *Byrom*. The debtors in these cases are not being held in prison for failure to pay debt but rather for willful failure to abide by an order of the court. Civil contempt orders have long been utilized to compel action in accordance with a court's will.[119] States that have held unconstitutional the use of civil contempt orders in this arena have failed to uphold an important power of the court.

Further, debtors wishing to avoid this situation have multiple outlets for avoiding retribution. First and foremost, a debtor facing this kind of punishment can work with a debt buyer or collector to structure a repayment plan accounting for their individual financial situation. Debtors may also avoid imprisonment by proving to the issuing court that they are unable to repay their debt. Alternatively, and perhaps more simply, a debtor facing this situation can file for bankruptcy, which carries with it an automatic stay from collections and the potential

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110 *Id.*
111 *Id.* at 789-90.
112 *Id*. at 790.
113 *Byrom*, 316 S.W.3d at 790.
114 *Id.*
115 *Id.* at 791; TEX. CONST. art. I, § 18.
116 *Byrom*, 316 S.W.3d at 792 (referencing *In re* Henry, 154 S.W.3d 594, 596 (Tex. 2005) (holding that delinquent child support payments are not a debt)).
117 *Id.*
118 *Id.* at 792-95.
119 *See, e.g.,* Ressler, *supra* note 43, at 371.

discharge of their debt. Thus, concerns over the constitutionality of these laws confuse the process of the issuance of a civil contempt order and refuse to acknowledge that a debtor in this situation likely failed to mitigate their predicament in any tangible way.

C. Third Party Debt Buying and Second Party Debt Collectors

Recently, "debt buying" has become one of the fastest growing trends in the debt collection market.[120] "Debt buying," for our purposes, refers to tertiary parties who purchase debt from first and second party debt owners and subsequently attempt to collect the debt.[121] Because most of the contempt orders referred to here result from legal actions taken by these third party buyers, this Note focuses mainly on the efficiency of the practice for these downstream buyers.

To grasp a basic understanding of the debt buying process, it may be illustrative to distinguish it from debt collection. When a first party creditor makes the decision to sell debt to a third party debt buyer they create a debt portfolio, which they market to potential buyers.[122] The portfolios contain large collections of similar or "bundled" debt—similarities range from "type of debt, to location of the debtor."[123] Because debt buyers may have incomplete or inaccurate information there may be some additional cost insulated from the possibly low sticker price of the debt.[124] After collecting the necessary information, debt buyers may then attempt to collect on the debt or sell the portion of the debt they could not recover to another buyer.[125] Unlike debt collection, the debt buyer has no contracted return rate that must be paid to the original creditor upon collection.[126]

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[120] FED. TRADE COMM'N., THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, i (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[121] *Id.*

[122] *Debt Buyers and Debt Collection Agencies: What Consumers Should Know*, CLEARPOINT CREDIT COUNSELING SOLUTIONS, http://www.clearpointcredit counselingsolutions.org/resource-center/articles-and-tips/dealing-with-debt/debt-buyers-debt-collection-agencies, subsection "Third Party Debt Collectors and Debt Buyers" (last visited Sept. 20, 2015) [hereinafter *Debt Buyers and Debt Collection Agencies*].

[123] *Id.* at subsection *The Debt Buying Process.*

[124] *Id.* at subsection *Debt Buyers May Not Have Accurate Information.*

[125] *Id.* at subsection *Resale*.

[126] *Id.* at subsection *What Happens Next?*; *see also Examination Procedure Debt Collection,* CONSUMER FIN. PROT. BUREAU, http://files.consumerfinance.gov /f/201210_cfpb_debt-collection-examination-procedures.pdf (last visited Oct. 20, 2015) [hereinafter *Examination Procedure*] ("Third-party debt collection agencies [referred to elsewhere in this Note as debt collectors for simplicity] collect debt on behalf of originating creditors or other debt owners, often on a contingency fee basis. Debt buyers purchase debt, either from the originating creditor or from another buyer, usually for a fraction of the

Hoping to grasp a better understanding of this emerging market, the Federal Trade Commission ("FTC") recently conducted a study analyzing information from the nine largest debt buyers, who accounted for 76.1% of debt sold in 2008.[127] Through its study, the Commission acquired data on more than 5,000 debt portfolios, encompassing nearly 90 million consumer accounts.[128] Combined, "these accounts had a face value of $143 billion dollars," but were purchased for a mere $6.5 billion, meaning that debt buyers paid only 4.5% of the value of the debt.[129] Thus, these downstream debt buyers paid an average of only 4.0 cents on the dollar to acquire debt with a value of $143 billion dollars.[130]

Because the purchase price of the debt is so low, a third party debt buyer must only see a slight return to see a large profit. Because, as explained above, debt buyers do not operate on commission, their revenues are not tempered by a contractual obligation to return a percentage of the debt collected to the original creditor. Although traditional methods of phone calls and mail-outs allowed large revenues, employment of the threat of imprisonment has led to record levels of return on investment.[131] Indeed, since employing this method, one debt buying company reported "a 239 percent return."[132]

One of the largest differences between a debt buyer and a debt collector is the contract between the collections agency and the bank. Although debt buyers purchase the debt outright, many debt collectors do so on the basis of commissions and are contractually obligated to return a percentage of the debt collected to the debt owner.[133] For a bank or other large financial institution, the collections agency offers both positives and negatives. Specifically, entering into this sort of contract ensures that the bank will recover at least some of the value of debt; however, this arrangement also ensures that the institution will incur the cost of a potentially long recovery period.[134] This, however, does not mean that debt collectors do not enjoy a large return on investment. In 2010, debt collectors recovered around $54.9 billion in total debt, earning approximately $10.3 billion in commission. This means that in 2010 alone, the debt collection industry

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balance owed.").

[127] FED. TRADE COMM'N., *supra* note 120, at i.

[128] *Id*. at ii.

[129] *Id.*

[130] *Id*.

[131] Silver-Greenberg, *supra* note 67 ("Debt collectors used to harry nonpaying borrowers for months with letters and phone calls. But those tactics are less effective now that many more borrowers are deeply in debt. So the new breed of debt collectors turns much more quickly to court to squeeze money out of distressed paper."); s*ee also* Van Buren, *supra* note 6.

[132] Van Buren, *supra* note 6.

[133] CONSUMER FIN. PROT. BUREAU, *supra* note 126.

[134] This is especially true since debt collectors, particularly those attached in some way to large banks, are unlikely to use the threat of imprisonment, meaning their only method of recovery is direct solicitation to the debtor through phone calls and mail, which, as already mentioned, have a low response rate. Silver-Greenberg, *supra* note 67.

returned over $44.6 billion in debt to first party creditors and the general economy.[135]

Because the difference between debt collectors and debt buyers is technically difficult, a hypothetical may be illustrative. Assume that Bank X issues a loan to Borrower Y for $10,000. Borrower Y defaults, leaving $9,000 of the loan unpaid. In attempt to collect Y's outstanding debt, Bank X will enter into a commission-based contract with Collector Z. Collector Z will then attempt to collect the debt from Borrower Y, largely through phone and mail contact. If Collector Z is successful, a large portion of the $9,000 will go back to Bank X, minus the commission owed to Collector Z. Because the value of the debt depreciates as it ages, if Collector Z remains unsuccessful, at some point Bank X will determine that selling the debt at a huge discount is more profitable than incurring any additional collections costs. At this point Bank X will contract with Buyer B—an independent third party company—to sell Borrower Y's debt and information outright. If Buyer B is successful in collecting the outstanding debt, Buyer B will keep 100% of the money gained. After purchasing the bundled and heavily discounted debt, Buyer B will then attempt to collect the debt via phone and mail outs. If Buyer B is unsuccessful in their initial collection attempts, they may then pursue filing a claim against Borrower Y. If Borrower Y chooses not to settle, the court may enter judgment in favor of Buyer B, ordering repayment of the debt. If Borrower Y continues to evade the court order, Buyer B can file for civil contempt, and a court will determine if Borrower Y can be imprisoned for intentionally failing to comply with the court's order. Keep in mind that if Borrower Y can show that they are unable to repay the debt, the court cannot sentence them to imprisonment.

In both debt buying and debt collection, the original creditor loses some amount of the total value of their original investment. For debt that remains delinquent past 30 days, the rate of recovery for debt collectors is approximately 20%. Moreover, because the longer a debt remains uncollected the more its value depreciates, a recovery of only 20% after 30 days, represents not only an 80% facial loss to the institution of the overall debt, but also the amount representing the debt's depreciation value. Further, the bank incurs an opportunity cost by losing the chance to sell the debt when it is younger and more valuable. Although utilizing a debt collection agency may be less costly because the original creditor retains a large amount of control, sale of debt constitutes an immediate return on investment without having to absorb the costs of a long collections process.[136] Moreover, sale to a debt buyer insulates the institution from the depreciation loss and opportunity cost of uncollected debt. That being said, considering the FTC rates above, debt buyers are unlikely to pay above five to ten percent of the face

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[135] ERNST & YOUNG, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE NATIONAL AND STATE ECONOMIES 2 (February 2012), http://www.acainternational.org/files.aspx?p=/images/21594/2011final-ey-acaeconomicimpactreport1.pdf.

[136] *Debt Buyers and Debt Collection Agencies*, *supra* note 122, at subsection *What Happens Next?*.

value of the debt.[137] This means that regardless of which method the creditor employs, in a worst-case scenario they may lose between 80-95% of the face value of the debt.[138]

D. How The Debtors' Prison Model Works Abroad

> Debtors' prisons are still widely used throughout the world.
>
> In Greece, a debtor can still be imprisoned for not paying his . . . debt to a private bank. Germany maintains comparable concepts to debtors' prisons. Debtors in the United Arab Emirates (including Dubai) can be imprisoned for failing to pay their debts. China, including Hong Kong, has debtors' prisons, inter alia.[139]

By examining debtors' prisons abroad, we can see both the strengths and weaknesses of the system currently employed in the United States. Stringent models employed by Middle Eastern states, like Saudi Arabia and Dubai, are of particular import because they evidence the deterrence to risky borrowing and lending that the threat of prison provides. Additionally, looking at different forms of enforcement ranging from what could be considered the most traditional in Dubai to the most modern in the United States makes clear that although most *in terrorem* legal structures offer some level of deterrence, the system behind the practice can aid in maximizing that benefit while minimizing the associated social costs. To understand how these comparisons add or detract from the larger discussion of the functionality of debtors' prisons in the United States, it is necessary to explore how these systems operate.

1. Saudi Arabia

Before delving into how the debtors' prison model functions in Saudi Arabia, it is important to understand a bit about the country's legal and judicial structure. Because Saudi Arabia is an Islamic state, its legal and judicial structure is based on Islamic law, regardless of whether a case is civil or criminal in nature.[140] The Saudi Arabian court system is divided into three parts, the Shari'ah

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[137] FED. TRADE COMM'N., *supra* note 120, at i.

[138] *See id.*; Van Buren, *supra* note 6.

[139] CHARLES JEROME WARE, LEGAL CONSUMER TIPS AND SECRETS: AVOIDING DEBTORS' PRISON IN THE UNITED STATES 178 (2011).

[140] *About Saudi Arabia, Legal and Judicial Structure,* ROYAL EMBASSY OF SAUDI ARABIA IN WASHINGTON, DC (last visited Oct. 2, 2015), http://www.saudiembassy.net /about/country-information/government/legal_and_judicial_structure.aspx [hereinafter *About Saudi Arabia*].

Courts, which hear the largest number of cases across the broadest spectrum of issues, the Board of Grievances, which presides over matters involving the government, and lastly "various committees within government ministries that address specific disputes, such as labor issues."[141] For those unfamiliar with Shari'ah law, the term refers to a series of guidelines derived from the Holy *Qur'an*, the *Sunnah*,[142] *Ijma'*,[143] and *Qias*.[144] In 2007, by royal order, the Saudi Arabian system was enlarged to include a Supreme Court and smaller courts presiding over commercial, labor, and administrative issues.[145] Like the legal system in the United States, "Shari'ah [law] presumes that a defendant is innocent until proven guilty, and only in serious crimes or in cases of repeat offenders is one likely to witness severe punishments."[146] Because there is no separation between secular and religious aspects of society, the government plays a large role.[147]

Like many other areas of Saudi Arabian society, the Saudi government controls much of the country's financial sector.[148] Even with government oversight, recent reports from Saudi Arabia put the rate of consumer debt used to purchase consumer goods at 75%.[149] Reacting to this debt saturated market, Saudi Arabian banks cracked down on their lending and borrowing practices.[150] In order to enable banking reform, the SADAD Payment system, established by the Saudi Arabian Monetary Agency in 2004, streamlined bill payment through a more unified system of banks.[151] In boosting the efficiency of bill repayment the system strengthened the rights of banks,[152] allowing them to implement stricter debt collection practices.[153]

Collection practices in Saudi Arabia today are extremely strict: "When . . . money is not repaid in due time, the bank freezes the account, stops all electronic transactions of the debtor, and . . . sends them notifications through the

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[141] *Id.*

[142] The *Sunnah* refers to "the practices and sayings of the Prophet Muhammad during his lifetime." *Id.*

[143] *Ijma'* refers to "the consensus of opinion of Muslim scholars on the principals involved in a specific case occurring after the death of the Prophet." *Id.*

[144] *Qias* refers to a source of law referred to by analogy. *Id.*

[145] *About Saudi Arabia, supra* note 140.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Saudi Arabia and the UAE Handle Bad Debts Differently, yet Both Come to the Same Wrong Conclusion*, FAILKA (Feb. 6, 2013, 5:23 PM), http://failaka.com/saudi-arabia-uae-bad-debts/#sthash.b2A7oFDe.0BZn4bR7.dpbs [hereinafter FAILKA Article].

[150] *Id.*

[151] *SADAD,* SABB, https://www.sabb.com/1/2/sabb-en/personal/services/sadad [hereinafter SABB].

[152] *Id.*; Diana Al-Jassem, *60,000 Saudis Unable to Repay Their Debts*, ARAB NEWS (Feb. 6, 2013) http://www.arabnews.com/60000-saudis-unable-repay-their-debts.

[153] SABB, *supra* note 151.

police department."[154] Through utilization of the police department and the courts, those debtors who default on their debt are imprisoned until they are able to settle with the appropriate bank.[155] Similar to the system operating in the United States, "Saudi law allows imprisonment for debt but makes an exception if the person is insolvent."[156] Some reports, however, claim that unlike in the United States where imprisonment for debt is permitted only in cases in which the debtor willfully refuses to comply with a court order, debtors' prisons in Saudi Arabia are used more frequently and more arbitrarily.[157]

Claims of arbitrariness largely result from the countries' utilization of Shari'ah law, which exists in the absence of codification and without a reliable system of precedent.[158] Facially, Saudi Arabia's interpretation of the debtors' prison model is much more traditional—meaning it is closer to the historical system followed in England—than that currently existing in the United States. Notably, the Saudi Arabian model highlights the importance of having an independent and reliable system behind implementation of the debtors' prison method to guard against arbitrariness and overuse. As discussed below, however, even within this stricter debtors' prison model, the threat of imprisonment may in fact deter risky borrowing and lending. Even the seemingly strict model employed in Saudi Arabia may seem relatively tame when compared with that employed in Dubai, which has no bankruptcy system, leaving debtors no real options outside of a prison sentence.

2. Dubai

Dubai is one of seven emirates comprising the United Arab Emirates (UAE).[159] As a member of the UAE, Dubai is subject to the federal law applicable to all seven emirates, but holds the right to manage its internal affairs.[160] Like Saudi Arabia, the legal system relied on in Dubai is largely based on Shari'ah law with foundations in the principles of civil law.[161] In reaction to exposure to international commerce, Dubai and the UAE have developed codified

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[154] *Id.*

[155] *Id.*

[156] *Saudi Arabia: Free Debtors from Prison, Continuing Detention Violates Arab Human Rights Charter, Saudi Laws*, HUMAN RIGHTS WATCH (Nov. 2, 2010), http://www.hrw.org/news/2010/10/28/saudi-arabia-free-debtors-prison [hereinafter *Free Debtors from Prison*].

[157] *Id.*; *see also* Christoph Wilcke, *Saudi Arabia Needs a More Transparent Justice System*, THE GUARDIAN, (Oct. 26, 2011, 05:30 AM), http://www.theguardian.com/commentisfree/libertycentral/2011/oct/26/saudi-arabia-justice-system-reform.

[158] *Free Debtors From Prison, supra* note 156; Wilcke*, supra* note 157.

[159] ANDREW TARBUCK & CHRIS LESTER, DUBAI'S LEGAL SYSTEM CREATING A LEGAL AND REGULATORY FRAMEWORK FOR A MODERN SOCIETY 7 (2009), www.lw.com/upload/pubContent/_pdf/pub2787_1.pdf.

[160] *Id.*

[161] *Id.*

federal laws, which cover everything from civil procedure to intellectual property.[162] Dubai retains courts and judges independent of the UAE, which apply both federal law and where federal law is silent, decrees enacted by Dubai's Ruler.[163] Dubai's court system is made up of a Court of First Instance, a Court of Appeal, and a Court of Cassation, each of which are divided into three divisions for civil law claims, criminal cases, and matters pertaining to Shari'ah law.[164]

The wide use of the debtors' prison model in Dubai, results largely from the country's relationship to credit card debt.[165] Due to restrictions embedded in Islam discouraging the charging of interest, credit card usage was traditionally very low in Dubai.[166] By 2008, however, foreign banks like Citigroup and HSBC fought to take the controlling share of the Dubai market, and as a result "the number of cards leapt to four million[,] . . . a fivefold increase in five years."[167] Although short term gains were prevalent, Dubai's lack of a reliable credit bureau led to creditors lacking knowledge as to how many cards or even how much debt any one debtor carried.[168] Lack of such information led to rampant engagement in risky borrowing and lending practices with inexperienced debtors accepting an average interest rate of 36%—more than twice the national average.[169] Some reports from this time period show debtors borrowing at a rate of 50%.[170] Such staggering debt required more stringent government oversight and the development of a stricter form of the debtors' prison model—perhaps even more akin to the historical English system than that developed in Saudi Arabia. Indeed; analogous reports of inhumane treatment are now surfacing from Dubai's debtors' prisons, with one report describing more than 250 prisoners sharing six rooms designed to hold only 48 and only two working toilets.[171] Unlike in the United States, where debtors are jailed after failing to comply with court orders, in Dubai bouncing a check is a jailable offense, and "debtors go to jail for bouncing the blank 'security checks' they must sign when accepting a card. If borrowers fail to pay, banks can deposit the checks for the sum owed," thus bouncing the check.[172] Like the Saudi Arabian system discussed above, the model employed in Dubai underscores the importance of the systems working behind the debtors' prison

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[162] *Id.* at 8.

[163] *Id.*

[164] Tarbuck & Lester, *supra* note 159, at 8-9.

[165] Jason Depale, *Stuck in a Web of Debt*, THE HINDU (Aug. 23, 2011), http://www.thehindu.com/opinion/op-ed/stuck-in-a-web-of-debt/article2384742.ece.

[166] *Id*.

[167] *Id.* (citing the source of this figure to a study conducted by the Lafferty Group, a London research firm).

[168] *Id.*

[169] *Id.*

[170] Depale, *supra* note 165.

[171] Henry Meyer, *Jailed in Dubai, Accused Wait Long After Good Times*, BLOOMBERG (Aug 11, 2010 11:14 AM), http://www.bloomberg.com/news/2010-08-10/jailed-in-dubai-accused-wait-long-after-the-good-times-have-disappeared.html.

[172] Depale, *supra* note 165.

model in realizing the benefits of the *in terrorem* effect while shielding against social costs.

Thus, unlike in the United States, where the decision to jail for failure to pay a debt stems from a civil contempt order issued by a neutral, detached magistrate, in Dubai and Saudi Arabia the government and the banks hold all the power. Important to note here is that even an advanced network of debt buyers operating in either state would be powerless to decide when and if imprisonment should be pursued. Thus, debt buyers would be unable to levy the threat of prison against debtors, and the same level of deterrence present in the United States would likely remain unrealized. Although the same level of deterrence may be unrealizable under the current debtors' prisons models, some point to the fact that even this strict imposition of prison sentences creates deterrence through fear, just as the threat of imprisonment does in the United States.[173]

V. IMPLICATIONS OF THE DEBTORS' PRISON MODEL

A. The Debtors' Prison Model is Economically Efficient as a Viable Business Model

Putting the constitutionality of the practice aside, at the very least, utilization of the debtors' prison model is an economically efficient and lucrative business tool. Encore Capital Group and its subsidiaries, such as Midland Credit Management, Inc., are thought to be some of the nation's biggest downstream debt buyers.[174] Midland Credit Management commonly uses the threat of imprisonment to try and encourage repayment of debt.[175] In 2009 alone, one out of six of Encore's subsidiaries reportedly filed upwards of 245,000 lawsuits with a resulting return of $487.8 million.[176] Further evidencing the effectiveness of this model is a case study from North Virginia, in which Midland filed 16,878 lawsuits over otherwise uncollectable debt between 2003 and 2014.[177] Of the 16,878 suits filed, nearly two-thirds either settled voluntarily or resulted in judgments in

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[173] *See infra* Part V.B (discussing the deterrence effect of prison sentences in either country).

[174] Danielle Douglas, *Taking on the Country's Biggest Debt Buyer*, THE WASHINGTON POST (May 9, 2014), http://www.washingtonpost.com/business/economy/taking-on-the-countrys-biggest-debt-buyer/2014/05/09/fbd65a24-a94d-11e3-b61e-8051b8b52d06_story.html.

[175] Silver-Greenberg, *supra* note 67. Repayment can refer to voluntary settlement, meaning in the absence of court intervention, or involuntary settlement as a result of court action, meaning that a creditor obtains a money judgment they can then utilize to pressure the debtor into repaying the money owed, including through wage garnishment and property liens.

[176] *Id.*

[177] Douglas, *supra* note 174.

favor of Midland, which the company then used to urge repayment from the debtor.[178]

Although critics may sight concerns over "robo-signing" of complaints without proper documentation and cost to the judicial system, with returns as large as those reported by Encore and other debt buyers,[179] the economic value of the practice is undeniable.[180] Further, some of these concerns may be over-exaggerated as Encore claims to have "180 million pages of documentation from issuers supporting the debts . . . collect[ed], with access to even more."[181] For those critics who worry that the *in terrorem* effect of this revamped process isn't worth the cost on judicial economy, Encore counters that it makes every possible effort to contact each individual debtor by phone or mail in an attempt to work out an oft discounted settlement.[182] Although some may regard such remarks as mere fluff, such critics may want to consider that the cost of collection "through . . . legal channel[s] is nearly fives times higher than [the] cost to collect through other channels," which ensures its use only as a last resort.[183] Moreover, because repayment of debt becomes exponentially more unlikely if a debtor is actually imprisoned, companies like Encore have a disincentive to pursue legal action past the contempt stage.

Further, while some may see this system as placing a large amount of power in the hands of creditors all too willing to take advantage, proponents suggest looking broadly at the economic benefit of discouraging default on debt. Indeed, creditors are simply working within a system of neutral and independent courts to hold debtors responsible for agreements they entered into voluntarily. Perhaps even more importantly, the system at issue here discourages negative behavior on both sides. On the one hand, this system may discourage future debtors from borrowing money they cannot afford, defaulting on debt already incurred, or encouraging settlement of outstanding claims. On the other hand, the system discourages first party creditors from continuing to make overly risky loans in the first place, lest they prefer to continue to provide profits to their direct competitors, many of whom offer the same services as traditional banks. This argument becomes more persuasive as more debt buyers are now utilizing complex business structuring to partner with or create subsidiaries engaging in commercial lending and borrowing.[184] Encore, for example, has partnered with Heartland to compete in this normally bank-centered market.[185] As Heartland's website emphasizes, partnerships such as

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[178] *Id.*

[179] As previously discussed, some companies report up to 239% in return rates. Van Buren, *supra* note 6.

[180] Douglas, *supra* note 174.

[181] *Id.*

[182] *Id.*

[183] *Id*.

[184] *Lending Services,* HEARTLAND, http://www.heartlandpaymentsystems.com/lending/ (last visited Nov. 2, 2015).

[185] *Id.*

this offer a direct advantage over more recognized commercial lending institutions because "[U]nlike most commercial banks, Heartland Lending Services and its lending partners understand small business owners. . . . That's why . . . you can borrow up to $750,000 for any business purpose—quickly, without collateral or complicated paperwork."[186] A closer examination of the two major modes of deterrence will reveal a fuller understanding of why the *threat* of imprisonment is the key to maximizing the benefits of the debtors' prison model.

B. The Debtors' Prison Model Offers Two Modes of Deterrence

Critics of the debtors' prison model point to the fact that debtors imprisoned for failure to repay their debt will be less likely to make payments once out of prison—due largely to the potential for job loss and the interruption in earning potential.[187] Although in theory this may be true, these same parties fail to look at the correct link in the chain to realize the model's true deterrence value. Indeed, it is not the imprisonment of debtors that creates the deterrence, but rather the *threat* of prison that creates repayment and settlement of debt owed. The discussion of Encore's astounding rate of return above bolsters this point. The use of the legal system to coerce debtors into repaying their obligations is extremely effective. Moreover, most people in this situation are not in fact imprisoned; instead, they settle their debt or agree to a repayment plan.[188] Although rare cases of imprisonment do occur,[189] this is a necessary evil because if the threat of imprisonment was empty then the deterrence value of the system would be moot. Thus, while it is logical to see that imprisoning debtors may not encourage those individual debtors to pay down their debts, those same debtors stand as an example, encouraging the vast majority to settle on their debt before such action is taken. Moreover, because once a debtor is imprisoned they become increasingly unlikely to repay,[190] debt buyers are logically discouraged from overusing motions for civil contempt.

Further, the effectiveness of the threat of being imprisoned for failure to abide by a court order is likely to deter risky lending and borrowing practices. In recent years this method of debt collection has seen an enormous return on investment for third party buyers. However, the cost associated with this model—in human capital through employment of legal assistance, court fees, and

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[186] *Id.*

[187] *See generally* James, *supra* note 1, at 163.

[188] Silver-Greenberg, *supra* note 67.

[189] While no national statistics are kept on how many people are incarcerated in the United States for failure to pay debts, some reports cite to a few hundred across the country. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

[190] James, *supra* note 1, at 148.

the like—make it an unrealistic option for first party creditors obviously unable to take advantage of bundled discounted debt. Not to mention that the perceived harshness of this method likely ensures too much ill will for a nationally known and recognized bank or other similar creditor to take advantage of this model. As we saw above, when a creditor chooses to sell debt, they may incur an extremely large loss on the face value of the debt—up to 95% estimating from the FTC's latest reports.[191] In the long term, realizing such a loss and recognizing that a direct competitor is able to see a large return as a result, may discourage first party lenders from making the type of loans that lead to the employment of the debtors' prison model in the first place. Thus again, critics of this model fail to look systemically at the effects of this practice to realize its true deterrence value.

C. The Use of the Debtors' Prison Model in the International Sphere Demonstrates Both its Effectiveness and Deterrence Value

The successful use of the debtors' prison model abroad not only helps to demonstrate its effectiveness, but also points to differences in the U.S. system that may maximize deterrence while minimizing social cost. Saudi Arabia, arguably implements a more traditional form of debtors' prisons model than that employed in the U.S. Although the Saudi system exempts debtors who can show they are insolvent, its reliance on Shari'ah law often results in the arbitrary imprisonment of debtors.[192] That said, even this conceivably harsher system has proven to provide deterrence as recent changes in the law working in tandem with the threat of being imprisoned, has dramatically lowered borrowing and lending.[193] Indeed, one of the chairmen of the National Committee for the Care of Prisoners and their Families, has commented, "I think Saudis are becoming more cautious about getting indebted due to the strict procedures that banks are following."[194] The chairman, went on to explain that those already in debt have begun to look for money in other places, such as asking family members for help, out of fear of imprisonment.[195] Although this system may seem harsh to outsiders, in a country where recent estimates place consumer debt as making up 27.2% of GDP, a harsher version of the debtors' prison model may be necessary to discourage overly risky borrowing and lending.[196] The evidence from Saudi Arabia confirms the deterrent effect of the model while

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[191] FED. TRADE COMM'N., *supra* note 120, at i-ii.

[192] *Free Debtors from Prison, supra* note 156.

[193] Al-Jassem, *supra* note 152 (reporting a drop in borrowing and lending after implementation of debtors' prisons by the national committee for the care of prisoners and their families).

[194] *Id.*

[195] *Id.*

[196] *Id.*

emphasizing that the oversight of courts in the United States is important for minimizing social cost.

Emphasizing the importance that debt buyers play in maximizing deterrence, Dubai's debtors' prison model relies on heavy threats with adverse results.[197] Although Dubai's system has evidenced some deterrence, many identify an inability to maximize these benefits due to the lack of any form of collections systems.[198] Underlining the importance of such systems in relation to deterrence is the fact that because citizens of Dubai are unable to turn to a company offering debt restructuring, they flee from the country in mass.[199] Analyzing these models comparatively highlights the significance of the system working behind the implementation of the debtors' prison model and reveals that contrary to critics' assertions, the threat of imprisonment actually does reduce risky borrowing and lending practices.

VI. CONCLUSION

The rate of return for debt buyers who utilize the threat of prison to pressure debtors into repaying and/or settling outstanding amounts owed, shows not only that the system is an efficient business model, but that it is a useful and proven method for the collection of debt. Although critics argue that the system is too harsh and provides little deterrence, they fail to recognize that the deterrence value of the debtors' prison model comes not from those imprisoned after defaulting on debt and then consistently failing to take responsibility for their actions, but rather from the market incentives the model provides to creditors. Whether creditors utilize debt buyers or debt collectors, they are likely to realize only a small amount of the original value of the debt. Although certainly these first party creditors are in no sense hurting from this loss, the potential return realized by the nation's largest debt buyers, who compete directly with first party creditors, is likely to disincentivize creditors from lending to such risky borrowers in the first place. This conclusion is evidenced by the employment of debtors' prisons in other countries. In Saudi Arabia, which imposes a much more stringent version of the system, we can see that while the threat of prison may be more effective than imprisonment itself, the heavy penalty of prison discourages borrowing while restricting lending to less risky endeavors. Likewise, Dubai's system reiterates the importance of underlying financial and legal structures, capable of promoting deterrence,

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[197] Hugh Naylor, *Pay up or Go to Jail, Banks Tell Debtors,* THE NATIONAL (July 26, 2009), http://www.thenational.ae/news/uae-news/pay-up-or-go-to-jail-banks-tell-debtors#full.

[198] *Id.* Collection systems could mean a uniformly followed bankruptcy system or the widespread utilization of credit bureaus, collections agencies, and debt buyers.

[199] Robert F. Worth, *Laid-Off Foreigners Flee as Dubai Spirals Down*, N.Y. TIMES (Feb. 11, 2009), http://www.nytimes.com/2009/02/12/world/middleeast/12dubai.html.

while avoiding abuse. Although some may argue that creditors will not be deterred, at the very least the large return on investment seen through utilization of the legal system ensures the continued use of the debtors' prison model, and at most, as profits soar, creditors may be more reluctant to leave billions of dollars on the table.

THE EUROPEAN UNION AND UNITED STATES IMMIGRATION SYSTEMS: WHY BORDER STATES SHOULD NOT BE THE BEASTS OF BURDEN

Jahna Locke*

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I. INTRODUCTION

> *Paradoxically, the ability to control migration has shrunk as the desire to do so has increased. The reality is that borders are beyond control and little can be done to really cut down on immigration. The societies of developed countries will simply not allow it. The less developed countries also seem overwhelmed by forces propelling emigration. Thus, there must*

* To Kevin, Sampson, and Marco. One of you made me coffee while the other two curled up at my feet keeping me warm. Thank you for the support. The author would also like to thank her classmate, Bri Campbell, Note Comment Editor, Dane Dehler, and Supervisor, Professor David Gantz, for their thoughtful comments; this Note flourished because of your time and effort, thank you.

> *be a seismic shift in the way migration is addressed: governments must reorient their policies from attempting to curtail migration to coping and working with it to seek benefits for all.*
>
> -Jagdish Bhagwati, 2003

The European Union ("EU") and United States immigration systems are parallel because both 1) have union/federal government setting policy for semi-autonomous regions, 2) are plagued by mass illegal immigration,[1] and 3) have border states that are disproportionally burdened in coping and dealing with this illegal immigration.[2] This Note will review the EU and U.S. immigration systems, their respective immigration histories, and their scholarly views of immigration trends and policies. From this review the analysis will examine how and why border states in both the EU and United States are similarly burdened by mass illegal immigration. Finally, this Note will recommend policy changes to shift the burden of illegal immigration solely away from border states thus making structural adjustments to create more effective and functional immigration systems. As explained in this Note, border states and surrounding communities' limited ability to cope with mass illegal immigration is a systemic issue within the EU and United States that ultimately affects all member states.[3] Because mass illegal immigration is an issue that affects all member states in the EU and United States, both the Commission and Federal systems, respectively need to invest in border states' efforts to manage mass illegal immigration and enforce local and national immigration policies.

Illegal immigration and its burden on border states affect all EU and U.S. member states regardless of point of entry. These affects include problem solving the cost of massive systems that process asylum applications, family relocation, and navigating the shifts in communities to accommodate recently immigrated individuals and families. Accordingly, the EU and the United States need to shift

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[1] Although there are more sensitive terms to describe individuals who enter a nation without correct legal documentation such as *irregular* or *undocumented*, the term *illegal immigration* will be used in this Note. By using this specific term the author is highlighting that border states are alone in the burden of enforcing EU Commission and U.S. Federal immigration laws.

[2] "[C]omparisons between the European Union and the United States are widely accepted, as the European Union is understood by many to display elements of a federal system sufficient to allow for useful and meaningful comparative analysis." Erin F. Delaney, *Justifying Power: Federalism, Immigration, and 'Foreign Affairs,'* DUKE J. OF CONST. L. & PUB. POL'Y 153, 154 (2013).

[3] For a list of EU and U.S. member states, *see Countries in the EU and EEA*, GOV.UK, https://www.gov.uk/eu-eea (last updated Nov. 12, 2014); *see also 50 States and the District of Columbia*, U.S.A.GOV, http://www.usa.gov/Agencies/State-and-Territories.shtml (last updated Mar. 9, 2015). This Note primarily focuses on Greece, Italy, and Spain in the EU and Texas, Arizona, and California in the United States.

the burden of paying for border security from border states to a holistic approach. Instead, a system in which all states, regardless of location, contribute an equitable amount to the maintenance of the border and the support of many systems immigrants are processed through, such as hospitals, schools, and the welfare system, needs to be instituted.

II. BACKGROUND

A. The European Union

1. History of Immigration in the European Union

To understand how immigration policy is enforced in the EU, a cursory overview of the formation of the EU and its infrastructure is necessary. The contemporary EU began with the combined endeavors of Belgium, France, Germany, Italy, Luxembourg, and the Netherlands on April 18, 1951, to promote peace after World War II using economic and political means through the creation of the European Coal and Steel Community ("ECSC") promulgation of the Schuman Declaration.[4] The ESCS's success led these six states to sign the Treaty of Rome and create the European Economic Community ("ECC") that formed the underpinnings allowing people, goods, and services to move freely across borders.[5] Although August 1961 saw the separation of communist East Germany from West Germany with the Berlin Wall construction, a common agricultural policy in 1962 gave ECC members joint control over food production and ensured that farmers were paid the same price for produce.[6] The ECC continued its progressive growth in the 1960s with the Yaoundé Convention that liberalized trade with former African colonies.[7] The institution of free cross border trade between the six members, and the application of the same duties on member imports from outside countries—in other words, the world's largest trading group was created.[8] The ECC expanded to include Denmark, Ireland, and the United Kingdom in 1973 and created the European Regional Development Fund a year

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[4] *A Peaceful Europe—The Beginnings of Cooperation*, EUR. UNION, http://europa.eu/about-eu/eu-history/1945-1959/index_en.htm (last visited Sept. 15, 2015); *see also The Schuman Declaration—9 May 1950*, EUROPA.EDU, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last visited Sept. 15, 2015).

[5] *A Peaceful Europe—The Beginnings of Cooperation*, *supra* note 4.

[6] *The Swinging Sixties–A Period of Economic Growth*, EUR. UNION, http://europa.eu/about-eu/eu-history/1960-1969/index_en.htm (last visited Sept. 15, 2015).

[7] Lorand Bartels, *The Trade and Development Policy of the European Union*, 18(4) EUR. J. INT'L. L. 715 (2007), http://ejil.oxfordjournals.org/content/18/4/715.full.pdf+html.

[8] *A Period of Economic Growth*, *supra* note 6.

later, which invested funds from monetary wealthy regions into depressed, poor regions for roads, communications, investment, and job improvement.[9]

While the 1980s witnessed three more states joining the ECC, bringing it to a total of twelve members,[10] the 1990s marked a period of many transitions with the reunification of Germany after the fall of the Berlin Wall.[11] In 1992, the Treaty on European Union was signed, renaming the ECC the "European Union" and ushering in more political integration via a single currency (implemented in 2001), foreign and security policy, as well as police and judicial cooperation in criminal matters.[12] The iconic EU freedoms such as the uninhibited movement of goods, services, people, and money became possible after this 1992 treaty was signed.[13] By 2007, the EU had expanded to include twenty-seven members who later signed the Treaty of Lisbon.[14]

The states that now comprise the EU historically saw many members of their populations emigrate to colonies in the New World and later to the United States and South American countries.[15] Forced migration also contributed to a history of emigration from European states including the Spanish Expulsion in 1492, where an estimated two hundred thousand Jews and similar numbers of Muslims were driven from Spain, and the multiple conflicts in southeast Europe between Russia, Austro-Hungarian and Ottoman empires.[16] Natural resource (and arguably man-made) disasters like the Irish Potato Famine also contributed to a large and continuous movement of people out of continental Europe.[17] During the Potato Famine one quarter of the Irish population emigrated. This number later escalated to 4.7 million Irish immigrants who followed their family members out

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[9] *A Growing Community*, EUR. UNION, http://europa.eu/about-eu/eu-history/1970-1979/index_en.htm (last visited Sept. 15, 2015).

[10] *The Changing Face of Europe—The Fall of the Berlin Wall*, EUR. UNION, http://europa.eu/about-eu/eu-history/1980-1989/index_en.htm (last visited Sept. 15, 2015).

[11] *A Europe Without Frontiers*, EUR. UNION, http://europa.eu/about-eu/eu-history/1990-1999/index_en.htm (last visited Sept. 15, 2015).

[12] *Id.*; *Treaty of Maastricht on European Union,* EUR-LEX, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm (last visited Sept. 15, 2015).

[13] *A Europe Without Frontiers*, *supra* note 11.

[14] *Further Expansion*, EUR. UNION, http://europa.eu/about-eu/eu-history/2000-2009/index_en.htm (last visited Sept. 15, 2015).

[15] Ben Hall, *Immigration in the European Union: Problem or Solution?,* OECD OBSERVER (Jun. 2000), http://www.oecdobserver.org/news/archivestory.php/aid/337/Immigration_in_the_European_Union:_problem_or_solution_.html.

[16] *Modern Jewish History: The Spanish Expulsion*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Judaism/expulsion.html (last visited Sept. 15, 2015); Hall, *supra* note 15.

[17] Charles A. Wills, *European Emigration to the U.S. 1851–1860*, PBS, http://www.pbs.org/destinationamerica/usim_wn_noflash.html (last visited Sept. 15, 2015).

of Ireland for the rest of the 19th century and continuing into the 20th century.[18] Mass immigration into the EU is a relatively recent phenomenon with a doubling of the foreign workforce from 1960 to 1973.[19] After 1973, immigration into the EU consisted primarily of individuals seeking family reunification and later applications for asylum in part because the expanding work force seldom sought citizenship.[20] These asylum applications largely originated from ethnic conflicts after the Cold War such as the 1990s Balkan wars where paramilitaries often targeted civilians.[21] Over two million refugees fled from the Yugoslav Republics during the ethnic cleansing and violent conflicts in the early 1990s.[22] Now individuals from these areas view EU states as a better opportunity to improve their economic status and family's quality of life, rather than risk returning to states still rife with continuous ethnic tensions.[23]

2. Scholarly Views of Immigration in the European Union

> *Two rival visions of modern Germany clashed: the liberal vision, embraced by the country's elite, of a globalized, open society, and a conservative one, more assertive about national interests and German identity in a chaotic and dangerous world . . . 57 percent of Germany's non-Muslims regard Islam as a threat, and one in four Germans would support a ban on Muslim immigrants.*[24]

Before delving into scholarly views of immigration in the EU, it is helpful to examine the root of these views via a brief exploration of how communities in EU states are reacting to the immigration debate. PEGIDA (Patriotische Europäer Gegen die Islamisierung des Abendlandes, or "Patriotic Europeans Against the Islamization of the Occident") is an anti-Islamization movement that drew more than 25,000 protesters to German city streets in

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18 *Id.*

19 Hall, *supra* note 15.

20 *Id.*

21 *Id.*

22 Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 1 (2004).

23 Hall, *supra* note 15; *The Death of a Killer*, WALL ST. J. EUR. (Mar. 13, 2006), https://advance.lexis.com (search "death of a killer" "wall street journal Europe" in query box; then follow "News" filter; then use "Narrow By" filter and set "Timeline" for year "2006"; then follow "The Death of a Killer" hyperlink).

24 Lucian Kim, *Germany's Anti-immigrant PEGIDA Isn't a Vladimir Putin Plot. It's Scarier*, REUTERS: THE GREAT DEBATE (Jan. 14, 2015), http://blogs.reuters.com/great-debate/2015/01/14/germanys-pegida-isnt-a-vladimir-putin-plot-the-truth-is-scarier/.

response to the Charlie Hebdo shootings in Paris, which later elicited condemning words from Chancellor Angela Merkel.[25] PEGIDA and its massive following demonstrate two important characteristics about how EU communities perceive immigration. First, this large gathering of average German citizens rallying under an anti-Islamist organization points to an underlying fear of the *other*.[26] Leaders of PEGIDA plainly state distaste for differences in lifestyle and customs practiced by Muslims and a phobia of *traditional* German culture being taken over by these *others*.[27] Second, movements like PEGIDA illustrate a general anti-immigration sentiment felt by Germans and many other EU citizens who "feel sidelined by mainstream politicians, who they claim have gone too far in making their country attractive to foreigners at their expense."[28] That said, this anti-immigration sentiment is met with an almost equal number of EU citizens and leaders who advocate for a peaceful co-existence and open arms to immigrants and refugees alike.[29]

Scholarly views towards immigration in the EU, as exemplified above, can be roughly divided into two parties: those who expound a nationalist anti-immigration perspective and those who see the EU's future in multicultural assimilation.[30] Unlike in the United States, the "melding of Europe's Muslim communities . . . into Europe's pluralistic, secular society [is] particularly tricky" because of a perception that immigrants are not integrating effectively (think headscarf debate).[31] This perception is augmented by recent events such as the Charlie Hebdo shootings, which were perpetrated by homegrown extremists. As a consequence, views that support stronger border security and harsher treatment of immigrants are becoming more popular.[32] However, multicultural assimilation, despite current events and change of popular opinion, is still the controlling scholarly view.[33]

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[25] *Record Pegida Rally in Dresden Sparks Mass Rival Protests*, BBC EUR. (Jan. 12, 2015), http://www.bbc.com/news/world-europe-30777841.

[26] Kim, *supra* note 24.

[27] *Id.*

[28] Melissa Eddy, *Big Anti-Immigration Rally in Germany Prompts Counterdemonstrations,* N.Y. TIMES, (Jan. 12, 2015), http://www.nytimes.com/2015/01/13/world/europe/big-anti-immigration-rally-in-germany-prompts counterdemonstrations.html.

[29] *Id.*

[30] Matthew Karnitschnig et. al., *Europe's Anti-Immigrant Parties Stand to Gain Ground in Wake of Paris Attacks*, WALL ST. J. (Jan. 16, 2015), http://www.wsj.com/articles/europes-anti-immigrant-parties-stand-to-gain-ground-in-wake-of-paris-attacks-1421371307.

[31] *Id.*

[32] This trend is particularly poignant in the amount of support nationalists' parties have gained. For a visual of this trend, see Karnitschnig, *supra* note 30.

[33] Ezio Benedetti, *EU Migration Policy and Its Relations with Third Countries: Russia, Ukraine, Belorussia and Moldova*, PROJECT BRIDGE 1, 3 (2012), http://www.project-bridge.eu/datoteke/Publications/BRIDGE_EU%20migration%20

3. Immigration and Policy Trends in the European Union

Because of the relatively recent formation of the EU in 1951, its history regarding immigration is much shorter than that of the United States[34] That being said, in less than 80 years EU immigration policies have been altered considerably.[35] In the sixties immigration policies were irregular and consistent only with what individual states decided.[36] However, after this era of immigration policy the EU began to transform.[37] In particular, the global dimension of immigration:

> caused a progressive change of perspective in the adoption of governmental policies in this sector, policy which has been characterized since the early eighties by the slow but progressive renouncing of an unilateral and sectorial approach to the management of migratory flows and the development of an international cooperation policy.[38]

This shift in immigration policy translates to an approach that is "more and more accepting that it is impossible to stop migration (the zero immigration is at the same time unrealistic and impossible)" and to instead focus on 'migration management.'[39] This migration management approach is more holistic in melding immigration policies with foreign policy to strive for a better outcome for the EU and outside states with potential migrants.[40] Migration management has increased the use of migration partnerships that "include agreements between governments to better regulate migration, improved cooperation on migration issues between departments of national governments, and the integration of the private sector and civil society groups into migration policy."[41] However, immigration policy trends appear to be enforced in a less than optimal manner as discussed below.

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policy_paper_Dr.Benedetti.pdf.

[34] *A Peaceful Europe—The Beginnings of Cooperation*, *supra* note 4. *See The Schuman Declaration—9 May 1950*, EUR. UNION, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last visited Sept. 20, 2015).

[35] Benedetti, *supra* note 33.

[36] *Id.* at 8.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 5.

[40] Benedetti, *supra* note 33, at 5.

[41] *Id.*

4. How Immigration Policy is Enforced in the European Union; The Burden Placed on Border States

> *The allure of Europe for illegal migrants rests primarily in rich countries; the burden of catching and dealing with them should not lie with countries simply because they happen to be en route.*[42]

The brief overview of how the EU was formed, discussed above, lays the foundation for understanding how the EU creates and enforces its immigration policy. The EU was formed to prevent future conflict between European states and to promote social and economic stability.[43] EU immigration policy has similarly focused on the promotion of family unity, human rights, and integration as described in the above policy trend section.[44] The implementation of immigration policy was intended to protect migrants and foster a pro-assimilation environment; however, its consequences have been to the contrary. In other words, "it is a grand European project, born of integrationist ideals yet undermined by participants' unwillingness to share costs as well as benefits."[45]

To begin, the Schengen agreement in 1995 eliminated controls at common borders between EU states to ensure citizens the fundamental right to travel, work, and live in any EU state.[46] While the freedom to travel is perhaps one of the most iconic and beneficial effects of the EU's many agreements, it also enables illegal immigrants to travel from any port of entry to wealthier destination states.[47] However, the Dublin regulation, which establishes a hierarchy of responsibility for member states in processing immigration claims,[48] also mandates that the state in which an illegal immigrant or refugee entered is responsible for their processing.[49] The Schengen agreement combined with the

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[42] *Europe's Huddled Masses; Rich Countries Must Take on More of the Migration Burden*, THE ECONOMIST (Aug. 16, 2014), http://www.economist.com/news/leaders/21612152-rich-countries-must-take-more-migration-burden-europes-huddled-masses.

[43] *A Peaceful Europe—The Beginnings of Cooperation*, *supra* note 4; *see The Schuman Declaration—9 May 1950*, *supra* note 34.

[44] Benedetti, *supra* note 33, at 14.

[45] *Europe's Huddled Masses; Rich Countries Must Take on More of the Migration Burden*, *supra* note 42.

[46] Dimitris Avramopoulos, *Schengen Area*, EUR. COMM'N (Apr. 29, 2014), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

[47] *Europe's Huddled Masses; Rich Countries Must Take on More of the Migration Burden*, *supra* note 42.

[48] *Dublin Regulation*, EUR. COUNCIL ON REFUGEES AND EXILES, http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html (last visited on Sept. 20, 2015).

[49] *Asylum and Irregular Immigration in the EU: State of Play*, EUR.

Dublin regulation and illegal immigration means that while illegal immigrants are attracted to wealthier EU states (often the interior or northern EU states), it is border states who are saddled with the expense and administrative burden of catching and processing illegal immigrants.[50] This is especially true when considering that the majority of impoverished individuals who risk the journey to the EU do so by crossing the Mediterranean Sea or other dangerous routes.[51] For example, in 2014 alone, a reported 3,500 people died in the attempted Mediterranean Sea crossing.[52] Moreover, Italy recently cancelled its sea rescue Mare Nostrum operation to be replaced by a far smaller border control operation called Triton.[53] While Mare Nostrum was specifically designed to prevent immigrant death, Triton only operates near EU coast and has far fewer ships.[54] Mare Nostrum was cancelled because Italy could no longer afford the nine million euro (twelve million U.S. dollars) a month bill that the rest of the EU refused to contribute to.[55] Italy is not the only border state without EU assistance for its immigration related expenses; of the 63 million euros Greece spent in 2013 to prevent illegal immigration, EU border agencies only contributed three million euros.[56]

B. The United States

1. History of Immigration in the United States

Legislative attempts to comprehensively reform the U.S. immigration system by bringing it in line with the economic and social realities that spur immigration failed in 2006 and 2007. As a result, many state and local governments are implementing or considering proposals to turn police officers into de facto immigration agents, and to "crack down" on unauthorized immigrants and those who provide them with jobs or housing.

PARLIAMENTARY RES. SERV., 1 (Mar. 25, 2014), http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140776/LDM_BRI%282014%29140776_REV1_EN.pdf.

[50] *Europe's Huddled Masses; Rich Countries Must Take on More of the Migration Burden*, *supra* note 42.

[51] *Id.*

[52] *Hundreds of Migrants Killed in New Mediterranean Tragedy, Says UN*, BBC (Feb. 11, 2015), http://www.bbc.com/news/world-europe-31414009.

[53] *Id.*

[54] *Id.*

[55] *Europe's Huddled Masses; Rich Countries Must Take on More of the Migration Burden*, *supra* note 42.

[56] *Id.*

> *In short, the United States is as conflicted as ever about its historical identity as a nation of immigrants.*[57]

The very first Americans crossed the Bering Strait between twelve and thirty thousand years ago from Asia.[58] The North American continent saw the beginning of the second wave of mass immigration when Europeans arrived beginning in 1492.[59] However, the U.S. federal government did not establish a uniform rule for naturalization until The Naturalization Act of 1790.[60]

A close examination of U.S. trends since 1790 show the continuation of a cyclical pattern of waves of immigration followed by ambivalent, contradictory, and even hostile reactions from the U.S. population.[61] Immigrants who arrive in the United States in search of economic opportunity and political freedom have often been subjected to discrimination based on race and religious beliefs.[62] Post assimilation and after decades of U.S. citizenship, the descendants of these immigrants take a disparaging perspective of the growing numbers of new immigrant populations.[63] In turn, these ambivalent and hostile attitudes are reflected in national immigration policies.[64] Ironically, it is these caustic and often hostile national immigration policies that are detrimental to the United States's economic interests.[65] For example, despite the extent to which the United States and Mexico's economies are intertwined, over the past twenty-five years the United States has continued to impose additional legal limits on immigration from Mexico.[66] Notably, the United States distinguishes visa applicants based upon the labor skill level to encourage high skilled professionals to immigrate while trying to stem the flow of unskilled laborers. This trend was exemplified when President Obama announced "broad procedural changes that will make it easier and faster for high-skilled immigrants, graduates, and entrepreneurs to stay and contribute to the American economy in a transparent effort to maintain U.S. edge over other nations."[67] More importantly, the United States's expanding

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[57] Walter A. Ewing, *Opportunity and Exclusion: A Brief History of U.S. Immigration Policy*, IMMIGR. POL'Y CTR. (Jan. 2012), http://www.immigrationpolicy.org/sites/default/files/docs/opportunity_exclusion_011312.pdf.

[58] *Id.*

[59] *Id.* Note, while a brief history of early North American immigration is given, U.S. immigration in the twentieth and twenty-first century will primarily be examined because this article discuses modern immigration trends and policies in the United States.

[60] *Congress of the United States*, HARV. U. LIBR., http://pds.lib.harvard.edu/pds/view/5596748 (last visited Sept. 20, 2015).

[61] Ewing, *supra* note 57.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Ewing, *supra* note 57.

[67] Chidanand Rajghatta, *Obama Greenlights High-Skilled Immigration; Relief for*

immigration policies since the 1980s has disproportionally burdened border states.[68]

In 1986, in response to rising levels of illegal immigration, the United States passed the Immigration Reform and Control Act of 1986 ("IRCA").[69] IRCA was important for three reasons. First, IRCA allowed many immigrants who arrived illegally to apply for legal status.[70] Not including seasonal workers, IRCA opened the pathway for 1.6 million illegal immigrants to naturalize through its generalized legalization program.[71] Second, IRCA created a temporary category visa for seasonal agricultural workers.[72] Thirdly, IRCA instituted laws that imposed sanctions on employers who "knowingly" hired people not authorized to work in the United States (generally illegal immigrants) and increased border funding.[73] Later, the Immigration Act of 1990 raised the annual immigration cap and granted temporary protection to illegal immigrants fleeing from natural disasters or armed conflicts.[74] However, in 1996 a shifting political climate translated into the creation of harsher immigration laws.[75] Beginning in California, in 1994, Proposition 187, titled Save Our State ("SOS"), denied recently naturalized individuals state benefits and illegal immigrants kindergarten through university education access.[76] However, Proposition 187 was superseded by federal law with the passage of three immigration laws passed in 1996.[77] The first law was the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") that created new grounds for inadmissibility with a new definition for an aggravated felony and retroactively applied this definition. As a consequence,

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H-1B Visa Holders, Spouses, Students, THE TIMES OF INDIA, (Nov. 21, 2014), http://timesofindia.indiatimes.com/world/us/Obama-greenlights-high-skilled-immigration-relief-for-H-1B-visa-holders-spouses-students/articleshow/45226976.cms.

[68] Phil Galewitz, *Medicaid Helps Hospitals Pay For Illegal Immigrants' Care*, KAISER HEALTH NEWS (Feb. 12, 2013), http://kaiserhealthnews.org/news/medicaid-illegal-immigrant-emergency-care/.

[69] Ewing, *supra* note 57.

[70] *Id.*

[71] Donald M. Kerwin, *More than IRCA: U.S. Legalization Programs and the Current Policy Debate*, MIGRATION POL'Y INST. (Dec. 2010).

[72] *Id.*

[73] Ewing, *supra* note 57.

[74] *Id.*

[75] *Id.*

[76] *Prop. 187 Approved in California*, MIGRATION NEWS (Dec. 1994), https://migration.ucdavis.edu/mn/more.php?id=492_0_2_0; *CA's Anti-Immigrant Proposition 187 is Voided, Ending State's Five-Year Battle with ACLU, Rights Group, ACLU* (July 29, 1999), https://www.aclu.org/immigrants-rights/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-righ [hereinafter *CA's Anti-Immigrant Proposition 187 is Voided*].

[77] *CA's Anti-Immigrant Proposition 187 is Voided, supra* note 76.

many legal immigrants became newly defined as aggravated felons.[78] In addition, the new law included a newly created expedited removal process.[79] Second, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), required legal permanent residents ("LPR") to wait five years after obtaining their green card before receiving public-benefit programs and ten years before receiving Medicare and Social Security.[80] Third, the Antiterrorism and Effective Death Penalty Act ("AEDPA") allowed immigrants, both legal and illegal, suspected of being terrorists to be deported based on secret evidence and more rigorous asylum requirements.[81] Although these 1996 laws were mainly geared to address legal immigrants, they demonstrate how public policy is set by fears and hostility against immigrants in general.[82] Specific fears and hostilities in the 1990s arose from the newly diversified group of immigrants that consisted of more individuals from Latin and Asian nations than the historically favored European nations; this was exacerbated by the parallel shift of wealthy skilled professionals to poor unskilled labors immigrating into the United States.[83] Furthermore, beyond IIRIRA's increase in border enforcement, these 1996 laws failed to comprehensively address illegal immigration, leaving border states to individually tackle the issue.

After the September 11, 2001 attacks on the World Trade Center, anti-terrorism efforts became closely intertwined with attempts to curb illegal immigration.[84] Programs like the temporary National Security Entry-Exit Registration System ("NSEERS") required a second screening of individuals from certain countries that posed possible national security threats were implemented.[85] More permanent fixtures, like the Enhanced Border Security and Visa Entry Reform Act of 2002 ("EBSVERA"), created new and stringent procedures for visa applicants and travel documents.[86] The REAL ID Act of 2005 placed more burdens on border states by requiring proof of citizenship or legal immigration status to issue a driver's license.[87] Lastly, 850 miles of fence along the United States-Mexico border was built after the Secure Fence Act of 2006 was passed.[88]

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[78] Ewing, *supra* note 57.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Elizabeth S. Rolph, *Immigration Policies Legacy from the 1980s and Issues for the 1990s*, RAND, 7-9 (1991), http://www.rand.org/content/dam/rand/pubs/reports/2007/R4184.pdf.

[83] *Id.* at 7-12.

[84] Ewing, *supra* note 57.

[85] *DHS Removes Designated Countries from NSEERS Registration*, DEP'T OF HOMELAND SEC. (May 2011), http://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011.

[86] Ewing, *supra* note 57.

[87] *Id.*

[88] *Id.*

As demonstrated, these three laws, which were passed post September 11, focused on deterring illegal immigration and the entrance of possible terrorists at the U.S. border. However, as discussed below, this approach to illegal immigration creates a disproportionate burden on border states in administering and paying for these requirements and privileges. It is this disproportionate burden on border states that begs for a federal immigration policy reform. This immigration policy reform should have a more holistic approach in allotting more federal funding for border states, a mandatory periodic review of immigration policy (so as to have the opportunity to update inefficient immigration policies), a national electronic system for immigration processing, and a top-down emphasis on integration from the federal government to avoid *othering* documented and illegal migrants.

2. Scholarly Views of Immigration in the United States

Before examining politicians' and scholars' positions and perspectives on immigration, it is helpful to understand how the average middle class U.S. citizen feels about immigration. This middle class U.S. perspective is important because it in part forms the national debate and what leaders and scholars focus on in immigration.

In general, there are two attitudes towards immigration held by the U.S. middle class, pro and contra. As mentioned in the former section, immigration is a galvanizing topic that resonates from people's fears and anxieties. Murrieta, an average border town in southern California filled with families and those escaping the hustle of the city, exemplifies how the middle class public can view illegal immigration fearfully.[89] To relieve the burdened Texas processing system, buses full of illegally immigrated mothers and children were sent to Murrieta for processing.[90] However, Murrieta as a community physically blocked these buses from arriving, and fearful for the safety of the bus passengers, Border Patrol rerouted the buses to San Diego.[91] During a town hall-style meeting Murrieta community members expressed their fear of illegal immigrants in their questions to Border Patrol agents, the Murrieta mayor, and other federal officials, asking, "What happens when they [illegal immigrants] come here with diseases and can overrun our schools? How much is [processing illegal immigrants] [ ] costing us? How do you know they are really families and aren't some kind of gang or drug cartel?"[92] While other Murrieta community members expressed their disgust at this reaction to illegal immigrants arriving for processing, this incident

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[89] Jennifer Medina, *The Town Where Immigrants Hit a Human Wall,* N.Y. TIMES, (July 3, 2014), http://www.nytimes.com/2014/07/04/us/influx-of-central-american-migrants-roils-murrieta-calif.html.

[90] *Id.*

[91] *Id.*

[92] *Id.*

demonstrates the habitual fearful reaction many communities have when confronted with illegal immigration.[93]

Although Murrieta is but one small town in southern California, it exemplifies how illegal immigration is perceived as a predominantly negative phenomenon. Illegal immigration is seen as a crushing drain on community resources, a breeding pool of crime, and a loss of the community's culture. Ann Coulter, a popular conservative pundit, exemplifies this perception by her pronouncement that the United States is threatened more by illegal immigrants than the Islamic State of Iraq and Syria ("ISIS").[94] Ms. Coulter's argument asserts that while ISIS is geographically far removed from the United States, illegal immigrants have permeated U.S. communities and cities.[95] Therefore, because illegal immigrants are within our midst, they must be more dangerous than the terrorists who have filmed the decapitation of U.S. citizens.[96] The anti-immigration perceptions expounded by the town of Murrieta and Ms. Coulter serve to demonstrate how and why illegal immigration is so strongly opposed. Partisan Republican politicians (it should be noted that there are Republican politicians such as Senator McCain who tried unsuccessfully to co-sponsor major immigration reform with Democrats)[97] often echo this opposition in that any leniency in immigration policy will lead to a rush of illegal immigrants—hence President Obama's self-made 'humanitarian crisis' when minors flooded the United States-Mexico border during summer 2014.[98] Therefore, Republicans argue, resources should be focused on securing the actual border by building and improving the fence separating the United States and Mexico.[99] Arizona Representative Martha McSally argues that if individuals without documentation are prevented from entering the United States then the issue of illegal immigration is avoided.[100] Although this often-conservative perspective is logical, it fails to

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[93] *Id.*

[94] Catherine Taibi, *Ann Coulter Believes Americans Should Fear 'Illegal Immigrants' More Than ISIS*, THE HUFFINGTON POST (Mar. 26, 2015, 2:59 PM), http://www.huffingtonpost.com/2015/02/26/ann-coulter-isis-immigrants-illegal-aliens_n_6762734.html.

[95] *Id.*

[96] *Id.*

[97] Steve Benen, *McCain Walks Away from His Immigration Bill (Again)*, MSNBC (Aug. 26, 2014, 10:55 AM), http://www.msnbc.com/rachel-maddow-show/mccain-walks-away-his-immigration-bill-again.

[98] Julia Preston & Laura Tillman, *Immigration Advocate, Detained on Texas Border, Is Released in Visa Case*, N.Y. TIMES, (July 15, 2014), http://www.nytimes.com/2014/07/16/us/Jose-Antonio-Vargas-immigrant-advocate-arrested.html.

[99] Perla Trevizo, *$10 Billion Border Bill Unneeded, Critics Say*, ARIZ. DAILY STAR (Jan. 24, 2015), http://tucson.com/news/government-and-politics/billion-border-bill-unneeded-critics-say/article_86d0a126-2d81-5728-9b8d-7626f34776a2.html.

[100] *Id.*

account for the multitude of illegal immigrants that are already present in the United States and that lose their legal status from visa expiration.[101]

Supporters of immigration reform tend to focus on more pathways to citizenship and guest worker programs to increase immigrant integration in technology centers such as Silicon Valley.[102] The integration perspective is partially illustrated by President Obama's executive actions including the Deferred Action for Childhood Arrivals ("DACA") and the recent expansion of DACA.[103] Through DACA more than 4 million of the eleven million illegal migrants in the United States are protected from deportation and many can receive work permits.[104] That said, President Obama's executive actions, although important in physically integrating immigrants into communities, were implemented in a manner that did not foster a national sense of integration to avoid *othering*, but instead polarized the immigration debate to an extreme.

Lastly, some pro-immigration activists believe that border states are not burdened by illegal immigration. Instead they feel that certain issues are politicized in order to justify heightened border security and harsher immigration policies. While there is merit in this view, it is more of a conspiracy theory at its substance. The issue with this perspective is that multiple private, state, and federal entities have collected methodical and non-biased data demonstrating that illegal immigration does negatively impact border states. The Pew Research Center for example, a nonpartisan fact tank, noted that more than half of undocumented migrants, 59% of 11 million people, are uninsured.[105] Given that one third of undocumented migrants' children and one fifth of adult undocumented migrants live in poverty, it is inferential that the free emergency care hospitals are obligated to provide regardless of insurance or legal status is heavily relied upon by these individuals.[106]

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[101] David Seminara, *New Pew Report Confirms Visa Overstays Are Driving Increased Illegal Immigration*, CTR. FOR IMMIGR. STUD. (Sept. 30, 2014), http://www.cis.org/seminara/new-pew-report-confirms-visa-overstays-are-driving-increased-illegal-immigration.

[102] Brooke Donald, *Q&A: Stanford Scholars on Immigration Reform,* STANFORD NEWS (Feb. 1, 2013), http://news.stanford.edu/news/2013/february/qanda-immigration-reform-020113.html.

[103] Max Ehrenfreund, *Your Complete Guide to Obama's Immigration Executive Action*, WASH. POST (Nov. 30, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/.

[104] *Id.*

[105] Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. (Apr. 14, 2014), http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/.

[106] *Id.*

3. Immigration and Policy Trends in the United States

> *As this contradiction between immigration law and economic reality illustrates, the contours of the U.S. immigration system are often shaped more by public fears and anxieties than by sound public policy.*[107]

A recent study by Reuters found that 70% of U.S. citizens believe undocumented immigrants threaten their cultural beliefs and customs.[108] Furthermore, 63% of people surveyed believe that documented and legal immigrants place a burden on the U.S. economy.[109] One may potentially assume that the U.S. citizens surveyed by Reuters are simply reacting to current events including Congress' failure to agree on broad immigration reform and President Obama's unilateral track record.[110] However, this Reuters survey does more than capture a nation's momentary sentiment; it showcases a habitual reactionary approach to immigration that consists of fear and hostility. The reactionary approach in turn produces aggressive national immigration policy. Aggressive national immigration policy, as described in Part II.B(1), has translated into greater border security (from 5,000 to 20,000 agents) and an increase in pressure on businesses to ensure their employees are documented legal immigrants.[111]

Although these may be effective measures to combat illegal immigration, they place an undue burden on border states. Illegal immigration largely occurs through the 1,954 mile border shared between the United States and Mexico. This means that while the Border Patrol is funded by the federal government, border states such as Texas, California, and Arizona are disproportionally burdened by the administration, enforcement costs of federal immigration laws, and the unpaid healthcare bills accrued by illegal immigrants.[112]

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[107] Ewing, *supra* note 57.

[108] Alistair Bell, *Americans Worry that Illegal Migrants Threaten Way of Life, Economy*, REUTERS (Aug. 7, 2014).

[109] *Id.*

[110] *Id.*

[111] Donald, *supra* note 102; Manny Fernandez, *Texas Bolsters Border Patrol with its Own*, N.Y. TIMES (Aug. 6, 2014), http://www.nytimes.com/2014/08/07/us/texas-is-accused-of-overreaching-and-overspending-to-police-border.html.

[112] Byron Pitts, *Illegal Immigrant Births–At Your Expense*, CBS NEWS (Apr. 7, 2008), http://www.cbsnews.com/news/illegal-immigrant-births-at-your-expense.

4. How Immigration Policy is Enforced in the United States & The Burden Placed on Border States

The $500 million Texas Governor Rick Perry spent to equip and pay for the expanded Texas game wardens exemplifies the burden that illegal immigration enforcement places on border states.[113] Although these Texas game wardens do not have the authority to enforce federal immigration laws, they are able to enforce state laws such as human trafficking and drug smuggling codes.[114] Texas game wardens to date have made 13,000 arrests, seized 87 million dollars in drugs, and rescued 137 people since Governor Perry's efforts.[115] Governor Perry, beyond the purchase of state police helicopters and surveillance airplanes, has also repeatedly called for the assistance of the National Guard.[116] While Texas taxpayers are currently bearing the burden of protecting its state borders, Governor Perry has requested the federal government reimburse all border security expenditures.[117] However, as some disagree with Governor Perry's tactics, Texas has yet to be reimbursed for managing its borders.[118]

Rural and sparsely populated counties in the southern reaches of Texas are also burdened through processing the numerous people found deceased from attempting illegal immigration.[119] Although technically immigration is a federal issue, these counties have become responsible for completing DNA tests, record searches, and final burial for these deceased individuals.[120] Thus far, these Texas counties have faced increasing financial hardship and suffer from being short-staffed.[121]

Healthcare expenditure for illegal immigrants is an unlikely example of the burden border states bear under current immigration policies. An estimated eight percent of the 4.3 million or 340,000 babies born in U.S. hospitals had parents who were illegal immigrants.[122] Although this fact may be seen as a positive trend towards naturalizing migrants and holding individuals to the same taxes and community responsibilities as citizens, the majority of these bills for

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113 Fernandez, *supra* note 111.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 Fernandez, *supra* note 111.

119 *Bodies Pile Up in Texas as Immigrants Adopt New Routes Over Border*, N.Y. TIMES (Sept. 22, 2013), http://www.nytimes.com/2013/09/23/us/bodies-pile-up-in-texas-as-immigrants-adopt-new-routes-over-border.html.

120 *Id.*

121 *Id.*

122 Devin Dwyer, *Study: 8 Percent of U.S. Births to Illegal Immigrants*, ABC NEWS (Aug. 11, 2010), http://abcnews.go.com/Politics/birthright-citizenship-study-sheds-light-illegal-immigrants-children/story?id=11376791.

childbirth are left unpaid.[123] While birth tourism does generally entail parents paying for the hospital bill for their child's birth,[124] Arizona alone spends $150 million statewide each year in unreimbursed healthcare bills for illegal immigrants.[125] It takes very little creativity to imagine how much Arizona could invest in construction, education, and infrastructure if these funds were not used for unpaid medical expenses. Beyond unpaid hospital bills for childbirth, all medical emergencies are unquestionably sent to border state hospitals.[126] In 1986, Congress passed the Emergency Medical Treatment and Active Labor Act ("EMTALA"), effectively requiring all hospital emergency rooms to accept emergency health care treatment regardless of ability to pay, insurance, and legal status in the United States if they wish to be eligible to apply for federal medicare funds.[127] This means that when a hypothetical human smuggler rolls his overloaded SUV near the United States-Mexico border, all car occupants are treated at U.S. hospital emergency rooms and hypothetically the hospitals are not compensated for their care. While unpaid hospital bills caused by illegal immigrants continue to rise, "Congress recently set aside $1 billion to reimburse states for treating illegal immigrants. Arizona will get $40 million annually over four years starting in 2005, about one-fourth of what it actually spends."[128]

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[123] Byron Pitts, *Illegal Immigrant Births - At Your Expense*, ABC NEWS (Apr. 7, 2008), http://www.cbsnews.com/news/illegal-immigrant-births-at-your-expense/.

The author would like to make clear that while there is an ongoing debate as to whether the 14th Amendment guarantee that those born on United States soil are automatically citizens should be reinterpreted or amended is generally misinterpreted. Parents of U.S. citizens must wait until their newborn reaches age 21, meet requirements to qualify for I-130 Petition for Alien Relative approval, and then wait for sometimes years for the I-130 to be approved when a visa number becomes available. Furthermore, the author argues that it is in the U.S.' best interest to have naturalized and unified families contributing economically and socially to local communities in place of fragmented families that live in fear of deportation and work illegally. *Bringing Parents to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/family/family-us-citizens/parents/bringing-parents-live-united-states-permanent-residents (last visited Sept. 25, 2015); *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/i-130 (last visited Sept. 25, 2015).

[124] Devin Dwyer, *A New Baby Boom? Foreign "Birth Tourists" Seek U.S. Citizenship for Children*, ABC NEWS (Apr. 14, 2010), http://abcnews.go.com/Politics/birth-tourism-industry-markets-us-citizenship-abroad/story?id=10359956.

[125] David Kelly, *A Hospital on Border Going Over the Edge*, L.A.TIMES (June 20, 2004), http://articles.latimes.com/2004/jun/20/nation/na-hospital20.

[126] *Id.*

[127] 42 U.S.C.A. § 1395dd (West 2011); *Lessons Learned From EMTALA Enforcement*, STRATEGIC MANAGEMENT (Sept. 2012), http://compliance.com/articles/emtala-enforcement/.

[128] Kelly, *supra* note 125.

As a consequence of the federal government's under-repayment to Arizona and other border state hospitals, many are forced to close or they struggle to provide care with a stretched budget.[129] The University of Arizona Medical Center's losses were close to one million dollars *per month* in unpaid treatment, while another large private hospital in Tucson simply closed its emergency room to avoid uncompensated medical care.[130] Worse, in small rural areas where the local hospital is the only viable medical location for miles, its possible closure negatively impacts local communities.[131] Therefore, the high cost of uncompensated emergency hospital bills from illegal migrants, under-refunded by the federal government, is a heavy burden on border states. This is a simple and definitive example of how U.S. federal immigration policy burdens border states that, because of their geographical location, interact with the issue of illegal immigration more than other states.

III. AN ANALYSIS FOR FUTURE REFLECTIONS

> *It is clear that undesirable exploitation of migrants and all sorts of racketeering are associated with inefficient border controls.*[132]

There are roughly three categories for border reform in the EU and the United States. The first is commonly associated with the partisan Republican Party and conservative leaning individuals, who believe that border security should be heightened to stop illegal immigration at the border. This strategy is often referred to as "securing" or "closing the border." This has been shown not to function as well as believed with the doubling of the border patrol and still record number of illegal immigrations crossing the border into the United States. Because of the 1,954 mile border the United States and Mexico share, there is very little chance of any fence retaining its efficacy with cut holes commonly found and a healthy demand for illegal narcotics.[133] This also does little to address the issue of what to do with more than 11 million undocumented migrants already in the United States. Deportation is likely too great of an undertaking, with an estimated 30 years necessary to process the current backlog of cases awaiting the immigration court. In 1886 the U.S. Supreme Court ruled that migrants, regardless of documentation status, are afforded Fourteenth Amendment constitutional rights.[134] Although this is undoubtedly a landmark decision

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129 *Id.*
130 *Id.*
131 *Id.*
132 Benedetti, *supra* note 33.
133 Trevizo, *supra* note 99.
134 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

securing basic human rights in the United States, these rights translate to time consuming and expensive legal proceedings, especially deportation proceedings. Likewise, in the EU it is nearly impossible to stop the hundreds of thousands of individuals who travel by sea (in often perilous conditions) to reach any number of coastal regions or the many others that enter EU border states via surrounding non-EU member nations.[135] It is important to note that the immigration trend is not declining but increasing as a global phenomenon demonstrated in the table found in Appendix 1, another justification against treating immigration as a strong-borders-issue. The EU, like the United States, cannot logistically or physically create a border impenetrable to individuals' dreams of a better life or of their drug trafficking business.

The second view is that pro-immigration that expounds the virtues of an open border. While this may relieve the specific issue of illegal immigration, it creates many more. The first foreseeable issue is that the rest of the world operates using geographical borders. Therefore, if the EU and the United States ceased to enforce its borders with other states, an EU-type system would be created without the agreements, policies, and shared understandings that the member states of the EU have. Instead, individuals from all over the world would be able to enter into the EU and the United States without any kind of regulation or manner of managing numbers effectively, massively increasing the population. In turn, this will create a crippling tax on EU and U.S. states that cannot provide for the masses of people entering and using finite community resources such as public and emergency health care, public schools, welfare, and police forces. In short, open borders without any control on the flow of people would not only function to destabilize border states, but it would also create negative outcomes for the entirety of the EU and the United States because of the endless number of people entering and leaving nations in an unregulated fashion.

The third view, endorsed by the author, is a four-part suggestion. The first suggestion is that because the burden placed on border states translates into a systemic issue all EU and U.S. member states end up struggling with, the Commission and Federal government need to dedicate more funds and political will to monetarily support border states and border communities in the managing of borders and enforcing immigration policies.

These funds from the Commission and Federal system can materialize from a number of sources. One could be that all member states contribute a proportionate amount of their GDP to a border security and immigration fund. This would be reminiscent of a tax and similar to the EU budget that primarily relies on the Gross National Income ("GNI") to proportionately draw funds from

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[135] Phillip Connor, *Illegal Immigration by Boat: A Dangerous, but Common Way of Entering Europe*, PEW RES. CTR. (Apr. 30, 2014), http://www.pewresearch.org/fact-tank/2014/04/30/illegal-immigration-by-boat-a-dangerous-but-common-way-of-entering-europe/.

each state.[136] In this regard, the EU and the U.S. members could contribute funds to tackle a national issue without leaving border states to bear the majority of the financial burden.[137] Using a fund to which all member states contribute would also entail border states calculating and reporting their expenditures to receive necessary funding.[138] In turn, these calculations and reports produced by border states would help draw attention to issues not solved by current immigration policy. Consequently, the application for funds through the production of calculations and reports on immigration trends would serve to make future immigration policy more efficient and effective.

This group member funding approach based on state GNI/GDP would also include an innovation in responding to current immigration trends. For example, many migrant workers from Mexico are seasonal and would prefer to stay in Mexico but have illegally migrated to United States because of fewer seasonal visas. Therefore, one way to respond to this trend and prevent undocumented migration would be to issue more migrant worker visas.

Another option for the United States is that the federal government could take a percentage of military spending and dedicate it to border security because immigration is a national security issue—think nuclear material stolen in Mexico.[139] This money would be used not just for border patrol but for fortifying communities to better handle the burdens of immigration. If, say, hospitals in Arizona were not closing because of the multitude of unpaid medical bills for illegal immigrations, the community would be stronger as a whole and better able to support a system where illegal immigration is minimized.

The second part of the author's suggestion is geared more towards the United States than the EU. The EU's immigration policy is decided collaboratively every five years. If the EU and the United States fund border states and border communities to manage borders and to enforce immigration policies, then accordingly such funding deserves national treatment. While the EU decides immigration policy every five years the United States has a more disjointed process in which border patrol is controlled by the federal government and border states handle many other aspects of illegal immigration. For example, while Border Patrol "catches" illegal immigrants, these individuals are either shunted to state or federal courts to be processed, thus creating irregular outcomes

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[136] *Where Does the Money Come From?*, EUR. COMM'N, http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm (last visited Sept. 25, 2015).

[137] Paul McDonough et al., *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, EUR. COUNCIL ON REFUGEES & EXILES (2008), http://www.asyl.at/fakten_1/ECRE_Dublin_Reconsidered_Mar2008.pdf.

[138] *Id.*

[139] *Mexico Finds Radioactive Load from Stolen Truck*, REUTERS (July 4, 2014), http://www.reuters.com/article/2014/07/05/us-mexico-radioactive-idU.S.KBN0FA00Y20140705.

and an overall disjointed system. Even more recently in the U.S., Immigration and Customs Enforcement (ICE) has shifted to prosecutorial discretion to unburden the massive queue for deportation proceedings; in effect this blurs immigration statues while giving individual ICE attorneys discretion to decide who is a 'low-priority' for deportation.[140] Therefore, a national committee(s) specifically for immigration policy could make suggestions and ensure that all states in the United States had an opportunity to contribute to the immigration discussion.

The third part of the four-part suggestion is for the EU and the United States to create national electronic systems that link all states in a unified immigration system. Non-border states could process files without disrupting individuals' right to be heard while minimizing resources dedicated to processing illegal immigrants. An individual in immigration proceedings could be processed anywhere in the EU and the United States without disrupting the case or the individual's rights but allowing a shift in the burden of handling immigration cases. While this suggestion may appear on its face to encourage shunting illegal immigrants from one state to another for legal processing, it in fact accomplishes something much more important. First, a comprehensive system will streamline the process for illegal immigrants who, when reuniting with family or searching for employment, often move to a different geographical region. In place of ICE shipping large files across the United States to follow individuals, any ICE attorney will be able to pick up where the last ICE attorney left off. A similar scenario plays out in the EU, where an illegal migrant may enter through Spain and be apprehended but must petition to have her case heard in Germany where her family resides. In place of the EU's current petition system that often rejects cases based on arbitrary reasons or even loses files, an individual could simply be found in a comprehensive electronic system. More important, a comprehensive electronic system for immigration will collect data from all states and be an excellent resource to analyze immigration trends to monitor what immigration policies are working. Although a comprehensive electronic system for immigration will be undoubtedly expensive up front, the streamlining process and data collection will be cost saving in the long term and provide invaluable data sets.

The fourth part of the four-part suggestion regards foreign policy in the form of international aid. As discussed previously, illegal immigration is a repercussion of economic instability, threats to physical health, and natural and man made disasters. In this sense, illegal immigration will not stop unless these

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[140] *How to Seek Prosecutorial Discretion from ICE*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/immigrationAction (last visited Sept. 25, 2015); Muzaffar Chishti & Claire Bergeron, *Questions Arise with Implementation of Obama Administration's New Prosecutorial Discretion Policy*, MIGRATION POL'Y INST. (Feb. 29, 2012), http://www.migrationpolicy.org/article/questions-arise-implementation-obama-administrations-new-prosecutorial-discretion-policy.

individuals lack a reason to leave their home country. If an individual can provide for herself and her family without threat of violence, there is little impetus to leave her home, community, culture, and comfort to subject herself to the often dangerous journey and the impoverished conditions many illegal immigrants face when working for meager wages in sub-par work environments in the EU and the United States. Therefore, while the EU and the United States need to address border security as a comprehensive issue that means more than a checkpoint, it also needs to address the root cause of illegal migration. While the EU and the United States have a responsibility to respect national sovereignty, soft power projects that address and support education, individual and public health, and women's rights and ability to provide for herself and her family are viable pathways to support economically undeveloped states in strengthening infrastructure and therefore retaining their citizens.[141]

Lastly, although integration is not necessarily an area of reform easily manipulated by the EU Commission or the U.S. federal government, it is nonetheless important. While not directly linked to mass illegal immigration, integration of illegal immigrants already present in the EU and the United States is vital. As described in the scholarly views sections, both the EU and the United States are host to xenophobic communities and perspectives.[142] Although individuals are entitled to their opinions and beliefs, globalization trends and the ease of human population movements will continue to support the flow of both documented and undocumented migrants to the EU and the United States. Therefore, in order to provide cohesive and efficient policy creation and implementation it is necessary to normalize the immigration debate and avoid extremism, not rooted in fact but rather based on discrimination against often marginalized groups. The world and its states function on the semi-free trade of goods, services, and knowledge regardless of a nation's desire to curb immigration, documented and undocumented. Unless a nation chooses a foreign policy similar to that of North Korea, the flow of people in and out of a nation is unavoidable. Consequently, the EU and the United States, while focusing on shifting the burden away from border states, should also emphasize integration of present migrants, both documented and undocumented to avoid future conflicted debates and gridlock on the immigration debate. While integration, like any social change, is slow moving, it is important to incorporate into education and public policies that will encourage positive change while eliminating opportunities and climates that foster *othering* of someone simply because they arrived 150 years later than someone else's family did.

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[141] Wayne King, *Mexican Women Cross Border so Babies Can Be U.S. Citizens*, N.Y. TIMES (Nov. 21, 1982), http://www.nytimes.com/1982/11/21/us/mexican-women-cross-border-so-babies-can-be-us-citizens.html?pagewanted=all.

[142] *See, supra*, Parts II.A(2), II.B(2).

IV. CONCLUSION

> *Sound policy must also embrace the question of how we integrate immigrants into American society. That is the ultimate test for whether immigration law works or not. In turn, the fundamental prerequisite for integration is that citizens and newcomers alike have confidence in U.S. immigration law and policy. And that confidence needs to begin with a coherent view of the rule of law in immigration law. I have tried to show this evening that competing views of the rule of law can differ profoundly.*[143]

Through careful and thoughtful investigation of EU and U.S. immigration trends, one becomes painfully aware of the fact that immigration issues are only a consequence of a larger issue that leaders and communities are struggling to confront. The world that we inhabit now is nearly alien to the one fifty years ago because of the great technological strides in communication, transportation, biological understanding, and medicine. As life expectancies climbed past forty years old and fifty years old (forty is the new thirty after all), and individuals in Russia conduct transactions with businesses in Panama, and college students travel to Djibouti to enhance their "real world experiences," the world becomes infinitely more connected. With this enhanced interconnectedness comes an entirely new set of challenges and problems that traditional forms of governance are often woefully inept at perceiving and effectively handling.

First, as described in the analysis above, both the EU and United States need to invest more funds and political will as a Commission and Federal government to bolster aid for border states that are the forefront of facing illegal immigration. Illegal immigration, as argued in this Note, is an issue that affects all states in the EU and in the United States, but its impact is unevenly felt among the border states. An increase in funding and political will by the EU and United States will allow: national and collaborative periodic review of the immigration systems and policy effectiveness; a unifying electronic immigration system that links all member states for streamlined immigrant processing; and continued incorporation of foreign policy that seeks to stem the tide of illegal immigration at the source by offering infrastructure aid to prevent natural or man-made disasters. It is far more inexpensive to aid nations in need than it is to process their floods of refugees in border states.

Hand-in-hand with this suggestion of viewing immigration as an interconnecting global phenomenon is the importance of shifting EU and U.S. perceptions in politics and education to push for the integration of legally present

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[143] Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT'L. L. 139, 153 (2008), http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1257&context=tjcil.

immigrants. In part, the fear of mass illegal migration is fueled by the fear of the *other*. Despite the EU's and U.S.' histories of migration and immigration, a pattern of *othering* new migrants continues to occur. The opening vignette poignantly states that migration can no longer be controlled, but instead government policies must be shifted to cope with and seek benefits from our disappearing, intangible states' borders. While individuals, grassroots movements, and even some not-for-profit organizations can strive for change, true immigration reform can only occur from the top down beginning with the EU Commission and the U.S. federal government. Only when the EU and the United States move beyond traditional normative policy approaches to dealing with all immigration will the *issue* of immigration be cured.

Appendix 1

The global context (migrant stocks, millions)

	1960	1970	1980	1990	2000	2005	2009
World	**75.9**	**81.5**	**99.8**	**154.0**	**174.9**	**190.6**	**200,5**
Africa	9.0	9.9	14.0	16.2	16.3	17.1	18,9
Asia	29.3	28.1	32.3	50.0	49.9	53.3	60,3
Europe	17.0	21.8	25.4	48.4	56.1	64.1	65,2
Lat. Am. + Carib.	6.0	5.7	6.1	7.0	5.9	6.6	7,2
North Am.	12.5	13.0	18.1	27.6	40.8	44.5	48,9

Source: UNDESA, population division[144]

[144] Benedetti, *supra* note 33.

TAKING ACTION AGAINST BASE EROSION PROFIT SHIFTING

Brian Mistler*

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I. INTRODUCTION

With the explosion of globalization and the rise of multinational business entities (MNEs), an increasing number of opportunities are available for entities to minimize their taxable income by taking advantage of inconsistencies in federal tax laws.[1] Well-known companies, including Apple, Microsoft, Hewlett-Packard,

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[1] *Action Plan on Base Erosion Profit Shifting*, ORG. FOR ECON. COOPERATION & DEV., 7-8 (2013), http://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter *Action Plan*].

Google, Amazon, IBM, and Caterpillar, have sought to lower their tax burdens by shifting profits to lower-tax jurisdictions, even if very little of the profit came from that jurisdiction.[2] It is estimated that more than $2 trillion is being kept overseas as companies look to minimize their tax bills.[3] The Organization for Economic Cooperation and Development (OECD) has taken steps to help combat this perceived tax avoidance, better known as base erosion profit shifting (BEPS).[4] The OECD has released an Action Plan on BEPS that contains 15 action items designed to target problem areas identified by the OECD.[5] The OECD has also authored multiple discussion drafts designed to accompany the Action Plan that provide more detailed explanation.[6] In essence, the OECD is trying to garner global unanimity in an effort to discourage profit shifting.[7] Although the OECD did a remarkable job on the proposals, and they may work very well in other jurisdictions, the United States might have a tough time implementing them given the way the United States taxes income globally.

This Note focuses on Action 2 of the OECD plan–"Neutralise the Effects of Hybrid Mismatch Arrangements"–and will take a look at the accompanying discussion drafts released by the OECD that expand on Action 2. More specifically, this Note discusses: (1) the international tax framework and the need for international corporate tax reform, drawing on recent examples from Apple and Amazon; (2) Action 2, hybrid mismatch arrangements, and the two accompanying Discussion Drafts addressing hybrid mismatch arrangements; (3) early adoption of the Action Plan as well as implications. Finally, this Note concludes by positing that while Action 2 and the Discussion Drafts are a good starting point for international corporate tax reform, the OECD's model is most likely not the best solution for the United States given the way the United States taxes income globally.

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[2] Maxwell Murphy, *OECD Takes Aim at Improper Profit Shifting*, WALL ST. J. (Sept. 16, 2014, 5:32 PM), http://blogs.wsj.com/cfo/2014/09/16/oecd-takes-aim-at-improper-profit-shifting/; *see also* Richard Rubin, *Cash Abroad Rises $206 Billion as Apple to IBM Avoid Tax*, BLOOMBERG, (Mar. 12, 2014), http://www.bloomberg.com/news/2014-03-12/cash-abroad-rises-206-billion-as-apple-to-ibm-avoid-tax.html.

[3] Tim Higgins, *Tim Cook's $181 Billion Headache: Apple's Cash Held Overseas,* BLOOMBERG, (July 22, 2015), http://www.bloomberg.com/news/articles/2015-07-22/tim-cook-s-181-billion-headache-apple-s-cash-held-overseas.

[4] *Action Plan, supra* note 1, at 11.

[5] *OECD Releases Action Plan on Base Erosion and Profit Shifting (BEPS)*, ERNST & YOUNG LLP (July 19, 2013), http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--OECD-releases-Action-Plan-on-Base-Erosion-and-Profit-Shifting--BEPS-.

[6] *Tax Policy Bulletin: OECD Releases Two Discussion Drafts on Hybrid Mismatch Arrangements,* PRICEWATERHOUSECOOPERS LLP*,* (Mar. 21, 2014), http://www.pwc.com/en_GX/gx/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-releases-two-discussion-drafts-hybrid-mismatch-arrangemen.pdf [hereinafter *Tax Policy Bulletin*].

[7] Richard Rubin, *Profit Shifting: Moving Profits to Cut U.S. Taxes*, BLOOMBERG (Aug. 4, 2015), http://www.bloombergview.com/quicktake/profit-shifting-avoid-tax.

II. LEGAL OVERVIEW

A. The International Tax Framework

In 2013, Bloomberg reported that tech giant Apple Inc. paid an effective corporate tax rate of just under 14% on its worldwide income, well below the standard U.S. corporate rate of 35%.[8] When testifying before Congress in May of 2013, Apple CEO Tim Cook stated that Apple paid the United States $6 billion in taxes the previous year at a tax rate of 30.5%.[9] While correct, his statements ignore Apple's overseas affiliates. Cook's 30.5% figure referred to pretax income of $19 billion, only about one-third of Apple's pretax income worldwide.[10] Apple's affiliate in Ireland reported another $30 billion of income[11] that was subject to Ireland's corporate tax rate of just 12.5%.[12] The complex arrangement of laws comprising the international tax framework often give rise to scenarios such as the one that brought Apple before Congressional leaders.

Jurisdictions can be categorized based on whether or not that jurisdiction taxes foreign income.[13] Today, 28 of the 33 OECD countries use a territorial tax system.[14] Under the territorial system, a corporation is taxed only on income earned in that jurisdiction.[15] Unlike many other OECD countries, the United States employs a worldwide taxation system, meaning corporations are taxed on all of its income earned both in the United States and abroad.[16] The corporation pays tax on foreign income when it is brought back into the United States, or

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[8] Jesse Drucker, *Apple Tax Rate Ignores Profit Shifting Offshore*, BLOOMBERG (May 22, 2013), http://www.bloomberg.com/news/articles/2013-05-23/apple-tax-rate-ignores-profit-shifting-offshore.

[9] *Id.*

[10] *Id.*

[11] *Id*.

[12] *Corporation Tax*, IRISH TAX AND CUSTOMS, http://www.revenue.ie/en/tax/ct/ (last visited Sept. 25, 2015) (explaining that the 12.5% tax rate applies to "trading income"—i.e. income that is not investment or some other form of passive income).

[13] Philip Dittmer, *A Global Perspective on Territorial Taxation*, TAX FOUND. (Aug. 10, 2012), http://taxfoundation.org/article/global-perspective-territorial-taxation.

[14] *The U.S. Tax Code: Love It, Leave It, or Reform It: Hearing Before the Comm. On Finance United States Senate*, 113 Cong. 11-12 (2014) (statement of Peter R. Merrill, Principal, PricewaterhouseCoopers LLP), http://www.finance.senate.gov/imo/media/doc/Testimony%20of%20Peter%20Merrill.pdf.

[15] *Territorial vs. Worldwide Taxation,* SENATE REPUBLICAN POL'Y COMMITTEE (Sept. 19, 2012), http://www.rpc.senate.gov/policy-papers/territorial-vs-worldwide-taxation.

[16] Dittmer, *supra* note 13.

"repatriated."[17] The respective benefits and drawbacks to the two different systems have long been the center of international tax policy debate.[18]

Under the current international tax environment, companies that have operations or affiliates in multiple tax jurisdictions may encounter tax rules that either overlap or result in income being deductible in multiple jurisdictions.[19] These two phenomena are known as double taxation or double non-taxation, and the latter is increasingly used to shrink an MNE's taxable income and is considered abusive.[20] Profits can also be shifted when an affiliate in the lower-tax jurisdiction provides cash through a loan for operations in the higher-tax jurisdiction rather than repatriating the cash.[21] By shifting profits to an offshore subsidiary in a lower-tax rate jurisdiction, companies can lower their overall effective tax rate and increase profits.[22] The OECD reports that a growing number of bilateral tax treaties help to address these inconsistencies across jurisdictions.[23] International pressure also caused low-tax jurisdictions such as Ireland to close some tax loopholes.[24] Still, many gaps in international taxation remain.[25]

The international tax framework in place today is in essence a competition-based model in which countries compete for investment income and tax revenue.[26] With communication and transportation costs plummeting globally, MNEs have expanded operations all over the globe.[27] Emerging economies such as China, India, and Brazil are eager to attract foreign investment to sustain their growth trajectory.[28] Often emerging economies design their tax laws to attract more international investment.[29] They hope to reap the benefits of the tax revenue

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[17] *Id*.

[18] SENATE REPUBLICAN POL'Y COMMITTEE, *supra* note 15.

[19] *Tax Policy Bulletin, supra* note 6.

[20] Yariv Brauner, *What the Beps?*, 16 FLA. TAX REV. 55 (2014).

[21] Kirsten Burmester & Stafford Smiley, *Overview of the OECD's Action Plan on Base Erosion and Profit Shifting*, 40 WGL-CTAX 49 (2013).

[22] Drucker, *supra* note 8.

[23] *Action Plan*, *supra* note 1, at 10-11.

[24] Sam Schechner, *Ireland to Close 'Double Irish' Tax Loophole*, WALL ST. J., (Oct. 14, 2014), http://www.wsj.com/articles/ireland-to-close-double-irish-tax-loophole-1413295755.

[25] *Action Plan*, *supra* note 1, at 10.

[26] Brauner, *supra* note 20, at 64-65.

[27] Steven Go & Joseph Wu, *Is International Tax Competition Really Harmful?*, PRICEWATERHOUSECOOPERS, (Oct. 2010), http://www.pwc.tw/en/topics/tax/taxation-20101010.html.

[28] Karl P. Sauvant et al., *Foreign Direct Investment by Emerging Market Multinational Enterprises, The Impact of the Financial Crisis and Recession and Challenges Ahead*, GLOBAL F. ON INT'L INV. (Dec. 7, 2009), http://www.oecd.org/investment/globalforum/44246197.pdf.

[29] Go & Wu, *supra* note 27.

that these operations generate.[30] A growing number of commentators argue that such tax competition is merely the byproduct of "structural changes in the global economy."[31] Proponents of the competition model are apprehensive about a global governance regime; they question the ability of countries to put aside their individual interests and work together collaboratively.[32]

B. The OECD Action Plan & Action 2

The competition-based paradigm is far from perfect. While low taxation is not necessarily bad, OECD argues that separating taxation from the economic activities that generate it "could harm competition, economic efficiency, transparency and fairness."[33] The multiple problems implicated by BEPS are so important that the OECD has developed and released an Action Plan for Base Erosion and Profit Shifting,[34] a plan world leaders endorsed at the 2013 G20 summit.[35] As markets drag through a sluggish world economy, OECD calls for closer collaboration between jurisdictions.[36] The Action Plan proposes both domestic rules and new model treaties that keep tax revenue in the countries in which the profits originated.[37] In short, the Action Plan seeks to spur a movement where countries work together to help close loopholes and ensure "coherence of corporate income taxation at the international level."[38]

The Action Plan includes five broad aims: (1) to address the digital economy's tax challenges, (2) to establish the international coherence of corporate income taxation, (3) to restore the full effects and benefits of international tax standards, (4) to ensure transparency, and (5) to swiftly implement the suggested measures.[39] Working within these five aims, the plan sets forth 15 specific action items, each with specific step(s) that the jurisdictions should take.[40] OECD claims that the overall world economy will improve by the elimination or minimization of double non-taxation and instances of "low or no taxation associated with

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30 *Id*.

31 *Id*.

32 Brauner, *supra* note 20, at 66.

33 *Action Plan*, *supra* note 1, at 15.

34 *Id.* at 11.

35 Theophilos Argitis & Scott Rose, *G-20 Nations 'Fully Endorse' OECD Action Plan on Tax Evasion,* BLOOMBERG (July 20, 2013), http://www.bloomberg.com/news/articles/2013-07-20/g-20-nations-fully-endorse-oecd-action-plan-on-tax-evasion-1-.

36 *Action Plan*, *supra* note 1, at 7.

37 *Id.* at 15.

38 *Id.* at 13.

39 Tim Anson et. al., *BEPS: OECD and Ways & Means Start Taking Action*, 24 J. OF INT'L TAX'N. 45, 46 (2013).

40 *Action Plan*, *supra* note 1.

practices that artificially segregate income tax from the activities that generate it."[41] Adoption of the OECD actions may nudge global taxation toward this goal.

One of the most crucial actions of this Plan is Action 2, "Neutralise the Effects of Hybrid Mismatch Arrangements." Hybrid mismatch arrangements are defined as "arrangements that utilize hybrid elements in tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to produce a mismatch in tax outcomes of payments made under those arrangements."[42] Therefore, this action proposes model tax treaty revisions needed to combat the mismatch of tax outcomes that lead to taxable base erosion. While difficult to implement, the second Action could be a driving force behind reform of international tax treaties and domestic tax policies if some of the suggested provisions are adopted. Action 2 proposes the following changes:

(i)	"Amendments to the OECD Model Tax Convention to ensure that hybrid instruments and entities (as well as dual resident entities) are not used to obtain the benefits of treaties unduly;"
(ii)	"Domestic law provisions that prevent exemption or non-recognition for payments that are deductible by the payor;"
(iii)	"Domestic law provisions that deny a deduction for a payment that is not includible in income by the recipient (and is not subject to taxation under controlled foreign company (CFC) or similar rules);"
(iv)	"Domestic law provisions that deny a deduction for a payment that is also deductible in another jurisdiction;" and
(v)	"Where necessary, guidance on coordination or tiebreaker rules if more than one country seeks to apply" the above rules to a transaction or structure.[43]

Table 1

The proposed changes are both global in nature (revising the OECD Model Tax Convention) and country-specific (domestic law provisions that avoid conflicting outcomes across jurisdictions).

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[41] *Id.*

[42] *OECD Releases Report under BEPS Action 2 on Hybrid Mismatch Arrangements*, ERNST & YOUNG LLP (Sept. 24, 2014), http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--OECD-releases-report-under-BEPS-Action%C2%A02-on-hybrid-mismatch-arrangements [hereinafter *OECD Releases Report*]. *See infra* Section IID.

[43] *Action Plan, supra* note 1, at 15.

C. Action Item 2 – The Discussion Drafts

On March 19, 2014, the OECD released two discussion drafts pertaining to Action Item 2.[44] The discussion drafts expand on the ideas expressed in Action 2 of the Plan.[45] The drafts further define hybrid mismatch arrangements as the result of "a difference in the characterization of an entity or arrangement under the laws of two or more tax jurisdictions that result in a mismatch in tax outcomes."[46] The discussion drafts targeted two specific outcomes that result from mismatch arrangements: payments that give rise to deductions in multiple jurisdictions (double deduction or DD) and payments that are deductible in the payer's jurisdiction but the payment is not recognized as income in the recipient's jurisdiction (deduction/no inclusion or D/NI).[47]

The first discussion draft, the "Domestic Laws draft," proposes numerous changes to domestic laws to combat the effects of BEPS and these mismatched arrangements.[48] The OECD puts forth some "design principles" that should be integrated into the development of domestic rules. The draft rules should:

> (a) Operate to eliminate the mismatch without requiring the jurisdiction applying the rule to establish that it has 'lost' tax revenue under the arrangement; (b) be comprehensive; (c) apply automatically; (d) avoid double taxation through rule co-ordination; (e) minimize the disruption to existing domestic law; (f) be clear and transparent in their operation; (g) facilitate co-ordination with the counterparty jurisdiction while providing the flexibility necessary for the rule to be incorporated into the laws of each jurisdiction; (h) be workable for taxpayers and keep compliance costs to a minimum; and (i) be easy for tax authorities to administer.[49]

The OECD identifies three key hybrid mismatch outcomes it is trying to minimize through domestic law reform: hybrid financial instruments (including

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[44] *Tax Policy Bulletin*, *supra* note 6.

[45] *Id*.

[46] *Public Discussion Draft BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Recommendations for Domestic Laws)*, ORG. FOR ECON. COOPERATION AND DEV. 4, 8 (Mar. 19-May 2, 2014), http://www.oecd.org/ctp/aggressive/hybrid-mismatch-arrangements-discussion-draft-domestic-laws-recommendations-march-2014.pdf [hereinafter *Domestic Laws*].

[47] *BEPS Action 2: Hybrid Mismatch Arrangements,* DELOITTE LLP (Mar. 26, 2014), http://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/2014-deloitte-ireland-beps-action-2-hybrid-mismatch-arrangements.pdf.

[48] *Tax Policy Bulletin*, *supra* note 6.

[49] *Domestic Laws, supra* note 46, at 5.

transfers),[50] hybrid entity payments,[51] and reverse hybrid and imported mismatches.[52] The OECD argues each has contributed greatly to the base erosion profit-shifting problem.[53]

The OECD also introduces the idea of "linking rules" in the Domestic Laws draft. The tax treatment of an entity, instrument, or transfer in one jurisdiction is "linked" to the treatment of the same entity, instrument, or transfer in another jurisdiction.[54] Thus, tax rules of the different jurisdictions are "linked" and mismatches can be avoided.[55] The OECD also recognized that seamless linking of two different jurisdictions' rules could be difficult, so it proposed a "defensive rule" that would act as a fallback when the primary rule did not apply in one jurisdiction.[56] In terms of the scope of these rules, the draft suggests both a "bottom up" approach and a "top down" approach to implementation.[57] In the "top down" approach, the rules are applied broadly to *all* hybrid mismatches with exceptions carved out for specific instances where it would be "impossible or unduly burdensome for the taxpayer to comply."[58] In contrast, the "bottom up" approach involves looking at the most significant transactions on a case-by-case basis with an emphasis on tax policy implications.[59]

The second discussion draft evaluates current tax treaties and proposes some new treaty language designed to clarify treatment of dual-resident (hybrid) entities (the "Treaty draft").[60] More specifically, the Treaty draft is almost exclusively suggesting changes to the OECD Model Tax Convention.[61] The OECD developed the Model in 1992, which often served as the basis for the development of new international tax treaties, particularly when there are concerns about double taxation across jurisdictions.[62] The Treaty draft was

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[50] *Id.* at 15 ("[W]here a deductible payment made under a financial instrument is not treated as taxable income under the laws of the payee's jurisdiction . . .").

[51] *Id*. ("[W]here differences in the characterization of the hybrid payer result in a deductible payment being disregarded or triggering a second deduction in the other jurisdiction . . .").

[52] *Id.* (explaining that payments made to an intermediary are not taxable on receipt due to a hybrid effect.).

[53] *Tax Policy Bulletin*, *supra* note 6.

[54] *Domestic Laws, supra* note 46, at 11.

[55] *Id.*

[56] *Id.* at 16.

[57] *Id*. at 33.

[58] *Id.* at 55.

[59] *Domestic Laws, supra* note 46, at 33.

[60] *Tax Policy Bulletin*, *supra* note 6.

[61] *OECD Discussion Drafts for Action 2 (Neutralise the Effects of Hybrid Mismatch Arrangements)*, KPMG LLP (Mar. 20, 2014), http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/14154-analysis.pdf.

[62] *OECD Model Tax Convention on Income and on Capital: An Overview of*

written to work in concert with the Domestic Laws draft, and it covers three main topics: (1) use of dual resident entities to obtain the benefits of treaties unduly, (2) use of transparent entities to obtain the benefits of treaties unduly, and (3) interaction between the recommendations included in the Domestic Law draft and the provisions of tax treaties.[63]

Consistent with the OECD Model Tax Convention, the Treaty draft suggests that dual resident entities' tax treatment be determined on a case-by-case basis.[64] Second, the use of transparent entities, the Treaty Draft proposes:

> Income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.[65]

When considering the interaction between current tax treaties and the recommendations in the Domestic Laws draft, the OECD drafters conclude generally that there is no conflict or inconsistencies between the proposals of the Domestic Laws draft and the utilized provisions of the Model Convention.[66] However, two interaction issues raise problems. The Domestic Laws draft suggests denying deductions and/or forcing income inclusion for hybrid instruments and payments.[67] The Model Convention suggests a tax on a nonresident with no permanent establishment in the jurisdiction; this varies from the forced income inclusion or deduction denial of the more recent discussion draft.[68] Also, anti-discrimination provisions in the Model Convention could conflict with some of the recommendations intentionally directed at hybrids.

Available Products, ORG. FOR ECON. COOPERATION AND DEV., http://www.oecd.org/ctp/treaties/oecd-model-tax-convention-available-products.htm (last visited Sept. 25, 2015) [hereinafter *OECD Model Tax Convention*].

[63] *Public Discussion Draft BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty Issues)*, ORG. FOR ECON. COOPERATION AND DEV. (Mar. 19 -May 2, 2014), http://www.oecd.org/ctp/treaties/hybrid-mismatch-arrangements-discussion-draft-treaty-issues-march-2014.pdf [hereinafter *Treaty Issues*].

[64] *Id.* at 5.

[65] *Id.* at 7.

[66] *Tax Policy Bulletin*, *supra* note 6.

[67] *Id.*

[68] *Id.*

D. Defining Hybrid Mismatch Arrangements

According to the OECD, the key elements of a hybrid mismatch arrangement are as follows: (i) the arrangement results in a mismatch in the tax treatment of payment; (ii) the arrangement contains a hybrid element; (iii) the hybrid element is the cause of the mismatch; and (iv) the mismatch in tax outcomes lowers the aggregated tax paid by the parties to the arrangement.[69]

Hybrid elements, as referenced in item (iii) above, are characterized either as hybrid entities or hybrid instruments.[70] The IRS defines a hybrid entity as an "entity that is not taxable as an association for Federal tax purposes, but is subject to an income tax of a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis."[71] Hybrid financial instruments are explained in greater detail below.

In summary, hybrid mismatch arrangements can contain any number of elements that cause conflicting tax outcomes in different jurisdictions, leading to arbitrage and an erosion of the United States's MNE's taxable base. As previously mentioned, the OECD categorizes these types of hybrid mismatch arrangements: (1) hybrid financial instruments (including transfers), (2) hybrid entity payments, and (3) reverse hybrids/imported mismatches.[72] Outcomes from these categories are generally characterized as DD (double deduction) or D/NI (deduction/no inclusion) events.[73]

1. Hybrid Financial Instruments (Including Transfers)

Hybrid financial instruments usually lead to D/NI outcomes because the payment is deductible in the payer's jurisdiction, while the receipt of the payment is not taxed as income in the payee's jurisdiction.[74] A number of reasons for the payment being deductible for the payee include exemptions, exclusions, or indirect tax credits that may apply.[75] See the figure below for a simplified illustration.[76]

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69 *Id*.
70 *Id.*
71 26 C.F.R. §1.1503(d)-1(b)(2)(3) (2015).
72 *Tax Policy Bulletin*, *supra* note 6.
73 *OECD Releases Report, supra* note 42.
74 *Domestic Laws, supra* note 46, at 20.
75 *Tax Policy Bulletin*, *supra* note 6.
76 *Domestic Laws, supra* note 46, at 19.

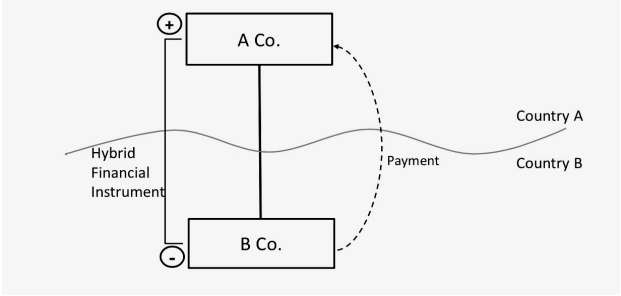

Figure 1

In this example, Company B borrows money from Company A, for which Company B pays interest to Company A. Company B's jurisdiction allows deductions for interest payments. Company A's jurisdiction has tax rules that exclude interest income for payments received from the financial instrument. The D/NI outcome that the OECD hopes to prevent is achieved as the taxable base is lowered for both of these companies. The OECD proposes draft rules that apply when differences in characterization of the financial instrument for tax purposes exists in the respective jurisdictions, as well as draft rules that apply when a particular payment (i.e. the interest payment in the example above) is given different tax treatment in these jurisdictions.[77]

Hybrid transfers are usually collateralized loans or derivative transactions where "the counterparties to the same arrangement in different jurisdictions are both treated as owner of the loan collateral or the subject matter of the derivative," leading to D/NI outcomes and subsequent surplus deductions.[78] The OECD recommends the following draft rules to minimize hybrid financial instruments and transfers. As a primary rule, "jurisdictions should deny a deduction for any payment made under a hybrid financial instrument to the extent that the payee does not include the payment as ordinary income."[79]

A secondary draft rule would "require the payee to include any payment as ordinary income to the extent that the payer is entitled to claim a deduction for such payment (or equivalent tax relief)."[80] Referring again to the above example, if Company B's jurisdiction adopted these proposed draft rules, Company B would be denied a deduction for the interest payments made to Company A. However, if it did not adopt the primary draft rule in B company's jurisdiction, then Company A's jurisdiction could apply the secondary draft rule. Company A

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77 *Tax Policy Bulletin, supra* note 6.
78 *Id.* at 3-4.
79 *Domestic Laws, supra* note 46, at 25.
80 *Id*.

would have to include the interest payments in its ordinary income, whether that happened through denial of deductions or otherwise.[81]

2. Hybrid Entity Payments

In this category of hybrids, the OECD targets arrangements with a hybrid entity designed to achieve a DD outcome ("deductible hybrid payments") or a D/NI outcome ("disregarded hybrid payments") from a single payment.[82] In this category, the hybrid treatment of the entity causes these results.[83]

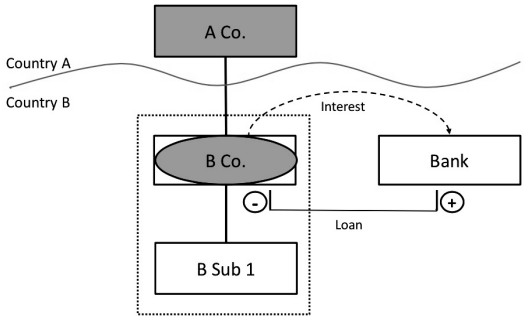

Figure 2

In the above scenario,[84] Company A is an investor in Company B. Company B is treated as a transparent entity under the tax laws of Country A, but as non-transparent under the laws of its own jurisdiction. Therefore, Company B is a hybrid entity. Because Company B is a transparent/disregarded entity in Country A's jurisdiction, Country A considers Company A the borrower under the loan. As a result, Company A gets a deduction for interest payments and Company B gets an interest deduction in its jurisdiction. The result is a DD outcome.[85] Taking the scenario even further, Company B's interest payments will offset the tax burden of the profits of B's subsidiary (sub 1).[86] This scenario simplifies the way hybrid entities can be used to erode the taxable income of a MNE,[87] and the discussion draft includes far more complicated scenarios.[88]

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81 *Tax Policy Bulletin*, *supra* note 6.
82 *Id*.
83 *Id.*
84 *Domestic Laws, supra* note 46, at 44.
85 *Id*.
86 *Tax Policy Bulletin*, *supra* note 6.
87 *Domestic Laws, supra* note 46.
88 For additional discussion of these more complicated scenarios, including

Hybrid entities can also be used to achieve D/NI outcomes. In the scenario below, the same structure in Figure 2 is used again.[89]

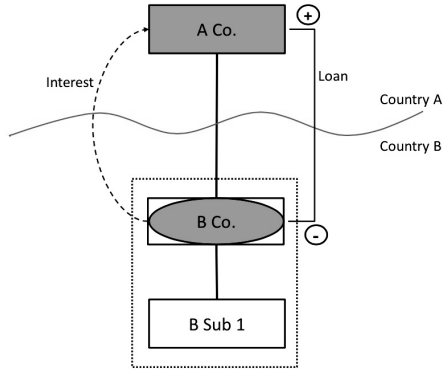

Figure 3

However, Company B is borrowing from Company A instead of a bank. Because Company B is transparent in Country A's jurisdiction, the loan, including interest, is ignored. However, because Company B is non-transparent in Country B, the loan is recognized, and Company B may get a deduction. Thus, the result is D/NI.[90] This deduction can be used to offset the tax burden of B's subsidiary.[91]

The discussion drafts recommend two sets of draft rules for each of the DD and D/NI outcomes that result from hybrid entity payments. To minimize the DD effect, the primary draft rule suggests "the duplicate deduction that arises in the investor jurisdiction should be denied to the extent it exceeds the taxpayer's dual inclusion income[92] for the same period."[93] The secondary rule proposes "the deduction for a hybrid payment should be denied in the subsidiary jurisdiction to the extent it exceeds a taxpayer's dual inclusion income for the same period."[94] In the event of a D/NI outcome, the OECD proposes the following primary rule: "deduction granted by the payer jurisdiction for a disregarded payment should not exceed a taxpayer's dual-inclusion income for the same period."[95] In other words,

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structures like partially owned entities, permanent establishments, dual resident entities, etc., which are beyond the scope of this Note, see *Domestic Laws, supra* note 46.

89 *Id*. at 48.

90 *Id.* at 47-48.

91 *Id.* at 48.

92 *Id*. at 49, 51 (explaining that "dual inclusion income" as used in the above scenarios describes income that has been taxed in both jurisdictions).

93 *Domestic Laws, supra* note 46, at 51.

94 *Id*.

95 *Id*.

any deduction beyond the payer's "dual inclusion income" will be denied. The secondary rule proposes "the payee should be required to include, as ordinary income, in the payee jurisdiction, any disregarded payment to the extent the payer's deductions for such payment in the payer jurisdiction exceed the payer's dual inclusion income for the same period."[96] Thus, if the primary rule does not apply, the payee's excess deductions should be included in the payee's income.[97]

3. Imported Mismatches & Reverse Hybrids

Both imported mismatches and reverse hybrids can be used to achieve D/NI outcomes.[98] Imported mismatches are arrangements created by a hybrid mismatch arrangement that can be moved, or "imported" into a third jurisdiction by means of a financing instrument.[99] Figure 4 illustrates an imported mismatch.[100]

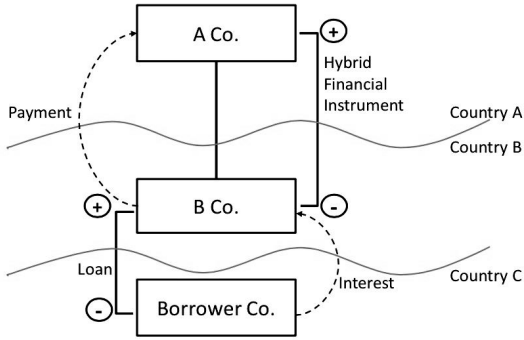

Figure 4

In the above example, Company A lends money to Company B (-) using a hybrid financial instrument. Company B makes interest payments to Company A (+). The payments are deductible in Country B's jurisdiction but not included in Company A's income in Country A. Meanwhile, Borrower Company is in a separate tax jurisdiction—Country C. Borrower Company borrows money from Company B. The Borrower Company's interest payments are deductible in Country C and taxable in Country B. Therefore, a D/NI outcome results because the Borrower Company's interest payments are deductible but are not taxable

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96 *Id.*
97 *Tax Policy Bulletin*, *supra* note 6.
98 *Id.*
99 *Id.*
100 *Domestic Laws, supra* note 46, at 58.

income for Company A.[101] The entire arrangement has no net effect on Company B, who will get a deduction for interest payments made to Company A but will be taxed on interest income from the Borrower Company.[102]

Reverse hybrids are often viewed as a subcategory of imported mismatches and also achieve D/NI outcomes.[103] The following scenario illustrates reverse hybrids: Company A owns Company B, which is treated as transparent in its own jurisdiction, (Country B), but non-transparent in Company A's jurisdiction, (Country A). Company B makes a loan to another entity, Company C. In certain instances, Company C's interest payments could be deductible in Company C's jurisdiction, but the interest is not recognized in either Company A's or Company B's jurisdiction (a D/NI outcome).[104]

The OECD proposes tax law changes to eliminate this result. For a primary rule, the investor (Company A) should include interest income from the arrangement.[105] As a secondary rule, the intermediate jurisdiction (Company B's jurisdiction in the example) should tax the income of the intermediary entity (Company B).[106] Additionally, the Domestic Law draft recommends a defensive rule as a fallback when neither of the above rules applies.[107] According to the defensive rule, the deduction is denied to the taxpayer when payments to a reverse hybrid or imported mismatch arrangement result in non-inclusion for the taxpayer or are offset by an expenditure of the hybrid mismatch arrangement.[108]

E. Amazon's Luxembourg Problem

Deeper exploration of the recent tax avoidance schemes by Amazon, Luxembourg, and other EU member states can help shed light on the current tax climate in the EU. As the Financial Times reported on January 15, 2015, European Commission (EC) investigators are heavily scrutinizing a corporate tax deal between Luxembourg and online retailer Amazon.[109] The EC alleges that under the deal, Luxembourg provided favorable tax treatment when it "artificially lowered and capped" Amazon's tax bill, thereby violating EU law.[110] The EC

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101 *Id*.
102 *Id*.
103 *Tax Policy Bulletin*, *supra* note 6.
104 *Id*.
105 *Domestic Laws, supra* note 46, at 61.
106 *Tax Policy Bulletin, supra* note 6.
107 *Domestic Laws, supra* note 46, at 61.
108 *Id*.
109 *See* Alex Barker, *European Commission Lays Bare Amazon Tax Deal with Luxembourg*, FIN. TIMES (Jan. 16, 2015), http://www.ft.com/cms/s/0/733c68bc-9d4d-11e4-9b22-00144feabdc0.html#axzz3nYZfSuKJ.
110 *Id*.

believes that Luxembourg "deviated from international standards" in its allocation of profits between two Amazon entities.[111]

The EC became interested when they noticed Amazon's EU entity had almost zero profit, and therefore minimal corporate tax liability, despite very strong sales.[112] Most of Amazon's EU profits were booked in Luxembourg, but untaxed.[113] More specifically, Amazon created a hybrid arrangement similar to the Scenario 1 illustrated above.[114] The arrangement in question involved Amazon EU Sarl (its main European entity) and a limited liability partnership (LLP) set up in Luxembourg to collect intellectual property royalty payments.[115] Amazon EU would make tax-deductible royalty payments to the Luxembourg LLP.[116] In addition to Amazon EU deducting the royalty payments, the Luxembourg LLP was not taxed on the payments[117] as taxing royalties is illegal in the EU.[118] The result was a D/NI outcome similar to Scenario 1 above. Amazon's main EU entity was left with virtually no taxable income because the majority of its profit was shifted to the Luxembourg LLP.[119]

Amazon, as alleged by the EU commission, allocated too much of its revenue as royalties for intellectual property to the Luxembourg LLP.[120] Furthermore, back in 2003, Luxembourg said it would essentially cap the amount of profits that could be taxable in its jurisdiction.[121] Regulators questioned the "objective basis" for the cap as well as the amount of royalty payments allowed.[122] The Commission posited that "they [the entities in the arrangement] do not seem to be based on any arm's length reasoning."[123] Essentially, the hybrid arrangement merely shifts profits. The commission argues that the situation amounts to an "illicit state subsidy" and the jurisdiction's lost tax revenue must be repaid.[124]

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[111] *Id.*

[112] Tim Worstall, *Following Apple and Starbucks, Amazon Now Faces European Commission Tax Probe*, FORBES (Oct. 7, 2014, 6:50 AM), http://www.forbes.com/sites/timworstall/2014/10/07/following-apple-and-starbucks-amazon-now-faces-european-commission-tax-probe/ [hereinafter *Tax Probe*].

[113] *EU to Investigate Amazon Tax Ruling for State and Breach*, ERNST & YOUNG LLP (Oct. 2014), http://www.ey.com/LU/en/Newsroom/PR-activities/Articles/Article_201410_EU-to-investigate-Amazon-Tax-Ruling-for-state-and-breach [hereinafter *EU to Investigate*].

[114] *Id.*; *see supra* Part II.D(1).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Tax Probe*, *supra* note 112.

[119] *EU to Investigate*, *supra* note 113.

[120] *Id.*

[121] Barker, *supra* note 109.

[122] *EU to Investigate*, *supra* note 113.

[123] Barker, *supra* note 109.

[124] *Id.*

The investigation remains ongoing as regulators continue to grapple with broader policy issues concerning MNE taxation.[125] Even though Amazon has ceded to international pressure and agreed to stop shifting the majority of its EU profit through Luxembourg, greater questions remain.[126] If Luxembourg is found to be in violation of tax regulations, it is unclear how this will immediately affect Amazon as a whole or other similarly structured hybrids in Europe.[127] Despite the fact that Amazon was "dodging" tax liability, it did so with the approval of the Luxembourg government.[128]

Commentators point out that the EU isn't even focusing on the most important aspect of the Amazon scenario—the underlying tax structures that are making the EU feel as though Luxembourg and Amazon have an unfair advantage.[129] Regulators, according to the preliminary conclusions letter, are more concerned with the tax liability that was supposedly left unpaid. The investigation is more reactionary than proactive in orchestrating changes. This is one of the reasons why the EU may want to develop a EU-wide, standardized set of tax regulations similar to the OECD proposals. They could avoid situations like the Amazon scenario where one country is developing tax agreements with companies that are perfectly acceptable to that country but viewed as illicit by neighboring countries.

III. ANALYSIS

A. Challenges with Entity Classification

The categorization of hybrid mismatch arrangements helps identify the specific types of arrangements that the OECD seeks to minimize to negate DD and D/NI outcomes.[130] However, even with the extensive definitions and scenarios in the discussion drafts, the categories are still broad in terms of the arrangement permutations they encompass.[131] Many issues can stem from the

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[125] Lisa Fleisher & Sam Schechner, *Amazon Changes Tax Practices in Europe amid Investigations*, WALL ST. J. (May 24, 2015), http://www.wsj.com/articles/amazon-changes-tax-practices-in-europe-amid-investigations-1432480170.

[126] *Id*.

[127] Barker, *supra* note 109.

[128] Tim Worstall, *Amazon's Tax Dodging in Luxembourg Might Have Been State Aid Says European Union*, FORBES (Jan. 16, 2015), http://www.forbes.com/sites/timworstall/2015/01/16/amazons-tax-dodging-in-luxembourg-might-have-been-state-aid-says-european-union/.

[129] Barker, *supra* note 109.

[130] DELOITTE LLP, *supra* note 47.

[131] *Tax Policy Bulletin*, *supra* note 6.

OECD's proposed plan for dealing with hybrid entities and arrangements, most of which arise from classification of the entities and transactions.[132]

The treatment of partnerships under tax treaties is one of the challenges with entity classification.[133] Given the differences in tax treatment between corporations and partnerships (e.g. taxation at the entity level for corporations versus taxation of the individual partners for partnerships), many uncertainties can arise when jurisdictions classify entities differently for tax purposes.[134] Pass-through taxation of partnerships adds a level of complexity to the bilateral treaty analysis.[135] While the complexities of the issue are beyond the scope of this Note, many problems arise when inconsistencies in the classification and/or the jurisdiction allow the entity to operate as fiscally transparent (disregarded).[136] Another difficulty affecting the OECD proposal is in the classification and treatment of other hybrid entities.[137] While the OECD has drawn the categories widely enough to encompass many of the most prominent hybrid entities, many more hybrids are unaffected by the rules.[138]

Non-traditional standards can also cause difficulties in classifying entities, such as the U.S.' "check-the-box" (CTB) regime.[139] Such regulations allow certain entities to opt out of the default entity classification and elect to operate under another business form.[140] When CTB extended to foreign entities, regulators were concerned with the possibility of the CTB regime giving rise to more hybrid entities and increased opportunities for mismatched tax treatment of those entities.[141]

Another concern is that the CTB election could influence the foreign classification of the entity.[142] In 1995, when the United States extended CTB to MNEs and foreign entities, regulators feared that foreign corporations would be able to create pass-through tax treatment in the United States by checking the partnership box (as long as the entity was not a *per se* corporation as defined by the Treasury regulations).[143] Since the rise of CTB, the United States used hybrid

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[132] Brauner, *supra* note 20, at 82.

[133] *Id*.

[134] David L. Forst, *The U.S. International Tax Treatment of Partnerships: A Policy-Based Approach*, 14 BERKELEY J. INT'L L. 239 (1996).

[135] *Id*. at 253.

[136] *Id*.

[137] Brauner, *supra* note 20, at 82.

[138] *Tax Policy Bulletin*, *supra* note 6.

[139] Brauner, *supra* note 20, at 82.

[140] IRM 4.61.5.1 (May 1, 2006); *see also* Treas. Reg. § 301.7701.

[141] Kenan Mullis, *Check-the-Box and Hybrids: A Second Look at Elective U.S. Tax Classification for Foreign Entities*, TAXANALYSTS (Nov. 4, 2011), http://www.taxanalysts.com/www/features.nsf/Articles/58D8A3375C8ECCD18525793E0055EB9B; *see also* I.R.S. Notice 95-14, 1995-14 I.R.B. 7 at 3-4.

[142] I.R.S. Notice 95-14, 1995-14 I.R.B. 7 at 4.

[143] Mullis, *supra* note 141.

structures to substantially invest in the UK, often organized around U.S. CTB rules to ensure a D/NI on loans between affiliated entities.[144] Far more complex structures have also been created to capitalize on CTB.[145] Complexity of entity classification poses a significant hurdle to the success of the OECD rules.

B. Challenges with Hybrid Instruments

Currently, hybrid instruments are classified in different, conflicting ways across jurisdictions, and there is no easy solution reconciling the differences.[146] One of a country's most confounding decisions is often the classification of a hybrid instrument as debt or equity.[147] Historically, the debt and equity classification has been an "all or northing" choice.[148] In reality, characterizing modern hybrid instruments is complex.[149] Classification has significant tax liability implications. Arbitrage opportunities for companies who successfully argue that the instruments are equity and threaten tax stability.[150] The classification of hybrid instruments presents significant challenges.

C. Who Is International Tax Competition Actually Harming?

Broad analysis of tax policies across jurisdictions reveals a common trend: countries want to remain competitive in the international market to stimulate international investment and economic growth.[151] Steven Go and Joseph Wu, international tax advisors based in Taiwan, argue that today's tax competition is "simply the product of structural changes in a global economy."[152] They acknowledge all countries are pressured for increased revenue, due in part to the

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[144] *Hybrid Mismatches–UK Proposals for Implementing the BEPS Recommendations*, MCDERMOTT WILL & EMERY, (Dec. 17, 2014), http://www.mwe.com/Hybrid-Mismatches-UK-Proposals-for-Implementing-the-BEPS-Recommendations-12-16-2014/.

[145] *See* Robert W. Wood, *Ireland Corks Double Irish Tax Deal, Closing Time for Apple, Google, Twitter, Facebook*, FORBES (Oct. 14, 2014, 2:37 AM), http://www.forbes.com/sites/robertwood/2014/10/14/ireland-corks-double-irish-tax-deal-closing-time-for-apple-google-twitter-facebook/.

[146] Brauner, *supra* note 20, at 82.

[147] Lee A. Sheppard, *Defending Cross-Border Debt-Equity Cases*, TAX ANALYSTS (Jan. 23, 2014), http://www.taxanalysts.com/www/features.nsf/Articles/F9EE0B6A5E577A7085257C6A00513DCE?OpenDocument.

[148] Brauner, *supra* note 20, at 82.

[149] *Id.*

[150] *Id.* (noting the different financial instruments and issues relating to their classification, which is beyond the scope of this Note).

[151] *Tax Policy Bulletin*, *supra* note 6.

[152] Go & Wu, *supra* note 27.

rise of developing countries increasing their wealth and global positioning through lower taxes.[153] If the OECD proposals are taken too far, they could stifle this "economic liberalization" of countries and jurisdictions.[154] The challenge for OECD in drafting its rule sets is finding the appropriate balance between free competition and regulation. Go and Wu believe the OECD can help countries achieve "beneficial tax competition."[155]

As previously mentioned, the OECD believes global tax competition to be harmful on the basis that it reduces global welfare.[156] Go and Wu assert that a government, as the leader of a sovereign nation, should serve its own people before all other stakeholders in the international economy.[157] The following example illustrates this principle. Government A decides to cut corporate tax rates for Country A. Companies move to Country A to take advantage of the lower tax rates. However, Countries B and C are upset they are losing tax revenue due to the migration of companies to Country A. Should Country A be blamed for the way its decision negatively affected Countries B and C? While this seems obvious, it is not so obvious in the context of the international marketplace when people talk about "negative fiscal externalities," such as the effects on Countries B and C in the above example.[158]

Although falling tax rates have characterized the recent international tax landscape, this is not the only way tax competition is affected.[159] Many countries employ defensive tax rules to prevent corporations from taking advantage of the lower tax rates offered by countries competing for the tax revenue, but the complexity of these rules could be a burden to international tax reform in the long term.[160] One key objective of the OECD is developing rules that "support the efficient operation of global markets."[161] By recognizing that not all tax competition is harmful and furthering rules that help "beneficial tax competition," as discussed by Go and Wu, the OECD can help eliminate the harmful effects of BEPS while actually improving tax efficiency.

Many countries, including the UK, Germany, Sweden, Denmark, Mexico, France, Australia, and the Netherlands, have adopted some form of the draft rules.[162] According to tax experts, one of the biggest challenges for the

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153 *Id*.
154 *Id*.
155 *Id.*
156 *Action Plan*, *supra* note 1, at 15.
157 Go & Wu, *supra* note 27.
158 *Id*.
159 *Id*.
160 *Id*.
161 Pascal Saint-Amans & Raffaele Russo, *What the BEPS Are We Talking About?*, ORG. FOR ECON. COOPERATION AND DEV. (2013), http://www.oecd.org/forum/what-the-beps-are-we-talking-about.htm.
162 *Tax Policy Bulletin*, *supra* note 6, at 7.

OECD plan going forward is whether the individual countries' adoption of the rules actually creates some uniformity and congruence.[163] The experts give the example of the UK, where many of the OECD draft rules have been adopted but older, incompatible rules had to either be altered or eliminated.[164] Included in the elimination was the "purpose test" that dictates the UK's anti-arbitrage statutes apply only when the purpose of the hybrid arrangement is to obtain a UK tax advantage.[165] In contrast the OECD rules apply in blanket fashion and include no such test.[166] Countries' adoption of the rules at the domestic level is necessary to achieve meaningful change.[167]

IV. IMPLICATIONS

A. Early Implementation: The United Kingdom

Proponents of immediate adoption argue that if the new rules are integrated properly, tax jurisdictions will realize benefits immediately.[168] The OECD argues the drafts provide enough detail to allow countries to implement the new rules.[169] While Action 2 might be more straightforward to develop domestic rules, the interaction of the various decision rules still provides some uncertainty for governments and MNEs.[170] Closer examination of the tax law regime in the UK yields valuable insight into potential immediate effects of implementation.

The UK government took the lead on implementation when it released a consultation document at the end of 2014.[171] In the document, the government addressed several BEPS issues, voiced its commitment to the OECD proposals, and outlined specific regulatory steps for the UK to take in connection with Action Item 2.[172] The government proposed completely removing the old anti-

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[163] *Id*.

[164] *Id.*

[165] *Id*.

[166] *UK Issues Consultation Document on Implementing OECD Proposals on Hybrid Mismatches*, ERNST & YOUNG LLP (Dec. 9, 2014), http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--UK-issues-consultation-document-on-implementing-OECD-proposals-on-hybrid-mismatches [hereinafter *UK issues*].

[167] *Tax Policy Bulletin*, *supra* note 6.

[168] *Weekly Tax Matters,* KPMG LLP (UK) (Oct. 10, 2014), http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Tax/weekly-tax-matters-101014.pdf.

[169] *Id*. (noting that the UK committed to leading the way on this implementation).

[170] *Id*.

[171] *Government Takes Further Step to Clamp down on Aggressive Tax Planning*, HM TREASURY (Oct. 5, 2014), https://www.gov.uk/government/news/government-takes-further-step-to-clamp-down-on-aggressive-tax-planning.

[172] *Id*.

arbitrage regulations and replacing them with the new OECD-inspired rules.[173] Tax planners believe that the new rules will actually cover a wider range of scenarios than the UK's old rules.[174]

Under the old anti-arbitrage scheme, the UK had something similar to a safe harbor provision. Her Majesty's Revenue & Customs (HMRC) would screen arrangements to ensure that they were in compliance and did not constitute "an arrangement for UK tax avoidance" (application of the purpose test).[175] Now, with the purpose test eliminated, many of these previously approved arrangements may no longer be legal under the new rules.[176] Thus, the new rules could give rise to more tax controversy in the short term.

The proposed rules also change the tax environment for many dual-resident companies.[177] The proposed UK rule is almost identical to the OECD rule governing dual-resident companies: no UK deductions are allowed unless matched by income included in both jurisdictions.[178] The only exception to this rule is when the UK and the second jurisdiction have agreed who will allow the deduction.[179] This could potentially cause the dual-resident company to lose the deduction in both jurisdictions.[180] The UK previously had additional exemptions in place, but the wider scope of the OECD rule will apply to all dual-resident companies.[181] The use of hybrids has historically been a pivotal component of U.S. investment in UK companies,[182] and much of this tax planning could be disrupted with the proposed UK rule changes.[183]

Some experts argue that the progress in the UK is more harmful than helpful.[184] Furthermore, the recent developments reveal one of the glaring problems with the OECD proposals: the unintended consequences of unilateral action.[185] The Action Plan is surprisingly comprehensive and the priority rules of Action Item 2 serve as a solid blueprint for both domestic laws and coordination efforts between countries. However, many tax policy experts argue that in reality

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[173] *See UK Issues, supra* note 166 (noting that the regulations include topics such as income brought into the country under a controlled foreign company (CFC), the treatment of repurchases and stock loans, and some variations on imported mismatches).

[174] *Id.*

[175] *Id.*

[176] *Id*.

[177] *Id.*

[178] *UK issues, supra* note 166.

[179] *Id*.

[180] *Id*.

[181] *Id*.

[182] MCDERMOTT WILL & EMERY*, supra* note 144.

[183] *Id.*

[184] *See* James J. Tobin, *Lots of BEPS Output – What Outcome?*, BLOOMBERG BNA (Dec. 22, 2014), http://www.bna.com/lots-beps-output-n17179921277.

[185] *Id.*

the Action Plan only works if countries collaborate.[186] As countries such as the UK continue to implement BEPS measures without global coordination, inconsistencies across tax jurisdictions could multiply rather than disappear.[187] For example, if jurisdictions begin unilaterally disallowing certain deductions without guidance or coordination from other countries (as Spain began doing),[188] two different jurisdictions could end up trying to tax the same income. Not only could double taxation have a negative impact on tax revenue, it could also hurt the jurisdiction's competitiveness globally.

The recent developments in the UK provide both promise and concern for those jurisdictions considering adoption of the OECD proposals. For some jurisdictions such as the UK, the new set of regulations will be much broader than the old rules and will overlap. They can cause old regulations to either be abandoned or modified. In other cases, the rules may address issues that had not previously been noted. Regardless, some level of coordination effort among countries is essential for continued progress. Furthermore, the OECD will have to continue development of certain areas of its proposals as more counties begin implementation and encounter obstacles in the process.

B. Implications for the United States

The United States has long sought to minimize erosion of its taxable base by MNEs.[189] Taxing income globally has posed some challenges for the United States as more companies opt to employ hybrid structures to avoid tax on repatriated income. As other jurisdictions such as the UK begin the implementation phase of the BEPS Action Plan, tax experts in the United States are concerned about the proposals in Action Item 2 because they could negatively affect the U.S. tax regime.[190] While there are valuable takeaways from the Action Plan, including the importance of collaboration, the OECD proposals could lead to an erosion of the U.S. tax base, put a strain on some of the underpinnings of the global taxation system, and catalyze issues relating to intergovernmental relations and authority. Both lawmakers and MNEs alike recognize the need for reform

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[186] *Id.*

[187] *Id.*

[188] *Global Tax Alert: Spanish Central Tax Court Disallows Tax Deductibility of Delay Interest*, ERNST & YOUNG LLP (July 7, 2015), http://www.ey.com/Publication/vwLUAssets/Spanish_Central_Tax_Court_disallows_tax_deductibility_of_delay_interest/$FILE/2015G_CM5582_Spanish%20Central%20Tax%20Court%20disallows%20tax%20deductibility%20of%20delay%20interest.pdf.

[189] David Ernick, *Will a Sponge Tax Soak up BEPS Concerns*, BLOOMBERG BNA (Jan. 5, 2015), http://www.bna.com/sponge-tax-soak-n17179921836/.

[190] *See* Tobin, *supra* note 184.

globally, but the constraints the OECD proposals place on tax policy render it a less than ideal option for the United States.[191]

The proposals may harm the U.S. tax system by shifting the additional tax revenue out of the United States[192] Due to the international crack-down on BEPS, foreign jurisdictions are incentivized to collect on tax that would typically travel back to the United States. The result: U.S. companies will pay a higher level of foreign tax.[193] Take Apple, for example, which manufactures many of its components in China.[194] A large portion of corporate taxes Apple pays to the United States would be paid to China under the proposed OECD rules, according to economist Joseph Stigiltz.[195] Not only will fixing the hybrid "problem" cause U.S. companies to pay more foreign tax, but increased tax controversy and greater uncertainty around the global taxation scheme could result.[196]

The OECD proposals could also affect the IRS foreign tax credit and subsequently the underpinnings of the U.S. global taxation system.[197] Traditionally, the United States has subsidized some of the foreign taxes imposed on U.S. MNEs.[198] The foreign tax credit helps the entity recoup some of what was paid to foreign tax jurisdictions.[199] If other countries continue to follow the OECD's lead, MNEs will be left with substantially larger tax bills and claim the foreign tax credit with greater frequency.[200] Consequently, U.S. tax revenue could be eroded by a dramatic increase in foreign tax credit claims.[201] Therefore, the Treasury must determine if the foreign tax credit should still remain a subsidy.

Conflicts related to governmental authority have also come to light in U.S. dealings with the OECD.[202] While the Treasury Department has largely been

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[191] Press Release, U.S. Senate Committee on Fin., Hatch, Ryan Call on Treasury to Engage Congress on OECD International Tax Project, (June 9, 2015) http://www.finance.senate.gov/newsroom/chairman/release/?id=ff0b1d06-c227-44be-8d5a-5f998771188b.

[192] Ernick, *supra* note 189.

[193] *Id*.

[194] *Supplier Responsibility,* APPLE INC., http://www.apple.com/supplier-responsibility/our-suppliers/ (last visited Sept. 25, 2015).

[195] Ben Walsh, *The International Tax System Is 'Repulsive And Inequitable.' Here's a Way to Fix It,* HUFFINGTON POST (Aug. 20, 2015), http://www.huffingtonpost.com/entry/multinational-corporations-taxes_55d4baede4b055a6dab265d9.

[196] Aparna Mathur, *The U.S. Is Right to Worry about the OECD's BEPS Project*, FORBES (June 22, 2015), http://www.forbes.com/sites/aparnamathur/2015/06/22/the-u-s-is-right-to-worry-about-the-oecds-beps-project/print/.

[197] Ernick, *supra* note 189.

[198] *Id*.

[199] *Id*.

[200] *Id*.

[201] *Id*.

[202] Press Release, U.S. Senate Committee on Fin., In Speech, Hatch Outlines Concerns with OECD International Tax Project (July 16, 2015)

the liaison between the U.S. government and the OECD, members of Congress are quick to remind the Treasury that Congress has the power to write tax laws for the United States (including laws governing cross-border transactions and multinational companies).[203] In an impassioned address on the Senate floor, Finance Committee Chairman Orrin Hatch claimed the Treasury is negotiating the terms of these Action Items without the input of Congress, and oftentimes the Treasury commits the United States to making changes to its tax system without any involvement from lawmakers or tax legislation committees.[204] He contended the U.S. tax base should not be "up for grabs in an international free-for-all."[205] In other words, certain commitments the Treasury has already made to the OECD are undermining the U.S. global taxation regime and its countless treaties. He concluded that parts of the BEPS project could damage U.S. efforts to comprehensive tax reform.

Ultimately, countries are going to adopt the OECD proposals that serve their interests.[206] As more countries continue to follow the UK's lead in implementation, competition for tax revenue will only increase.[207] The OECD BEPS project will affect the United States whether or not it chooses to adopt the suggested provisions.[208] Therefore, the United States needs to ensure that it protects the interests of U.S. companies and the government.[209] In terms of tax policy, the United States cannot support a plan that potentially diverts tax revenue away from itself, increases tax controversy, and undermines the U.S. tax system. However, there are very valuable insights, goals, and strategies to be gained from the ever-evolving BEPS project.[210] The United States will need to consider the policy issues associated with supporting the OECD BEPS project and must balance those concerns against the need for reform and a new set of best practices in the international tax arena.

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http://www.finance.senate.gov/newsroom/chairman/release (follow links to July 16 release).

[203] *Id.*

[204] *Id.*

[205] *Id*.

[206] Tobin, *supra* note 184.

[207] Mathur, *supra* note 196.

[208] Jeremy Scott, *Can the United States Kill BEPS?*, FORBES (June 16, 2015), http://www.forbes.com/sites/taxanalysts/2015/06/16/can-the-united-states-kill-beps.

[209] Tobin, *supra* note 184; *see also* Ernick, *supra* note 189 ("And, more importantly, certain of the BEPS 'solutions' espoused so far would disproportionately impact U.S. MNEs and have the effect of a direct federal transfer of tax revenue to foreign governments – sponge taxes which 'divert to [foreign governments] tax money that would otherwise find its way to the federal fisc' should be avoided.").

[210] Tobin, *supra* note 184.

IV. CONCLUSION

Regardless of a jurisdiction's policy position on taxation, tax competition, and a new international tax framework, it is almost universally agreed that there are some problems and inconsistencies in the current international tax regime.[211] Countries that adopt the OECD proposals and begin to legislate will inevitably impact hybrid financing arrangements and MNEs that utilize offshore profit shifting structures.[212] While the OECD should be commended for putting forth a plan for addressing many of the perceived problem areas of international taxation, there are many more uncertainties that need to be worked out.[213] There could be significant increases in compliance and transaction costs, given that more disclosure and documentation will be required.[214] Countries like the UK that are spearheading adoption, will provide valuable data that other countries can use to determine how to begin implementation.

It is clear that coordinated efforts are crucial for progress. Through use of the draft rules and the treaty provisions, the OECD remains hopeful that jurisdictions will be able to work together to minimize the detrimental effects of hybrid mismatch arrangements debated in this Note. At the same time, the international tax regime is a competition-based system. Jurisdictions will do what is in their best interest. The OECD will have to figure out how to strike a balance between combatting double non-taxation and prohibiting arrangements that promote economic activity. At the end of the day, jurisdictions want to solidify their tax base and prevent further erosion of tax revenues. While it is unclear whether these proposals will bring any benefit to the United States, all eyes will be on the OECD's proposals as reform takes shape.

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211 Ernick*, supra* note 189.

212 *Double Non-Taxation and OECD'S BEPS Action Plan,* ZETLAND FIDUCIARY GROUP LTD. (Nov. 2013), http://www.zetland.biz/newsletter/1311newsletter/NonTax.htm.

213 *See* Ernick, *supra* note 189.

214 *OECD Releases Report*, *supra* note 42.